

Precedent, Super-Precedent --abstract

The idea of super-precedent was first posited by (then) Prof. Posner & Prof. Landis 30 years ago, but as a throw-away, and was not picked up in the jargon. In 2000 Judge Michael Luttig of the 4th Circuit used it –as “super stare decisis” –and this time it did gain a following. “Super-precedent” –and even “super-duper precedent” --had an airing at both the Alito and Roberts hearings before the Senate Judiciary Committee and soon generated a couple of academic articles. No doubt there will be more. This is my contribution to the debate.

How, if at all, are we to make sense of the notion of super-precedent? Is it useful? I examine the concept as it might fit into the theories of stare decisis that have been in vogue at various times, in the process elaborating on the doctrine and the theories accounting for it. I also look at its use in the Senate hearings of Supreme Court nominees Roberts and Alito for indicia of the neologism’s popular usage and possible future.

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Precedent, Super-Precedent.

“*Stare decisis* is at least the everyday working rule of our law.”¹
“[R]emember that a rule of precedent, or *stare decisis*, is a means and not an end.”²

“Super-precedent” (or, equivalently, ‘super *stare decisis*’³) has crept into our usage lately, primarily through its use –along with “super-duper precedent” –in the interrogations of Chief Justice Roberts and Justice Alito before the senate Judiciary Committee.⁴ Of course the cases that focused this attention were *Roe v. Wade*⁵ and its principal successor, *Planned Parenthood v. Casey*,⁶ the point being to solicit acceptance from the nominees. But the nominees did not concede, and with justification; on any theory of precedent these cases’ stature as super-precedent is questionable.⁷ Although it has taken some hits of late,⁸ we might use *Marbury v. Madison*⁹ as a safe exemplar,¹⁰ or *Erie Railroad v. Tompkins*.¹¹

¹ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS*, 20 (1921).

² Max Radin, *The Trail of the Calf*, 32 *CORNELL L.QUARTERLY* 137, 159 (1946).

³ Some draw a distinction between the ‘precedent’ and ‘*stare decisis*’: See, e.g., Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *AM.J.LEGAL HISTORY* 28, 30 (1959)(Precedent needs a doctrine developed through a line of cases; *stare decisis* can use one case alone as authority); K.K.DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 *J.APP.PRAC. & PROC.* 397 (2001)(*stare decisis* means only “stand by things decided”; precedent is about bases for decision, and is an “evolving doctrine.”); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 *B.C.L.REV.* 81, 105 (2000)(*stare decisis* is strict, formalistic; precedent is less so.) I shall treat them as synonyms, unless noted. They are of the same ilk. Put ‘doctrine of’ in front of them and they are indistinguishable in ordinary legal usage; but though you can have ‘a precedent’ you cannot have ‘a *stare decisis*’; *stare decisis* is used only for the doctrine.

⁴ See text *infra* at notes ___-___. Professor Farber uses the term ‘bedrock precedent’ to much the same effect; see Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *Minn. L. Rev.* 1173, 1175, 1176-80 (2006)

⁵ 410 U.S. 113 (1973)

⁶ 505 U.S. 833 (1992)

⁷ Michael J. Gerhardt, *Super Precedent*, 90 *Minn. L. Rev.* 1204, 1219-20 (2006)

⁸ From *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) through *United States v. Mead Corp.*, 533 U.S. 218 (2000) to *Federal Communications Commission v. Brand X Internet Services* ___ U.S. ___, 125 S.Ct. 2688 (2005) there has been a steady erosion of the power of the courts to interpret legislation in favor administrative agencies. See Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 *NORTHWESTERN U.L.REV.* ___ (2007), available at SSRN: <http://ssrn.com/abstract=900582> at p.3.

⁹ 5 U.S. 137 (1803); see Gerhardt, *supra* note ___[7] at 1206.

¹⁰ The authority of judicial review has become a target of academic scrutiny over the last ten years or so. See Lawrence Alexander, *What is the Problem or Judicial Review?* Soc.Sci.Network Electronic Paper Collection, <http://ssrn.com/abstratID=802807> (Examining arguments by Jeremy Waldron and others; “Jeremy Waldron has been on the

‘Super-precedent’ seems to have been coined in 1976 by Judge (then professor) Posner and Professor Landes in an article about testing theories of precedent by counting citations; a super-precedent would be

so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place, or, if they do arise, induces them to be settled without litigation. In the limit, such a “superprecedent” might never be cited in an appellate opinion and yet have greater precedential significance than most frequently cited cases.¹²

The problem was not enough to bother their project as “such cases are probably rare,”¹³ being either too narrow or too broad to have significant progeny.¹⁴ From this beginning, however, their neologism seems not to have gained any popular currency.

It was re-introduced in 2000 by Judge Michael Luttig of the 4th Circuit Court of Appeals, apparently completely afresh, and this time it did catch some attention:

I understand the Supreme Court to have intended its decision in [Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 \(1992\)](#), to be a decision of super-stare decisis with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy. See [Casey, 505 U.S. at 844-46](#) ("Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, [Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 \(1973\)](#), that definition of liberty is still questioned. . . . After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed."). And I believe this understanding to have been not merely confirmed, but reinforced, by the Court's recent decision in [Stenberg v. Carhart, 530 U.S. 914, 2000 U.S. LEXIS 4484, 120 S. Ct. 2597, 147 L. Ed. 2d 743, 2000 WL 825889](#), at *4 (2000) ("This Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. [Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed.](#)

warpath against judicial review.” Id at 1 citing, *inter alia*, Jeremy Waldron, LAW AND DISAGREEMENT (1999), *The Core of the Case Against Judicial Review* (2005))

¹¹ 304 U.S. 64 (1938)

¹² William M. Landes and Richard A. Posner, *Legal Precedent: A Theoretical and empirical Analysis*, 19 J. of LAW & ECONOMICS 249, 251 (1976).

¹³ Id

¹⁴ Id. Perhaps this rationale has to be read to be believed:

If a case is highly specific, it will hardly qualify as “superprecedent”; by definition it will control only those infrequent cases that present virtually identical facts to those of the case in which it was originally announced. If it is highly general, and therefore more likely to be an important precedent, it is unlikely to decide –so clearly as to prevent disputes or litigation from arising –the specific form of the question presented in subsequent cases.

Id.

[2d 147 \(1973\); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\). We shall not revisit those legal principles."](#)).¹⁵

Although Judge Luttig does not attempt to define it –there are three criteria, or principles in the quoted passage, *viz*, consistency of decisions over 19 years, institutional integrity, and the Court’s resolve “not revisit those legal principles” --there is a rough, intuitive content in the word ‘super-precedent’ (or, synonymously, ‘super-stare decisis’), probably sufficient for popular use.¹⁶ To say a case is a super-precedent means it is judicially unshakeable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally. But what might it mean if put into legal use? Standing alone, as if self-justifying, in a brief it would not make an argument, not even of rhetorical moment. So the word needs explication. That is the aim of this paper: to explain how the concept of ‘super-precedent’ might fit in our understanding of stare decisis.

Section 1 is about stare decisis, the doctrine of precedent: how do we think of it, how do we use it, and what are the virtues and vices that have balanced so heavily in its favor. The section thus enumerates the criteria, both empirical and normative, by which we evaluate theories purporting to explain the doctrine. Sections 2 through 5 describe theories of stare decisis and how they might account for the concept of super-precedent. Section 2 is about the progenitor, the “declaratory theory” of the “brooding omnipresence in the sky.” Section 3 is about Christopher Columbus Langdell’s quasi-empiricism; it may be inadequate as explanation, but it is still a good description of what we do. Section 4 is about the utterly inadequate “enactment theory” (that cases make rules), the anti-theory of legal realism, and the legal process theory. Section 5 lays out a rather more detailed theory, the “standard

¹⁵ *Richmond Medical Center v. Gilmore*, 219 F.3d 376-77 (4th Cir., 2000)

¹⁶ Professor Gerhardt gives many definitions, overlapping, interchangeable, functional, and on the whole consistently serviceable. See Gerhardt, *supra* note [7] at 1205-06, 1207, 1213, 1221, 1222, 1223; most usefully “Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law). . . . Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.” *Id* at 1205-06. Professor Farber defines ‘bedrock precedent’ as “: ‘rulings [which] are not overturned except . . . only for compelling reasons.’”, Farber, *supra* note __[3] at 1176, and as “precedents that have become the foundation for large areas of important doctrine.” *Id* at 1180.

theory” that is pretty much accepted today. It provides a natural and consistent account of a spectrum of precedential force, with super-precedent at the most powerful extreme.

But one may argue about theory and practice, consistency and incoherence ’til the cows come home without making one whit of difference to popular usage. Section 6 takes up that problem: what sense can be made of the use of “super-precedent” in the Senate Committee hearings for Chief Justice Roberts and Justice Alito?

Section 1: What is stare decisis?¹⁷

In law as in so many aspects of life there is often a tension between the wisdom of the past and the rationality of the present. We see it quite dramatically when ancient religious texts and current empirical science disagree. In law, received wisdom comes to us not only in the authoritative writings of the founding fathers (constitutions) and legislatures (statutes) but also in past judicial decisions; rationality lies in attending to “[t]he felt necessities of the time,”¹⁸ that is, in the adaptivity of governing law to present societal needs.

The Constitution is authoritative, constitutive wisdom from the past; so too are statutes properly made pursuant to it.¹⁹ These are the texts provided by the ancients, but they do not come with ready-made interpretations. Nor do they cover all domains of human behavior, or all sources of conflict. Judicial decisions fill the gap; they have to, as conflicts cannot be left unresolved if society is to survive as such. It follows that judicial decisions should be normatively adaptive to “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even

¹⁷ Only a few years ago people were talking of the demise of *stare decisis*, that we no longer had such a doctrine in operation. In 1999 Professor Lee was able to begin an article with two pages of sources to that effect. Thomas R. Lee, *Stare Decisis in Historical Perspective...*, 52 VANDERBILT L.REV. 647, 648-49 (1999)(Many sources and quotes about the decline or irrelevance of *stare decisis* to present courts.)

¹⁸ Oliver Wendell Holmes, Jr., THE COMMON LAW, 1 (1881) (beginning perhaps the most famous and most quoted sentence of all secondary legal literature.)

¹⁹ It says so: *see* U.S.CONST. Art. VI.

the prejudices which judges share with their fellow-men” as Holmes famously put it.²⁰ But times change, and those decisions join the authority of the past, texts in tension with new, adaptive rationality. Stare decisis, the doctrine of precedent, mediates that tension, giving the edge to prior decisions, be they purely common law, or interpretations of statutes or constitutions.

How does the doctrine of precedent do this? This is a surprisingly difficult question to answer,²¹ but one the answers to which determine this inquiry into the nature and usefulness of the concept of super-precedent. For these purposes I shall confine discussion to horizontal *stare decisis* only, not vertical; super-precedent, if explicable at all, is so in terms of horizontal, not vertical *stare decisis*. We may all have a pretty good grasp of the doctrine, and use it in analysis and argument, yet even at the descriptive level, theories can be surprisingly variable. For example, although “...the method of precedents, ... is the characteristic and all-pervading method of the common law, for better or worse,”²² one is surprised to find in a widely used introductory textbook that “appellate courts, or so-called ‘higher’ courts, are not legally bound to adhere to the principle of *stare decisis*.”²³ That is not a view shared by many, and certainly not by the justices of our Supreme Court.²⁴

²⁰ Oliver Wendell Holmes, Jr., *THE COMMON LAW*, 1 (1881).

²¹ Professor Farber: ““It is one thing to say that a precedent should be followed. It is another to say precisely what it means to follow precedent. This is not an easy question to answer. As a writer of an earlier generation remarked, “Yet when one asks, how does one determine the legal significance of judicial precedents? - one finds only fragmentary answers in authoritative materials and no entirely satisfactory theory offered by the writers who have dealt with the subject.” That seems to remain true today.” Farber, *supra* note __[3] at 1199, citing Earl Maltz, *The Nature of Precedent*, 66 *N.C. L. Rev.* 367, , 376-83 (1988) and Neil MacCormick, *The Significance of Precedent*, 1988 *Acta Juridica* 174, 178-87, and quoting Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* 300 (1953).

²² Wright, *The Right Hon. Lord, Precedents*, 8 *CAMBRIDGE L.J.* 118,118(1943), reprinted from 4 *U.TORONTO L.J.*247(1942).; see also Levi, Edward H.,*AN INTRODUCTION TO LEGAL REASONING*, 2(1949) Williams(ed.),*SALMOND ON JURISPRUDENCE*, 162 *et seq.*(11th ed.,1957). But not everyone agrees: compare Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 *CREIGHTON L.REV.*441,443(1979)(“Before the Civil War American judges, enthusiastically taking up the legacy of Lord Mansfield, had approached the process of adjudication with a light-hearted disregard for precedent.”) with Julius Stone, *1966 And All That! Loosing the Chains of Precedent*, 69 *COLUM.L.REV.*1162, 1164(1969)(“...the rules of precedent have for centuries been thought of as law”)

²³ Glaser, Lieberman, Ruescher, Su, & Mills, *THE LAWYER’S CRAFT*, 23 (2002). See also, Manchester, Salter, and Moodie, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION*, 3, 4 (2nd ed., 2000).

²⁴ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

In the United States, especially in commentary on Constitutional interpretation, there is a tension between precedent and the perceived mandates of the supreme law of the land.²⁵ The tension is especially poignant for those who purport to find authority only in the Constitution's original meaning,²⁶ but it is not exclusive to them.²⁷ What is a judge to do when prior judicial interpretation does not agree with her understanding of the Constitution's requirements? Professor Barnett, an uncompromising subscriber to the original meaning of the Constitution as supreme,²⁸ mockingly posits "the existence of a rule of law that precedes any of the super precedents they cite - a rule of law that might be called "super-duper precedent": the text of the Constitution itself."²⁹

Judicial decisions have different precedential power according as they are interpretations of the Constitution, statutes, or purely common law. This variation is determined by damage control:³⁰ as a constitutional decision can only be changed only by amendment, a process so difficult as to be practically ineffective, stare decisis should be weaker, the Court ready to correct an interpretation that has proven maladaptive.³¹ Decisions under statutes may be treated to a stricter doctrine of precedent because legislative correction is simple and readily available: If the legislature does not like a judicial interpretation, it can revise the statute.³² No sweeping statement can be made about the power of

²⁵ Daniel A. Farber and Suzanna Sherry, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS, 25 (2002), Farber, *supra* note __[3] at 1173; Barnett, *supra*, note __[20?] at 1233.

²⁶ For example, Barnett, *supra* note __[20] at 1233-34

²⁷ Farber, *supra* note __[3] at 1173-74.

²⁸ Barnett, *supra* note __[20] at 1233 (characterizing himself as a "fearless originalist".)

²⁹ *Id* at 1248.

³⁰ Any system, to survive, must be able to control the harmful effects of inevitable maladaptive, unjust, & unworkable decisions. Justice Brandeis may have been the first to articulate the differential effect of different types of decision: "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932)(Brandeis, J., dissenting)(footnotes omitted).

³¹ *See e.g.*, *Smith v. Allwright*, 321 U.S. 649, 665 (1944)(*per* Reed, A.J. "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.")

³² Justice Kennedy: "One reason that we give great weight to *stare decisis* in the area of statutory construction is that Congress is free to change this Court's interpretation of its legislation." *Neal v. United States*, 516 U.S.284, 295 (1996) quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). *See also* Lawrence C. Marshall, 'Let Congress Do It': *The Case For an Absolute Rule of Stare Decisis*, 88 MICH. L. REV. 177 (1989); William N. Eskridge, Jr., *The Case of the*

precedent in common law decision making. Legislative revision is available, thus it is more like *stare decisis* in statutory decisions than constitutional interpretation,³³ but in some circumstances that is inappropriate. In purely common law domains strictness of adherence to precedents should be determined by the nature of the behavioral domain governed. Where denizens look to decisions for guidance, those decisions should have very powerful precedential authority; on the other hand, where virtually nobody knows or seeks out judicial authority before acting (think of negligent infliction of emotional distress), *stare decisis* should be commensurately weak and rational adaptivity to current cultural standards more compelling.³⁴

By far the most popular virtue of *stare decisis*, and surely its most significant, is the stability, continuity and predictability it lends to the law.³⁵ The great virtue of stability and predictability in the law is that the denizens governed by it can plan their actions in reliance on it.³⁶ Justice Brandeis: “*Stare*

Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 MICH. L. REV. 2450 (1990); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Stare Decisis*, 88 MICH. L. REV. 2467 (1990).

³³ Farber, *supra* no __[3?] at 1184: (“We should resist, however, a simple equation between the common law and constitutional law. Constitutional law does not rely purely on judicial precedents in the same way as the common law.” The three precedential articles on super-precedent, Farber, *supra* n_[3], Gerhardt, *supra* n__[10?] and Barnett, *supra* n_[20?] are about constitutional interpretation.

³⁴ See Sinclair, GUIDE TO STATUTORY INTERPRETATION 40 (2000)

³⁵ For example: Blackstone, *supra* note __ at *69 (“For it is an established rule to abide by former precedents, where the same points come again in litigation: ... as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his own private sentiments: he being sworn to determine, not according to his own private judgments, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one.”); Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 150 (1921)(With the varying composition of the court varying, “The situation would ... be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. ...”); Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV.L.REV. 409, 409 (1924)(“A natural desire for stability in the law gave rise to reliance on decided cases as far back as Bracton and the early Year Books of the fourteenth century.”); Max Radin, *The Trail of the Calf*, 32 CORNELL L.QUARTERLY 137, 147 (1946); Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 601-02 (1987)(“Here precedent has its greatest role to play, generating a format for decisionmaking that channels decisions toward consideration of a comparatively limited number of factors likely to be repeated over time.”); Thomas R. Lee, *Stare Decisis in Historical Perspective...*, 52 VANDERBILT L.REV. 647, 652-53 (1999); Farber, *supra* n__[3] at 1196 quoting . Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 751 (1988)(“departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided.”)

³⁶ James Kent, 1 COMMENTARIES ON AMERICAN LAW, *476 /528 (1ST ed. 1826 [*], this from the 7th ed., 1851)(*stare decisis* fosters reliance of “professional men” ... “the community have a right” to rely on a decision “to regulate their actions and contracts by it.”); Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 597-98 (1987)(“The Argument from Predictability”: predictability helps us plan our lives.)

decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”³⁷

Along with stability and certainty goes minimizing judicial discretion.³⁸ F.F. Alexander Hamilton saw this as central: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them”³⁹ *Stare decisis* is not merely about garnering support from a prior case with which one agrees; if it is to be meaningful, to provide stability and certainty, a judge’s choices must be constrained by prior cases.

A corollary virtue of following *stare decisis* is that it “contributes to the actual and perceived integrity of the judicial process.”⁴⁰ Following precedent tends to show that the court is not following the whims of political winds or the judges’ own predilections, not, in the fashionable phrase, legislating from the bench.⁴¹ The argument is easily carried too far: “[S]tandardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an

³⁷ *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-407(1932), Justice Louis Brandeis, dissenting. Justice Rehnquist: “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) per Rehnquist, C.J., citing *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).

³⁸ Blackstone, *supra* note __ at *69 (“For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion. . . .”); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L.REV. 422, 423 (1988)(“Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others”, “economizes on information,” limits judicial idiosyncrasy, & increases the chances of correctness.); Farber, *supra* n__[3] at 1196, quoting Monaghan, *supra* n__[46?] at 752 (“Adherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a “law which binds [it] as well as the litigants.” quoting Archibald Cox, *The role of the supreme Court in American Government* 50 (1976)).

³⁹ The Federalist, No.78, 507at 510

⁴⁰ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) per Rehnquist, C.J.(“*Stare decisis* is the preferred course because it . . . contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).”)

⁴¹ Thomas R. Lee, *Stare Decisis in Historical Perspective* . . . , 52 VANDERBILT L.REV. 647, 653 (1999).

institution”,⁴² but standardized decisions we get from legislation, and at the cost of justice in particular cases.⁴³

However, to mean anything, *stare decisis* must, at least on occasion, work against justice: as Lee puts it, *stare decisis* means a court “*must* [follow a prior case] when it perceives an error in the ways of the past.”⁴⁴ Justice and fairness are sometimes trotted out as values enhanced by the doctrine,⁴⁵ the idea being that it requires treating right cases alike.⁴⁶ But that is only a virtue where the prior case was decided justly; otherwise it means “an imprisonment of reason”⁴⁷ and the perpetuation of error, of injustice.

Common law and its principle of *stare decisis* could not have survived over more than five centuries in England and two in the United States, through so many social upheavals and radical technological and economic changes without being flexible and adaptive. Lord Mansfield saw the common law's adaptability to change in the requirements of justice as its principal advantage over statutes:

[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.⁴⁸

⁴² Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 602 (1987)(599 “The Argument from Strengthened Decisionmaking” ...600 “2. strengthening the institution”)

⁴³ Justice Scalia: “But the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability.” *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 689 (D.C.Cir. 1984), (Scalia, C.J.).

⁴⁴ Thomas R. Lee, *Stare Decisis in Historical Perspective...*, 52 VANDERBILT L.REV. 647, 654 (1999)

⁴⁵ Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 595-96 (1987)(“The Argument from Fairness” arguing that this “relatively large categories of likeness”, but missing the point that exactly that undermines stability and certainty and constraint on judicial decisions.)

⁴⁶ “[J]ustice demands, wherever that concept is found, that like men be treated alike in like conditions. Why, I do not know; the fact is given.” Karl N. Llewellyn, *THE BRAMBLE BUSH*, 42 (1930).

⁴⁷ *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting *United States v. International Boxing Club of N. Y., Inc.*, 348 U.S. 236, 249, 99 L. Ed. 290, 75 S. Ct. 259 (1955) (Frankfurter, J., dissenting)).[needs checking.]

⁴⁸ *Omychund v. Barker*, 1 Atk. 21, 33, 26 Eng.Rep. 15, 22-23 (Ch. 1744) (argument of Mr.Murray, then Solicitor-General of England, later Lord Mansfield).

Stare decisis works to the contrary.

Perpetuation of error is the principle charge against the strictures of *stare decisis*.⁴⁹ Compared with following precedent, the willingness of courts to drink from the "fountain of justice" is not so evident. A great judge like Cardozo may have sought a relaxed, adaptive *stare decisis*,⁵⁰ but few have had his insight, confidence, and powers of persuasion. Critics have long bemoaned the reluctance of courts to react to societal change. Arch-positivist John Austin wrote:

But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future). ... [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.⁵¹

Striking the right balance between stability and adaptivity, that is, explaining the natural or rational limits of the doctrine's compulsive power, is one of the principle burdens of a theory of precedent.

Finally, *stare decisis* enhances the pragmatic virtue of efficiency; without it, every decision would be a new one, to be argued on a clean slate. "The obligation to follow precedent begins with necessity, ... With Cardozo, we recognize that no judicial system could do society's work if it eyed each

⁴⁹ Max Radin, *The Trail of the Calf*, 32 CORNELL L. QUARTERLY 137 (1946) (Begins with a poem describing a calf wandering through scrub, creating a germ of a path, which ends up being the main thoroughfare of a great metropolis, rather like Bleeker Street; it is not, he says, how we should think of *stare decisis*; but why not?) Nor does it help to say, as Chancellor Kent was fond of repeating, that *stare decisis* does not apply if "it can be shown that the law was misunderstood or misapplied in that particular case"; James Kent, 1 COMMENTARIES ON AMERICAN LAW, 528[*475] (1ST ed. 1826 [*], this from the 7th ed., 1851) (similarly a precedent "ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error." Id at *476 /528) as that simply begs the question of criteria of "misunderstanding" or "misapplication."

⁵⁰ Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 150 (1921) (He used as an example *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916) in which the great Judge Benjamin N. Cardozo frankly acknowledged error in the prior decision on point: "We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright v. Hart, supra*, at p. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state. ... The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past... ." Id, 219 N.Y. at 385-86, 114 N.E. 810-11, a large string of cites omitted.); similarly from a rather less exulted source, *Leavitt and Lee v. Morrow*, 6 Ohio St. 71, 81 (1856): "It would seem, therefore, that a rule which, in its tendency, is calculated to foster bad faith and defeat the purposes of justice, ought not to be adhered to, simply on account of its antiquity."

⁵¹ 2 AUSTIN, LECTURES ON JURISPRUDENCE, 647 (5th ed. 1885).

issue afresh in every case that raised it.”⁵² The reference is to Judge Cardozo’s 1920 Storrs Lectures, “Judicial Process,” which gave us the benchmark quotable: “[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundations laid by others who had gone before him.”⁵³ There are two reasons here: the burden of numerosity were all cases to be decided afresh at all levels constrained only by the litigants’ willingness and budget; and the insecure base of decisions to be made. From a societal point of view *stare decisis* can be seen as promoting efficiency in dispute resolution resource allocation.⁵⁴

And there are those who are implacably hostile to *stare decisis*, most famously Jeremy Bentham.

Do you know how they make [common law]? Just as a man makes laws for his dog. When your dog anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me.⁵⁵

He has a point. It is stock jurisprudential wisdom that one cannot be bound by a law of which he or she has no notice.⁵⁶ Bentham himself said it: “That a law may be obeyed, it is necessary that it should be known.”⁵⁷ But how can the ordinary denizen know of prior judicial decisions? Still fewer than half a percent of the United States populace have the legal training necessary to find a case, and for almost all

⁵² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992) per Souter, J.(in the ellipsis: “and a contrary necessity marks its outer limit”, of which more later.)

⁵³ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS*, 149 (1921); cited or quoted by all commentators I’ve seen, e.g., Frederick Schauer, *Precedent*, 39 *STAN.L.REV.* 571, 599 (1987)(“The Argument from Strengthened Decisionmaking... 1. Decisionmaking Efficiency” –quoting Cardozo); Thomas R. Lee, *Stare Decisis in Historical Perspective...*, 52 *VANDERBILT L.REV.* 647, 652 (1999)(quoting Cardozo.)

⁵⁴ Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 *CORNELL L.REV.* 422, 423 (1988)(It “economizes on information”); Thomas R. Lee, *Stare Decisis in Historical Perspective...*, 52 *VANDERBILT L.REV.* 647 (1999)(it promotes economy in dispute resolution resource allocation.)

⁵⁵ Bentham, 5 *WORKS*, supra at 235.

⁵⁶ Aquinas, St. Thomas, *SUMMA THEOLOGICA*, Question 90, Articles 1 and 3 (1273); John Locke, *SECOND TREATISE ON GOVERNMENT*, §§ 57, 136 (1690); William Blackstone, 1 *COMMENTARIES ON THE LAWS OF ENGLAND*, 45-46 (4th American edition, George Chase, ed., 1938); Jeremy Bentham, “Of Promulgation of the Laws,” 1 *WORKS* 155 (Bowring, ed. 1859); Lon L. Fuller, *THE MORALITY OF LAW*, 34-35,39(1964); *Lambert v. California*, 355 U.S. 225 (1957); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁵⁷ Bentham, 1 *WORKS*, supra, at 157. Similarly, see Aquinas, *SUMMA THEOLOGICA*, supra, at Question 90, Art. 4; John Locke, *SECOND TREATISE OF GOVERNMENT*, §136 (1690).

the activities of life that have potential legal ramifications neither they nor anyone else has the time to look. And what of the landmark case --the one that sets a new standard? The most assiduous legal research would not find it, because it was somewhere in the future.⁵⁸ This leads to the criticism that common law decisionmaking is intrinsically retroactive;⁵⁹ but retroactive law has long been frowned on,⁶⁰ and the Constitution prohibits retroactivity at both the federal and state level.⁶¹ It's a conundrum with which every theory of *stare decisis* should come to grips.

Seventh Circuit Court of Appeals Judge Frank Easterbrook says that although we need a theory to explain, justify and constrain our reliance on precedent, "we do not have such a theory. ... no one has a principled theory to offer."⁶² Were he correct, it should indeed "frighten us."⁶³ Common law with its characteristic *stare decisis* has been serving our legal decisional needs for more than two centuries and those of England for nearly five centuries, through a great variety of circumstances: how could it be inexplicable? To the contrary: There have always been theories, or at least as long as there have been theorists.

We evaluate a theory of *stare decisis* according to how well it fits actual practice -- what judges and lawyers do in arguing from and about precedent ---and how it explains the qualities --be they

⁵⁸ Max Radin, *The Trail of the Calf*, 32 CORNELL L.QUARTERLY 137, 148 (1946)("Indeed, the fact that a case is in the reports is in itself evidence that when the situation arose, the law was uncertain, in spite of generations during which *stare decisis* has been dominant.")

⁵⁹ See, e.g., Kenneth Kress, *Legal Reasoning and Coherence Theories: Dworkin's rights thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369 (1984).

⁶⁰ Demosthenes called a retroactive statute "the most disgraceful and scandalous ever enacted in your assembly." Demosthenes' "Speech against Timokrates," XXIV DEMOSTHENES, 371, 388 (353 B.C.E.)(J.H.Vince, trans., Loeb Classical Library, 1935).

⁶¹ United States Const., Art.1, §§ 9 and 10. However this was interpretively restricted to criminal statutes only in 1798; *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). See Laura Ricciardi & Michael Sinclair, *Retroactive Civil Legislation*, 27 U.TOL.L.REV. 301, 302-328 (1996); Daniel E. Troy, RETROACTIVE LEGISLATION (1998).

⁶² Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L.REV. 422 , 422 (1988). For examples to the contrary see e.g., Eisenhower, James J., III, *Four Theories of Precedent and its Role in Judicial Decisions*, 61 TEMPLE L. REV. 871 (1988)(finding theories of *stare decisis* in the works of four great jurists, Hans Kelsen, GENERAL THEORY OF LAW AND STATE 124-50 (1945), H.L.A.Hart, THE CONCEPT OF LAW 124-132 (1961), Ronald Dworkin, TAKING RIGHTS SERIOUSLY 81-90 (1977), and Joseph Raz, THE AUTHORITY OF LAW 180-95 (1979).)

⁶³ Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L.REV. 422 , 422 (1988). The "frighten us" bit comes in a slightly different context, viz, "Text and precedent are an old pair. So old it should frighten us that we do not have a theory of their interaction." *Id.*

virtues, vices, or conundrums --of this doctrine that we hold so jurisprudentially dear. A theory should also explain how, as a matter of history, a workable balance of virtues and vices is so commonly – although not always –achieved. Most importantly, it should provide guidance in answering “The sixty-four thousand dollar question . . . when to adhere and when to reverse.”⁶⁴

One’s theory of *stare decisis* sets the context in which to evaluate an explanation of super-precedent.

Section 2. The Declaratory Theory

Judges of the new United States had no doubt about the obligation to precedent: to them, as to the framers of the Constitution, precedent was intrinsic to the role of judging.⁶⁵ They understood deciding cases to require finding and applying law, not making it; the latter power was expressly allocated to the legislature.⁶⁶ Following precedent, the application of law previously found, was part and parcel of judging. In this respect these early judges were simply following in the English common law tradition, a tradition they learned more through the works of Blackstone⁶⁷ and Hale⁶⁸ than old English cases.⁶⁹

Why should a judge follow a prior judge’s discovered law? In those days the answer lay in the “declaratory theory” of *stare decisis*.

⁶⁴ Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 Minn. L. Rev. 1232, 1236 (2006).

⁶⁵ The late Eighth Circuit judge and legal historian, Judge Richard S. Arnold, explained this in *Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2000) at 900; see Michael B.W. Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U.PITT.L.REV. 695, 706 (2003).

⁶⁶ Id., U.S.CONST. art. III, §1.

⁶⁷ William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND *69 (1765).

⁶⁸ Sir Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 44 et seq. (1713)(Charles M. Gray, ed., U. Chicago Press, 1971).

⁶⁹ Chancellor Kent, a near contemporary of the Framers, wrote of Blackstone that he “is justly placed at the head of all the modern writers who treat of the general elementary principles of law.” James Kent, 1 COMMENTARIES ON AMERICAN LAW 512 (1826).

Remember Holmes' derogatory reference to the "brooding omnipresence in the sky"?⁷⁰ The brooding omnipresence was a morality, universally applicable, a blueprint for propriety in all behavior. For many of the founding fathers, at least in their public moments, the world had been created by God according to a plan, and that plan reached not just the physical aspects but also the moral. "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this..."⁷¹ This is not to require some established religion to justify *stare decisis*; it is simply a recognition of one prevailing and superior morality.⁷² It is not such a strange idea. Think of the esteem in which the British judicial classes of the time held themselves and their mode of civilization, and of their willingness to impose it on others all over the world. Our forefathers too seemed to have few doubts about their rectitude, or about imposing it upon those already here, or dispossessing or disposing of them. That brooding omnipresence of morality was the source of the principles governing common law decision-making.

One might think of it as a great river of wisdom and guidance into which judges dip in their decisions. Of course no two cases are ever quite the same,⁷³ but they commonly have similar contours. You could say that of the river too: as in the old cliché, you can never bathe in the same river twice, but nevertheless its banks, depth, current, temperature and viscosity are usually much the same the second time as the first.

⁷⁰ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917)(Holmes, J., dissenting); Letter from Oliver W. Holmes, Jr. to Harold J. Laski (Jan.29, 1926), in *HOLMES-LASKI LETTERS, 1926-1927*, AT 822 (Mark DeWolfe Howe ed., 1953).

⁷¹ Blackstone, *supra* note __ at *41.

⁷² "[T]he customary law of England, which we doe likewise call ius commune, as comming neerest to the lawe of Nature, which is the root and touchstone of all good lawes, and which also is ius non scriptum, and written onley in the memory of man ... doth far excell our written lawes, namely our statutes or acts of Parliament." Sir John Davies, *LE PRIMER REPORT DES CASES ET MATTERS EN LEY* (1628), quoted by S.E.Thorne, *The Equity of a Statute and Heydon's Case*, 31 *ILL. L. REV.* 202, 207 (1936).

⁷³ Except in cases of *res judicata*, which might be considered the limiting case of *stare decisis*.

A judge, then, would dip into this river of justice and declare the law he found: thus the “declaratory” theory. So long as the judge had accurately perceived the applicable law, a subsequent judge faced with a similar case should naturally follow his predecessor’s decision and decide in the same way. But if the subsequent judge’s case was different in some significant aspect, then he would not be expected to find and declare the same law.

There was no problem of retroactivity in the decision as the parties should also have taken their guidance from that same source. But parties before a court then as now commonly disagreed about what they found when they consulted that brooding omnipresence; hence their interaction’s becoming legally contentious. Judges were seen as having a better perception of, perhaps even a privileged access to the source of law. Blackstone saw it almost mystically: “[T]he judges in the several courts of justice ... are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.”⁷⁴ Hale gave four rather more down to earth reasons for judicial authority:

First, because judges are chosen for their “greater Learning, Knowledge, and Experience in the Laws than others. *2dly*. Because they are upon their Oaths to judge according to the Laws of the Kingdom. *3dly*. Because they have the best Helps to inform their Judgments. *4thly*. Because they do *Sedere pro Tribunali*, and their Judgments are strengthened and upheld by the Laws of this Kingdom, till they are by the same Law revers’d or avoided.”⁷⁵

Judges, then, were held authoritative and they left their declarations in their opinions, to be followed by their successors.⁷⁶ But the authority did not extend beyond what was necessary for the decision, as only to that extent did the judge inquire with the necessary concentration and effort.⁷⁷

⁷⁴ Blackstone, *supra* note at *69.

⁷⁵ Hale, *supra* note ___ at 45.

⁷⁶ Blackstone:

[T]he monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity ... receive their binding power, and force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

Blackstone, *supra* note ___ at **63-64 (contrasting acts of parliament which do not enjoy such authority.)

But judges were not infallible. Their decisions did not make law; of mundane institutions, only a legislature could do that.⁷⁸ Their decisions were evidence of law, authoritative evidence but not infallible: “[I]ndeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such custom as shall form a part of the common law.”⁷⁹ Yet a subsequent judge could find that his predecessor had been mistaken, that in the precedent case the court had misperceived the moral blueprint in the sky; its decision was not “*bad law*, but ... it was *not law*...”⁸⁰ On the declaratory theory a court did not and could not absolutely bind its successors.⁸¹

This differs from our current understanding of *stare decisis*. For example, the power to find a precedent misguided was, and on the declaratory theory had to be, independent of the status of the court.⁸² There was no distinction between vertical and horizontal *stare decisis*.⁸³ Think of cases as

⁷⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (“If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.”)

⁷⁸ Hale:

Judicial Decisions [are binding] between the parties thereto, yet they [judicial decisions] do not make a Law properly so called, (for that only the King in Parliament can do); yet they have great Weight and Authority in Expounding, Declaring, and Publishing what the law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho’ such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

Hale, supra note __ at 45.

⁷⁹ Blackstone, supra note __ at *69 (“[I]n such cases the subsequent judges do not pretend to make a new law but to vindicate the old one from misrepresentation.”); *Swift v. Tyson*, 41 U.S. 1, 18 (1842) Per Story, J. (“In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often reexamined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.”)

⁸⁰ *Id.* (italics in original).

⁸¹ Blackstone:

Yet this rule [to abide by precedents] admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the Divine law.. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.

Blackstone, supra note __ at *69.

⁸² In part this was because the hierarchical court structure was not well in place in the early development of the common law. Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* 350 (5th ed. 1956). Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 31-33 (1959). But even with an hierarchy in place, precedent could transcend hierarchy; here is Justice Story citing a trial court opinion and an appellate court’s reliance on it: “In the earliest case, *Warren v. Lynch*, 5 Johns. R. 289, the Supreme Court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a bona fide holder without notice to recover the amount of a note endorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in *Bay v. Coddington*, 5 Johns. Chan. Rep. 54.” *Swift v. Tyson*, 41 U.S. 1, 16

analogous to observations or experiments in empirical science; they surely must follow natural law, but the scientist and the entire state of scientific understanding might misperceive what that is. The explanatory propositions of established science can be called into question by anybody, of no matter what status; a clerk in a Swiss patent office could overrule the most influential scientists in prior history. So too could a judge find a precedent in error no matter what the status of its author; so too can we, as students of law, find a case to be “wrongly decided.”⁸⁴

It wasn't a very compelling notion of *stare decisis*. A prior decision was evidence of the law only, not itself an instance of it, and as merely the effort of a judge, inherently fallible even as evidence. As Lord Mansfield said “[t]he reason and spirit of cases make law; not the letter of particular precedents.”⁸⁵ To this we must add the uncertainty of the reporting system, especially in the new United States. Reports here were few and not very reliable.⁸⁶ The early ones were merely notes kept by lawyers, sometimes published as a public service, but unofficial.⁸⁷ Dallas's reports of the United States' Supreme Court decisions and of the Pennsylvania Supreme Court were “submitted to the public in 1790 as a collection of lawyers' notes.”⁸⁸ They also focused on the arguments of counsel rather than on the

(1842)(But one should note that Justice Story was also prepared to trace the point to Roman and 18th century English jurists: “The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world.” Id at 19.)

⁸³ The earliest court to draw the distinction was an ecclesiastical court, part of a religious system thoroughly familiar with hierarchy, and even there quite late in coming. *Veley and Joslin v. Burder*, 1 Curt. 372, 163 Eng.Rep. 127 (Consistory Court of London, 1837)

⁸⁴ Justice Scalia says this “explains why first-year law school is so exhilarating: because it consists of playing the common-law judge, which in turn consists of playing king ... How exiting!” Antonin Scalia, A MATTER OF INTERPRETATION 7 (1997). My impression is rather that it creates rampant insecurity, sending students scurrying for the shelter of black letter study guides.

⁸⁵ *Fisher v. Prince*, 97 Eng.Rep. 876, 876 (K.B. 1762).

⁸⁶ Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 34 (1959) (“While England had some reliable, though unofficial, reports during the 17th and 18th centuries, it is safe to say that the colonists had none until the nineteenth century.”)

⁸⁷ Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 AM.U.L.REV. 757, 773 (1995)(In the United States in the late eighteenth through mid-nineteenth century recording of decisions was “unsystematic, idiosyncratic private reporting of vastly increased numbers of cases.”)

⁸⁸ Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 34 (1959) (Johnson's reports of New York decisions, 1799-1823 in 20 volumes, were similar. Id at n.21). Craig Joyce, *The*

decisions of judges. In 1826, New York's Chancellor Kent assessed "Even a series of decisions are [*sic*] not always conclusive evidence of what is law ..."⁸⁹ That "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"⁹⁰ remained supreme.

How does the declaratory theory account for the concept of super-precedent? Quite well, I think. Those decisions that rest upon larger commonalities in moral precept and not subject to difference in decision for minor variations would count. The major contours of the river, in that metaphor, or of the brooding omnipresence in Holmes' would not be variable except in cases of massive change in society. Thus in *Swift v. Tyson*⁹¹ Justice Story could safely rely on Lord Mansfield's decisions as unshakable evidence of the natural law of commerce: discharge of a pre-existing debt counts as consideration.⁹² Probably few such "super-precedents" exist as cases: for example, it is unlikely that one could discover the progenitor of the staple that one who deliberately chops off the limb of another is liable in tort; it is one of those fundamentals that a society could scarcely survive without. Compare the tort of seduction, and its early formulation in the writ of *per quod servitium amissit*, obsolete today even in states with precedents surviving.⁹³ But cases have pioneered seemingly unshakable doctrines, for example in contract—think of the prohibition on unforeseeable consequential damages established in the super-

Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy, 83 MICH.L.REV. 1291 (1985) ("Not a single formal manuscript opinion is known to have survived from the Court's first decade; and few, if any, may have existed for Dallas to draw upon. ... Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work." at 1305 (fn.s omitted).)[check]

⁸⁹ James Kent, 1 COMMENTARIES ON AMERICAN LAW *477 /529 (1ST ed. 1826 [*] /this from the 7th ed., 1851

⁹⁰ *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928), Holmes, J., dissenting.

⁹¹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)

⁹² *Id.* at 19 ("The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit." Trans.: "There will be no other law of Rome, (no) other (law) of Athens, (no) other now, (no) other in the future, but both in all countries and in all times, one and the same law shall obtain (apply).")

⁹³ Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQUALITY 33, 59-60 (1987)

precedent, *Hadley v. Baxendale*⁹⁴ --or in tort --think of the doctrine of “last clear chance” set down in the super-precedent *Davies v. Mann*.⁹⁵

Section 3: Langdell’s quasi scientific scholasticism.

The declaratory theory didn’t last, of course. It couldn’t last.⁹⁶ The underpinnings of the brooding omnipresence in the sky were in trouble by the early 19th century, coming under attack from pioneer positivists Jeremy Bentham and John Austin. Austin, not always boring, called it “the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.”⁹⁷

Urbanization along with the industrial revolution in England and immigration from diverse origins in the United States must have shaken faith in the universality of that transcendental body of law declared by judges. It wasn’t enough to talk, as did Bacon,⁹⁸ of the river of justice flowing through different topology and taking on local color. Even Blackstone doubted that the common law of England could rule in places as different as “[o]ur American plantations.”⁹⁹ If the differences in circumstance

⁹⁴ 9 Exch. 341 (1854)

⁹⁵ 10 M.& W. 543, 152 Eng. Rep. 588 (1842)

⁹⁶ But it never quite went away, either. Even on the most elevated of benches it occasionally finds a proponent; see, e.g. *Harper v. Virginia*, 509 U.S. 86, 102 et seq (1993)(Scalia, J., concurring). In the last century we saw much the same idea, although without the claim to universality, in the super-organic theory of culture of anthropologists Leslie White and Theodore Kroeber. Even postmodern theorists posit much the same; just substitute ‘culture’ or ‘morality’ for ‘discourse’ in the following from Michel Foucault: “In short, it is a matter of depriving the subject (or its substitute) of its role as originator and of analyzing the subject as a variable and complex function of discourse.” Michel Foucault, *What Is An Author?*, in David Lodge, ed., MODERN CRITICISM AND THEORY 209 (1988), (‘discourse’ is, in pomobabble, a universal placeholder for whatever you like as a determinant.)[or in David Richter, ed., THE CRITICAL TRADITION, 899 (1998).

⁹⁷ John Austin, LECTURES ON JURISPRUDENCE, 634 (R. Campbell, ed. London, 1885)

⁹⁸ Francis Bacon, perhaps the greatest of all jurisprudential thinkers (I reckon he was) used the image of a river explicitly in accounting for the adaptability of justice to circumstance:

And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the site of territories, the disposition of peoples, and the nature of commonwealths. Spedding and Heath, VI THE WORKS OF FRANCIS BACON 418 (London, 1857-74); Daniel R. Coquillette, FRANCIS BACON 288 (Stanford U.P., Stanford, 1992).

⁹⁹ Blackstone, supra note __ at **107-08:

were not just of geography and technological development but also of culture, the moral blueprint's universality as a source could scarcely survive: Different cultures handled stock social problems differently, and as effectively as the British upper classes.

In the United States the federal court system was set up with an hierarchical structure; with hierarchy goes power, flowing top down. Judicial hierarchy brought vertical stare decisis with its compulsive power over lower courts, independently of wisdom or rationality. Supreme court decisions were not merely evidence of law, to a lower court judge they were the law, with a controlling power akin to legislation. Most states followed the federal model.¹⁰⁰ The development of a reliable system of reports facilitated judicial reliance on prior decisions.¹⁰¹ "The movement toward official state reporters gained momentum in the 1840s and 1850s and was shortly universal."¹⁰²

American common law jurisprudence probably settled again only after the Civil War and the advent of the first modern law schools. Christopher Columbus Langdell, dean of Harvard Law School, and his successor James Barr Ames brought a revolution not only to legal education with the case

[I]t hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being ... are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such, especially, as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provisional judicature, subject to the revision and control of the king in council Our American plantations are principally of this latter sort. ... And, therefore, the common law of England as such has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions.

Id.
¹⁰⁰ Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 36 (1959)

¹⁰¹ Kempin records official reporting starting early in the nineteenth century. His examples are Robinson's Reports in Virginia, started in 1843, but authorized in 1820. Pennsylvania authorized official reporting in 1812, Georgia in 1841. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 35-36 (1959)

¹⁰² Id.

method but also to the doctrine of stare decisis.¹⁰³ Langdell was devoted to books. Hitherto it had been thought that the best training for the legal practitioner was in practice, drawing a

false analogy between medical education and legal education. ... Medicine can be learned only from the bodies of the sick and wounded; law, on the other hand, 'is to be learned exclusively from the books in which its principles and precedents are recorded, digested, and explained.' The place to find these principles and precedents, of course, was not the courtroom but the library.¹⁰⁴

But this wasn't a pure reversion to scholasticism; it was scholasticism dressed up as science. If "the opinions of judges and lawyers as to what the law is *are* the law,"¹⁰⁵ then one could take those opinions as data—as a scientist might take observations or specimens or the results of experiments in the laboratory—and generate an explanation, a general law.

According to Samuel Williston ... Ames "believed it to be the function of the lawyer, and especially of the teacher of law, to weld from the decisions a body of mutually consistent and coherent principles. To his mind there was but one right principle upon a given point, and if the decisions failed to recognize it, so much the worse for the decisions."¹⁰⁶

This is not the simplistic "rule of the case" of the "enactment theory";¹⁰⁷ individual decisions were not law, but a collection of decisions on a topic made law of a force equivalent to a statute.

Langdell's jurisprudence was unabashedly formalistic:¹⁰⁸ it rested on principles laid down by judges and discoverable from their opinions. "Law, considered as a science, consists of certain principles and doctrines" and "the number of fundamental legal doctrines is much less than is commonly supposed."¹⁰⁹ One synthesizes the relevant principles and deduces the solution to a problem. It is an

¹⁰³ See William P. LaPiana, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION, 7-28 (1994); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U.PITT.L.REV. 1 (9183).

¹⁰⁴ LaPiana, supra note __ at 15 quoting C.C.Langdell, *Teaching Law as Science*, AMERICAN L.REV. 21, 123-24 (1887)

¹⁰⁵ Quoted by LaPiana, supra note __ at 19 from a letter by J.C.Gray to C.W. Eliot, January 3, 1883.

¹⁰⁶ William C. Chase, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT, 19 (1982), quoting Alfred Z. Reed, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, 378 (1921), and citing many judicial concurrences, including Benjamin N.Cardozo, THE GROWTH OF THE LAW, 14 (1924).

¹⁰⁷ See text at notes __ - __ infra.

¹⁰⁸ Grey: 'formalism' "describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decisions whether from highly particular rules or quite abstract principles." Thomas C. Grey, *Langdell's Orthodoxy*, 45 U.PITT.L.REV. 1, 9 (1983).

¹⁰⁹ C.C.LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS, viii (1879)

inherently conservative conception: words of decisions from the past, not present social needs and values, are the data on which the judge bases “the rule.” Thus, Langdell’s conception is so intrinsically opposed to change that even statutes fell before it: “the landmark decisions of the formalist age are those which strike down laws regulating business or protecting workers.”¹¹⁰

How does Langdell’s quasi empiricist formalism account for the concept of super-precedent? At a first pass one would say “quite well.” It generates rules by abstraction from sets of cases rather than particular progenitor decisions, super-precedents, but it has that in common with the declaratory theory. Those sets of cases give us the legal categories for which we have names, the analogues of species or genera: “battery”, “tort” and the like. Yet *Marbury* would hold up as a super-precedent because it spawned lines of uncritical followers; taking the back-bearings from its progeny one can formulate a generalization no different from Chief Justice Marshall’s “It is emphatically the province ...”. So too would *Hadley v. Baxendale*.

The problem is rather that this theory of stare decisis would not seem able to distinguish super-precedent from common garden precedent or any gradation in between. Where cases from the past are in disarray on a topic, one simply could not form a rule; there would be no supportable abstraction. Between formal control of the present problem and no control at all, it does not provide a mechanism for introducing alternative sources of authority, such as adaptivity to current circumstances.

As the basis of a teaching method, Langdell’s formalism may have worked quite well; it is still in use today. But as a justification for stare decisis it is insupportable. Even though it keeps its eye fixed firmly on the past, it does not solve the problem of retroactivity: in those areas of behavior in which no ordinary denizen –and no sane lawyer –would check prior cases before acting, its rule of law may still

¹¹⁰ Allen D. Boyer, *Samuel Williston’s Struggle With Depression*, 42 BUFFALO L.REV. 1, 20 (1994) citing as examples *Lochner v. New York*, 198 U.S. 45 (1905)(holding a statute limiting work hours invalid as infringing freedom of contract); *In re Debs*, 158 U.S. 564 (1895)(upholding federal injunction against striking workers) and more.

come as a surprise. At first glance, it may appear to offer a modicum of certainty, reliability, and predictability, but that too is illusory. Legal historian A.W.B.Simpson:

... it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it as a single rule in what Pollock called "any authentic form of words." ... [I]f six pundits of the profession, however sound and distinguished, are asked to write down what they conceive to be the rule or rules governing the doctrine of *res ipsa loquitur*, the definition of murder or manslaughter, the principles governing frustration of contract or mistake as to the person, it is in the highest degree unlikely that they will fail to write down six different rules or sets of rules.¹¹¹

Of course. There are indefinitely many true explanations of any set of data,¹¹² so indefinitely many "laws" so-called will fit a set of cases, or a single opinion, and none is more authoritative than another. If the situation is in any way out of the ordinary, how can a lawyer advise, or a client act with confidence on their choice among hypotheses? Finally, with the theory's focus on the past comes resistance to change, a wooden rigidity inhibiting adaptation to the needs of a changing society. Common law and stare decisis could not have endured for so long and through such varied circumstances had it been built only on such ground.

The legal world might have been excused for swallowing Langdell's theory of precedent at the time. The two to three decades following the Civil War in the United States was a period of social insecurity, not only as a consequence of the war but also from industrialization, urbanization and rapid development in technology.¹¹³ It was hardly surprising that the judges sought an extremely formalistic

¹¹¹ A.W.B.Simpson, *The Common Law and Legal Theory*" A.W.B. Simpson (Ed.) OXFORD ESSAYS IN JURISPRUDENCE (2nd ed.) 77, 89 (1973).

¹¹² Basic in the philosophy of science; see, e.g., Ian Hacking, REPRESENTING AND INTERVENING, 143 (Cambridge U.P., 1983)(says this was accepted at least as early as 1894 when it was stated clearly in Heinrich Hertz, PRINCIPLES OF MECHANICS (1894; English translation published 1899).); Clark Glymour, THEORY AND EVIDENCE, 10 (1980)("...an infinity of incompatible hypotheses may obviously be consistent with the evidence."); Steve Fuller, THOMAS KUHN: A PHILOSOPHICAL HISTORY FOR OUR TIMES, 177 (U.Chicago Press, Chicago, 1999)("According to Ian Hacking, Heinrich Hertz's Principles of Mechanics (1894) was the first book to argue that the same facts can be represented in many different ways." Id at fn 76.) Conversely, no data can force one to give up a theory. Willard van Orman Quine, FROM A LOGICAL POINT OF VIEW, 43 (1953)("Any statement can be held to be true come what may, if we make drastic enough adjustments elsewhere in the system.")

¹¹³ Roscoe Pound, THE SPIRIT OF THE COMMON LAW, 119-120 (1921), Roscoe Pound, *Common Law and Legislation*, 21 HARV.L.REV. 383, 404 (1908).

jurisprudence; in rules lies security.¹¹⁴ But of course it couldn't last. Even as Langdell and Ames got the game going at Harvard, their sometime junior colleague Oliver Wendell Holmes Jr. was writing subversively:

The official theory is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle of the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view.¹¹⁵

Courts, according to Holmes, had power to adapt the law to “[t]he felt necessities of the time.”¹¹⁶ With the technological developments and their commensurate changes in social relations pressing at the beginning of the twentieth century, he had a point, didn't he?

But if not Langdell's *quasi* scientific scholasticism, and not the brooding omnipresence in the sky, then what?

Section 4: 20th Century theories

(a) *The enactment theory.*

One persistent, formalistic offshoot of Langdell's theory is the “enactment theory”:

Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved.¹¹⁷

The power of *stare decisis* follows simply from the decision's making a rule: “This may be called the 'School-rules concept' of law, and it more or less assimilates all law to statute law.”¹¹⁸ Despite its

¹¹⁴ Grant Gilmore, *THE AGES OF AMERICAN LAW* 62 ff (1977).

¹¹⁵ Oliver Wendell Holmes Jr., *Common Carriers and the Common Law*, 13 *AMERICAN L.REV.* ____, 630-31 (1879). He must also have been referring to Langdell when he referred to “the failure of all the theories which consider law only from its formal side, whether they attempt to deduce the corpus from a priori postulates, or fall into the humbler error of supposing the science of law to reside in the *elegantia juris*, or logical cohesion of part with part.” Oliver Wendell Holmes Jr., *THE COMMON LAW*, 36 (1881)

¹¹⁶ Holmes's successor on the United States Supreme Court, Justice Cardozo, wrote of Langdellian formalism, *inter alia*, “The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively.” Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 22-23 (1921).

¹¹⁷ Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, 110 (1977).

manifest inadequacies, the enactment theory is popular in law schools, the ‘R’ in the briefing formula “IRAC.”¹¹⁹

I shall not reiterate the manifold deficiencies of the enactment theory here,¹²⁰ but focus only on those peculiarly relevant to the concept of super-precedent. First, notice that even if there were a rule enacted in a case, nobody can say with authority just what are the words of that rule. But, as we all know from our struggles with statutes, the actual words used in a rule make vital differences. As lawyers and students of law we are entitled –*empowered* --to dispute any claim to authority in a particular formulation. But how is the poor denizen, untrained in law, unable even to find the case, to find a reliable rule, be it in super or mere mundane precedent? Supposing that a rule is only created when a court decides the case requires accepting both retroactivity and an intrinsic lack of notice, not a viable solution.

Stare decisis on the enactment theory is simply explained: A case enacts a rule, and that rule governs not only behavior but future judicial decisions.¹²¹ But it is in this reliance on the concept of rule

¹¹⁸ A.W.B. (Brian) Simpson, *The Common Law and Legal Theory*, A.W.B. Simpson (Ed.) OXFORD ESSAYS IN JURISPRUDENCE (2nd ed.) 77, 82 (1973). Similarly, but non-critically: “A legal rule established by the ratio of a case forms a precedent for application in future cases.” Colin Manchester, David Salter, and Peter Moodie, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION*, 3, 4 (2nd ed., 2000).

¹¹⁹ Nevertheless the enactment theory still has supporters, even among the higher echelons of the jurisprudential theorists – see, e.g., Larry Alexander and Emily Sherwin, *THE RULE OF RULES* (2001), Frederick Schauer, *PLAYING BY THE RULES* (1991) – and the judiciary -- see, e.g., Justice Scalia, *A MATTER OF PRINCIPLE* 7-9 (1997) (Prof. Farber says “Justice Scalia’s view of precedent calls on courts to lay down clear-cut dictates whenever possible; those rules are then binding as rules on later courts until overruled.”, Farber, *supra*, n__ at 1200), 7th Circuit Judge Frank Easterbrook, *The Supreme Court 1983 Term, Forward: The Courts and the Economic System*, 98 HARV. L. REV. 4, 5 (1984) (“Judges both resolve disputes and create rules.”), both judge and professors, Landes and Posner, *Legal Precedent: A Theoretical and empirical Analysis*, *supra* n__ at 249 unquestioningly espouse the enactment theory. [19 J. of LAW & ECONOMICS 249 (1976).]

¹²⁰ See Sinclair, *What is the ‘R’ in ‘IRAC’?* 46 N.Y.L.S.L.REV. 457 (2002-03), Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U.PITT.L.REV. 695, 726-31 (2003).

¹²¹ 9th Circuit Judge Alex Kozinski, *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (e.g. “...., the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases.”); Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 589 (1987) (“the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.”)

that the enactment theory and super-precedent find incompatibilities.¹²² A rule governs until repealed, *i.e.*, if judicially enacted, until it is overruled. But overrulings are rare, dramatic events, and new situations requiring new or different treatments abound. Distinguishing the old rule, the rule from the precedent case, and thus creating a new rule would seem no different whether one is dealing with super-precedent or mundane; a rule is still and only a rule.

One way the enactment theory accommodates to adaptive necessity is by allowing a subsequent court to modify –extend, narrow, create an exception to –the precedent rule of the prior case. But then not only does the rule of the prior become utterly unreliable as a guide, it is jurisprudentially inconsequential”: the exigencies of the social and moral circumstances rather than the precedent “rule” determine the new case’s outcome, just as they underpin the modified –“amended”? --rule. Thus the “R” in “I-R-A-C” stands also for “Redundant.”

To preserve any semblance of empirical accuracy or jurisprudential adequacy, enactment theory must allow subsequent courts to make new, variant rules to govern new, variant situations. From this starting point, Professor Farber argues on pragmatic grounds that the enactment theory is unworkable in itself and incompatible with the concept of super-precedent (“bedrock precedents” in his locution.¹²³) The proliferation of rules will, in practice, lead to “more fractured courts, with fewer majority opinions. ... This makes rules more brittle than standards, since they cannot be bent but only broken and recast. Thus, because a rule is less flexible than a standard, it is less likely to maintain the allegiance of later judges.”¹²⁴ As a practical matter, then, “Rules have a way of weathering poorly as precedents”,¹²⁵ they

¹²² To function as a prescriptive rule a string of words should, at a minimum, be general (*i.e.*, having at least one common noun phrase), be expressed in an accessible, identifiable and canonical verbal formula, having authority independent of the grounds for its enactment. *See* Sinclair, *What is the ‘R’ in ‘IRAC’?* *supra* note __ at 459-63.

¹²³ Farber, *supra* n__ at 1176, 1180 *et seq.*

¹²⁴ *Id.*, citing Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 90 (1992).

¹²⁵ *Id.* [Farber, *supra* n__] at 1201.

will tend to be reformulated at a higher level of abstraction, commonly called “standards.”¹²⁶ Standards provide less precision in guidance, which “undercuts the very stability that stare decisis was supposed to provide.”¹²⁷ Yet flexibility and adaptivity in application demand the sacrifice.¹²⁸ On this argument, then, the enactment theory fails; and, because on it they would be enacted rules, so also fails the notion of super-precedent. “There are limits to how much a court, especially in a constitutional case, can act like a legislature, laying down clear rules that will govern the future.”¹²⁹

On the general social level, in the twentieth century society neither wanted nor needed a jurisprudence entrenched in the past. Technological and social change came apace, and the conception of precedent in judging moved with it. In 1920 Judge Cardozo was properly derisive of rule-bound conceptions of stare decisis: “Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such process, and no judge of a high court, worthy of his office, views the function of his place so narrowly.”¹³⁰

(b) Legal Realism

The end of World War I ushered in a period of great confidence in the United States, and with it change in many aspects of society. “Historians have long recognized that, for better or for worse, American culture was remade in the 1920’s. Robust with business styles, technologies, educational policies, manners, and leisure habits which are identifiably our own, the decade sits solidly at the base of

¹²⁶ Henry M. Hart, Jr., and Albert M. Sacks, *THE LEGAL PROCESS* 139 (William N. Eskridge, Jr. and Philip P. Frickey, ed.s, 1994)

¹²⁷ Farber, *supra* n__ at 1202

¹²⁸ *Id.* (“there is a difference between stability and rigidity.”)

¹²⁹ *Id.*, at 1203 [Farber, *supra* n__ at 1203]

¹³⁰ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921)

our culture.”¹³¹ A confident judiciary, less interested in the security of purported stability,¹³² reshaped the law to suit. Jurisprudential theory matched.

Holmes had long since laid a foundation for diminished precedential power. But the legal realist school that followed in his wake gave us not so much a theory as an anti-theory of precedent. How can a precedent case control a current decision? A case is a particular decision and from one particular, nothing follows.¹³³ If one tries to generalize a particular decision, there are indefinitely many ways one can do so.¹³⁴ For which of the particular referential expressions in the precedent does one substitute a common noun, and in choosing that common noun, of what generality?¹³⁵ Even the proliferation of precedents was seen as adding indeterminacy,¹³⁶ as had been forecast by Chancellor Kent.¹³⁷ Jerome Frank argued that opinions seldom reveal the actual basis of decision,¹³⁸ so what courts purporting to follow precedent “in fact do is manipulate the language of former decisions” to suit their own, chosen ends.¹³⁹ But this is only harmful insofar as it is misleading, a pretense to follow precedent. Judges’ openly

¹³¹ Paula S. Fass, *THE DAMNED AND THE BEAUTIFUL: AMERICAN YOUTH IN THE 1920’S*, 3 (1977)(a detailed and comprehensive study of the change in societal values in the 1920s.)

¹³² William O. Douglas, *Stare Decisis*, Alan F. Westin (ed.), *THE SUPREME COURT: VIEWS FROM THE INSIDE*, 122, 122 (WWNorton & Co., New York, 1961), the 8th Benjamin N. Cardozo Lecture, 1949; 1st published in 4 *Record of the Association of the Bar of the City of New York*, 152 (1949)(“The search for a static security –in the law as elsewhere –is misguided.” Security requires “adapting . . . to current facts.”); *sim.* Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921)(on the futility of seeking certainty.)

¹³³ Max Radin, *The Trail of the Calf*, 32 *CORNELL L.QUARTERLY* 137, 140 (1946)(citing Aristotle, *Analytica Priora*, i, 24; curiously, Radin puts it in Latin: “*ex mere particularibus nihil sequitur.*” : “from particulars nothing follows” --if one ignores the ‘mere’ which appears to be an English import [!]-and ignores that Aristotle wrote in Greek, not in Latin. Still, Radin was giving a talk to judges, so it probably worked well rhetorically.) Radin also quoted Lord Halsbury in *Quinn v. Leatham* [1901] A.C. 506: “I entirely deny that it [sc. the decision] can be quoted for a proposition that may seem to follow logically from it.”” *Id.* at 142, fn.9.

¹³⁴ *Id.* [i.e. Radin, ...calf] at 141, text at note 113, *supra*.

¹³⁵ How large does one make one’s “categories of assimilation” as Schauer would put it. Frederick Schauer, *Precedent*, 39 *STAN.L.REV.* 571, 602 (1987).

¹³⁶ Radin, *supra* note __ at 148 [...calf](With so many cases available, how does one discern the paradigmatic from the marginal?)

¹³⁷ James Kent, 1 *COMMENTARIES ON AMERICAN LAW* *475 /527 (1ST ed. 1826 [*], this from the 7th ed., 1851)(“The evils resulting from an indigestible heap of laws, and legal authorities, are great and manifest. They destroy the certainty of the law, and promote litigation, delay and subtilty.” But Kent himself attributes the insight to Francis Bacon!)

¹³⁸ Jerome Frank, *LAW AND THE MODERN MIND* 148-50 (1930) (“You are not really applying his decision as a precedent in another case unless you can say, in effect, that, having relived his experience in the earlier case, you believe that he would have thought his decision applicable to the facts of the latter case.” *Id.* at 150)

¹³⁹ *Id.*, at 148.

questioning past decisions is as it should be: “It is, I think, a healthy practice (too infrequently followed) for a court to re-examine its own doctrine.”¹⁴⁰

These arguments amount to a rejection of *stare decisis* as a source of law. How can one take guidance from past decisions when they may at any time be reinterpreted, narrowed, expanded, distinguished or discredited by a court? As a theory it amounts to no more than saying “following precedent is what judges may say they do” but *stare decisis* in reality does not limit judicial discretion. Perhaps nobody actually went so far as to say quite that, but it is the output of the arguments. And of course as a matter of reality it was never accurate: judges did see themselves as confined by precedent, and lawyers, even devoted legal realist lawyers, continued to cite, rely on, and distinguish precedent cases in their arguments in court.

How would legal realism account for super-precedent? With skepticism, one might think, or rejection. If a judge need only be constrained by precedent if she chose, how could some precedents deny that choice? Why should it be more difficult to manipulate than language of one precedent than another? But, one suspects, one case might count as the realists’ super-precedent: *Marbury v. Madison* in its assertion that it is for the judiciary to say what the law is certainly accords with their philosophy.

(c) *Legal Process*

Like everything else, fashions in jurisprudence have moved more quickly, changed more rapidly since the middle of last century. And every new fad left us with new insights –well, perhaps not *every* fad: the brief flare of postmodernism may have passed without, one hopes, leaving a scar. And jurisprudence has become ever more sophisticated, and commensurately less informative. For present purposes, one more significant variant deserves mention.

¹⁴⁰ William O. Douglas, *Stare Decisis*, Alan F. Westin (ed.), *THE SUPREME COURT: VIEWS FROM THE INSIDE*, 122, 132 (WWNorton & Co., New York, 1961), the 8th Benjamin N. Cardozo Lecture, 1949; 1st published in 4 *Record of the Association of the Bar of the City of New York*, 152 (1949).

In the 1950s we had the “Legal Process” school based on the wonderful introductory text book THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW by Professors Henry M. Hart, Jr., and Albert M. Sacks.¹⁴¹ They look at law from the points of view of those actively engaged in it, basically lawyers and judges. This means its study of stare decisis is through many exemplary problems and cases followed by probing questions. But they do provide a capsule summary, “A Tentative Formulation of the Bases of the Doctrine of *Stare Decisis*.”¹⁴² It is a list of values similar to those in Section 1, above. But it adds reasons peculiar to the practitioner’s viewpoint; for example:

1. *In furtherance of private ordering* –

(c) The desirability of encouraging the remedial processes of private settlement by minimizing the incentives of the parties to try to secure from a different judge a different decision than has been given by the same or other judges in the past.

On enhancement of the legitimacy of the judiciary it is excellent:

3. *In furtherance of public confidence in the judiciary* –

(a) The desirability of maximizing the acceptability of decisions, and the importance to this end of popular and professional confidence in (1) the impersonality of decisions and (2) their reasoned foundation, as manifested both by the respect accorded to them by successor judges and by their staying power.¹⁴³

As a theory this is limited. *A posteriori* it explains why, once we had stare decisis, we continued with it, even after its initial theoretical justification was no longer viable. Because it does not show how stare decisis derives from more fundamental bases, it does not unify disparate data or distinguish the inappropriate. As we have seen, there are values countervailing those on the list. For example, would it be desirable for all disputes to be settled privately under prior, maladaptive precedents? Surely not; so

¹⁴¹ It was taught at Harvard Law School and had a huge influence on all who took the course. The materials were in mimeograph form, the set given to me quite uncongenial to use. It was not until 1994 that through the editorial efforts of Professors William N. Eskridge, Jr. and Philip P. Frickey the materials were published by Foundation Press, a service to all who take the time to work through them. (It must have been a busy course: I got through it all by teaching it in two upper division seminars. Both students and I came out of it much the wiser, but it’s a little difficult to pinpoint just how.)

¹⁴² Henry M. Hart, Jr., and Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW, 568-69 (1958 tentative edition, William N. Eskridge, Jr. and Philip P. Frickey, eds., 1994.)

¹⁴³ Hart & Sacks, *supra* note __ at 569.

there are limits on “1... (c)” above. What limits? A theory should generate at least the basis of an answer. So the list of values served does not tell us how to go on from here, how to evaluate new situations. For example, what can a list of values served tell us about super-precedent?

Any candidate super-precedent began as a landmark decision, the pioneer in its domain. How could the attorney for a party have used it in settlement negotiations? Would that landmark decision increase the “professional confidence” in the judiciary of the attorney who advised her client according to the rule it displaced? But on the other hand, once established, the super-precedent’s unshakable status serves the “this end of popular and professional confidence” (“3... (a)” above) and is based in “the respect accorded to them by successor judges and by their staying power.”¹⁴⁴

The legal process approach shared a problem with all the theories we have looked at in this section: it focuses too much on what lawyers and judges do, and not enough on the ordinary denizen. The ordinary denizen’s behavioral options are limited by the law. If precedent has power over legal decision-makers, then it also has power over everyone in the jurisdiction. But how is the ordinary person, without legal training, to know of or find out about a controlling precedent? Very few people in normal life are able to find cases,¹⁴⁵ and only for very special decisions ought others have to hire such a person to do it for them. A person cannot be bound by a law of which he or she has no notice.¹⁴⁶ How could a person follow a rule if she didn’t know it? As Jeremy Bentham said: “That a law may be

¹⁴⁴ Hart & Sacks, *supra* note __ at 569.

¹⁴⁵ There are still fewer than a million lawyers in this country, out of nearly three hundred million people.

¹⁴⁶ Aquinas, St. Thomas, *SUMMA THEOLOGICA*, Question 90, Articles 1 and 3 (1273); John Locke, *SECOND TREATISE ON GOVERNMENT*, §§ 57, 136 (1690); Blackstone, *supra* note 57 at **45-46; G.F.Hegel, *PHILOSOPHY OF RIGHT* 138, ¶ 215 (T.Knox trans. 1942) See also *id.* at 134-136, ¶211. “If laws are to have the binding force that, in view of the right self-consciousness ... they must be made universally known.”; Jeremy Bentham, *Of Promulgation of the Laws*, 1 *WORKS* 155 (Bowring, ed. 1859); Lon L. Fuller, *THE MORALITY OF LAW*, 34-35,39(1964); *Lambert v. California*, 355 U.S. 225 (1957); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

obeyed, it is necessary that it should be known ... that it may be known, it is necessary that it be promulgated.”¹⁴⁷

The problems of notice and retroactivity are a general explanatory burden for theories of common law in general and stare decisis in particular. The declaratory theory carries the burden: everyone has access to the moral blueprint in the sky. Sure, it was really the morality of a specially trained, elite that really set the standards. But the English upper classes never had any difficulty endorsing their own rectitude; why should others be held to a lesser standard?¹⁴⁸ Since that “transcendental body of law outside of any particular State”¹⁴⁹ is the universal moral guide, it tells everyone how to behave; legal advisors may use cases to help see it, but the brooding omnipresence is the ultimate guide. In contrast, the 20th century theories discussed in this section fail to cast any light on these problems.

Section 5: The Standard Theory

Let’s step back a moment. Law has the task of reconciling the interests of the individual with the interests of society. Legislatures do this by formulating, enacting and promulgating rules, authoritative strings of words, which confine the scope of action of the individuals governed. How does common law do it? A common law decision arises out of a clash of interests of individuals, antecedent to the decision. Other than in ending a dispute, how does the decision of that private clash serve the interests society?

¹⁴⁷ Bentham, *supra* note __ at 157. Similarly, see Aquinas, *supra* note __ at Question 90, Art. 4 (“[I]n order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.”); John Locke, *SECOND TREATISE OF GOVERNMENT*, §57 (1690)(“[N]o body can be under a law, which is not promulgated to him.”).

¹⁴⁸ Robert Gordon, *The Path of the Lawyer*, 110 HARV.L.REV. 1013, 1013 (1997)(In those days lawyers “had, as they saw it, a direct line to God’s mind through their knowledge of the principles of legal science.”)

¹⁴⁹ *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928)(Holmes, J., dissenting.)

It is easy to see how one can guide one's actions by statute law: even if the possibility of actually finding and reading the whole of some of today's legislative products is a bit remote, it is still sufficiently possible to support the myth that one could have actual notice. You cannot say that of common law decisions. Statutes operate prospectively,¹⁵⁰ so a person contemplating action can take notice of applicable constraints. Not so common law decisions; one acts first, and learns to one's cost of one's error much later.¹⁵¹ How can that be just?

Stare decisis tells us that a prior case similar to this one should be followed in this decision. But, except in cases of *res judicata*, no two cases are the same; one can always find a difference.¹⁵² On the other hand, no cases are completely different either; one can always find some similarity.¹⁵³ Whether a prior case is similar to or distinguishable from a case at hand depends entirely on the criterion of similarity.¹⁵⁴

Where does the judge find the properly applicable criterion of similarity? Professor Corbin answered with a list, similar to Holmes's most famous paragraph¹⁵⁵:

The [judge's] rules come from all possible sources – from constitutions and statutes; from the decisions of other judges; from legal writers, ancient and modern, and in this and other countries; from books of religion and morality; from general principles of right and wrong in which the judge was trained from his youth up; from the rules of action customarily followed in the community, lately referred to by Lord Chancellor Haldane as *Sittlichkeit*; from the judge's own practice and interest and desire.¹⁵⁶

¹⁵⁰ With a very few obnoxious exceptions; see Laura Ricciardi and Michael Sinclair, *Retroactive Civil Legislation*, 27 U. TOLEDO L. REV. 301 (1996).

¹⁵¹ This prompted the wonderful analogy from Jeremy Bentham: "Do you know how they make [common law]? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me." Bentham, 5 WORKS, *supra* at 235.

¹⁵² Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72 (1928) ("No identical case can arise. All other cases will differ in some circumstance, --in time, if in no other, and most of them will have differences which are not trivial.")

¹⁵³ Kennedy, *The Stages of the Public/Private Distinction*, 130 U.P.A.L. REV. 1349, 1351 (1982) ("But everything has property A, so everything is X, and the distinction between X and Y has collapsed.")

¹⁵⁴ *Res judicata* applies where there is exact similarity no matter what the criterion.

¹⁵⁵ See text at note __ *supra*.

¹⁵⁶ Arthur L. Corbin, *The Law and the Judges*, 3 YALE REVIEW 234, 240 (1914)

“*Sittlichkeit*”: “the prevailing sense of justice and the mores of the community;”¹⁵⁷ pretty much what Llewellyn called “situation sense.”¹⁵⁸ Inescapably Holmes and Corbin and Llewellyn all include the judge’s own perceptions of propriety. How could it be otherwise? Judges’ evaluations of what elements are critical, and among them which more so than others, obviously must vary *inter se*. Otherwise there’d be no dissents. Otherwise we wouldn’t take so seriously the elevation of a judge to the Supreme Court. Otherwise judges wouldn’t be human.

Criteria of similarity are reasons. Judges give reasons in their opinions, and of course in the great majority of cases they simply follow precedent. In significant cases, the ones Holmes and Corbin and Llewellyn are concerned with, the ones that set new law, the sources of those reasons are exogenous to the law.¹⁵⁹ Morality, politics, economics, social policy and technology develop outside of the law itself (even though judicial decisions can influence them), and judges have no authority over them.

In an opinion, the court recites a set of sentences as the facts of the case and for the last hundred and fifty years these facts have been beyond dispute; and the final decision too cannot be contested. But the justification connecting the two, the reasons for the decision on those facts, carries no such intrinsic authority, no horizontal power of *stare decisis*.¹⁶⁰ “...the unwritten law proceeds, not from the will of the judge as lawmaker, but from society speaking through him.”¹⁶¹ The author of the opinion carries no

¹⁵⁷ William Twining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 31 (1973)

¹⁵⁸ Karl N. Llewellyn, *THE COMMON LAW TRADITION* 60 (1960) (“Situation sense will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with and to judge with.”)

¹⁵⁹ “What really takes place, in legal evolution, is a change of effect whenever there is a change of cause; and these causes come chiefly from outside the law itself.” John Henry Wigmore, *Planetary Theory of the Law’s Evolution*, in 3 *EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS* 531, 534 (A. Kocourek & J. Wigmore, eds. 1918)

¹⁶⁰ Vertically, a recent argument from a court above is likely to be followed, for all the reasons that make vertical *stare decisis* so much more powerful than horizontal. See Sinclair, *What is the ‘R’ in ‘IRAC’?*, 46 *N.Y.L.S.L.REV.* 457, 490-92 (2002-03).

¹⁶¹ Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 *HARV.L.REV.* 409, 413 (1924). Oliver Wendell Holmes Jr., *Common Carriers and the Common Law*, 13 *AMERICAN L.REV.* ___, 630-31 (1879) (“... The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every

intrinsic weight on the validity or relevance of the justificatory argument (although obviously enough great judges, who became great by their acute sensitivity to social mores and ability to articulate them well, bring persuasive power in virtue of that greatness.)

Retrospectively we substitute reasons, saying “we can reconcile –or distinguish --this case on the theory that ...” and by ‘theory’ mean reasons for the decision. We all have the power and authority to contest the reasons given in an opinion and the theory produced.¹⁶² Indeed, one of the virtues of common law is its encouragement of the production of alternative explanatory theories, not only by writers in law reviews, but by advocates who must present theories to distinguish or rely on prior cases. This proliferation of theories has a positive adaptive value, more readily providing for change in law to keep up with change in society. As Lord Goff put it, “common lawyers worship at the shrine of the working hypothesis.”¹⁶³

It is thus that the common law adapts to a changing world and serves the interests of society.¹⁶⁴ Legislators are elected to serve the interest of the public and do so –to the extent they do –through legislation. Judges in common law decisions draw on the values of society in their reasoning, and adapt that reasoning to social needs, thus also serving the interests of the public, even though effected through particular decisions. “The outstanding truths of life, the great and unquestioned phenomena of society, are not to be argued away as myths or vagaries when they do not fit within our little moulds. If necessary, we must remake the moulds.”¹⁶⁵

important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.”); John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* etc, 163 (New York 1954)(1st ed. 1832) (custom and positive morality are the “grounds of judicial decisions upon cases.”)

¹⁶² See Scalia, *supra*, note 72 [or thereabouts]

¹⁶³ Lord Goff of Chieveley, *The Future of the Common Law*, 46 *INTERNATIONAL COMPARATIVE LAW QUARTERLY* 745, 752 (1997)

¹⁶⁴ “Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.” Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 64 (1921)

¹⁶⁵ *Id* at 127 [Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 127]

Adapting to present needs of society does not require a judicial disregard of precedent;¹⁶⁶ rather, judges take the old rules and give them new justifications, bringing different cases under their ambit until they looked like different rules.¹⁶⁷ Thus evolutionary drift, not revolution, is the more common method, allowing precedent to constrain judicial decisions but not too greatly in discord with the requirements of society.¹⁶⁸ And judges have ample means of limiting the harmful effects of cases which, when “manifestly out of accord with modern conditions of life ... should not be followed.”¹⁶⁹

“But,” comes the immediate objection, “what about the reliance interest which *stare decisis* serves only if strictly followed?” The first response is purely logical: following a prior case on the criterion of similarity set down in its reasoning is *stare dictis* not *stare decisis*. Replace the prior opinion’s reasons with those conducive to current needs and perhaps the so-called precedent will be seen as distinguished, or will find a more congenial set of progeny. *Stare decisis* is not mechanical; that a case stands as precedent requires justification, and again on values exogenous to the immediate law.¹⁷⁰

The more cogent approach is to recognize the importance of reliance as a societal value, where it is a societal value. But only where it is a relevant value: too often we trot it out as though universal,¹⁷¹ where in very many cases it is not. Think of commonplace interpersonal interaction or everyday

¹⁶⁶ Although on occasion it may; “The needs of successive generations may make restrictions imperative today which were vain and capricious to the visions of past times.” *Klein v. Marvelas*, 219 N.Y. 383, 114 N.E. 809 (1916) per Cardozo, J.

¹⁶⁷ Oliver Wendell Holmes, Jr., *THE COMMON LAW*, 36 (1881): “And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when the ancient rules maintain themselves ... new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.”

¹⁶⁸ Of course there were also revolutionary decisions, as called for by the changing times; e.g. *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923) (Throwing out the long-standing prohibition on a woman’s having a cause of action for criminal conversation.)

¹⁶⁹ von Moschzisker, *supra* n__ [about 8 or 9 back] at 414 [*Stare Decisis in Courts of Last Resort*, 37 HARV.L.REV. 409, 414 (1924).]

¹⁷⁰ “[T]o determine to be loyal to precedents and to the principles back of precedents does not carry us very far up the road. Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what?” Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 64 (1921).

¹⁷¹ “*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.” *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-407 (1932), Justice Louis Brandeis, dissenting.

contracting, the stuff of basic tort law and Article II contracts: only a very, very small proportion of those engaged in such behavior know of the governing cases (or the statute governing sales of goods) and among that few, who thinks of the law? Does anyone consult counsel about whether one may negligently inflict emotional distress? So, we should distinguish those behavioral domains in which we do rely on the law in choosing a course of action –“reliance domains” –from those in which we do not and should not have to –“non-reliance domains.”¹⁷²

In reliance domains, notice taken from precedent cases and relied upon is a significant value in judicial decision-making. Lord Mansfield:

In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.¹⁷³

Mercantile transactions are paradigmatic reliance domains. Justice Douglas adds other planning areas:

“Uniformity and continuity in law are necessary to many activities. ... contracts, wills, conveyances and securities...*Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence.”¹⁷⁴ In such cases courts are, as they should be, very reluctant to make retrospective changes.¹⁷⁵ The appropriate course of action is to notice the maladaptivity but rather than overrule, to

¹⁷² See Sinclair, GUIDE TO STATUTORY INTERPRETATION 8-9 (2000).

¹⁷³ *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng.Rep. 1012, 1017 (K.B. 1774); cf Justice Brandeis in *Burnett v. Coronado Oil and Gas Co.*, note 149 [or thereabouts] *supra*, not limiting the value of reliance to “all mercantile transactions” –*i.e.* to reliance domains.

¹⁷⁴ William O. Douglas, *Stare Decisis*, Alan F. Westin (ed.), THE SUPREME COURT: VIEWS FROM THE INSIDE, 122, 123 (WW Norton & Co., New York, 1961), the 8th Benjamin N. Cardozo Lecture, 1949; 1st published in 4 Record of the Association of the Bar of the City of New York, 152 (1949).

¹⁷⁵ When there has been justified reliance on prior decisions, courts have on occasion resorted to the expedient of announcing a decision as prospective only. This may be theoretically dubious, akin to legislating, but it is nevertheless effective. Thus, for example, when the Massachusetts Supreme Court faced the exploitation of an old decision, *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945), to subvert a fundamental tenet of estate planning –a reliance domain –it made its decision changing the old rule prospective only: “We announce for the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*.” *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572, 577 (1984).

say it is the prerogative of the legislature to make a change in such settled law.¹⁷⁶ Reliance is a very powerful social interest.

But in non-reliance domains reliance is not a value of significance. Where people act according to societal decencies, custom, and mores, and without seeking legal guidance, they should be held only to the standards current in the society. “The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong.”¹⁷⁷ In such behavioral domains, a judge serves societal interests by resolving the interpersonal dispute according to the standards of decency that prevailed at the time and place of the action giving rise to the dispute.

But on this account, what is the use of stare decisis? Aren't courts simply to decide according to the standards prevalent in society at the time, including reliance as an important standard where appropriate? Well no, and that is because there really are differences among judges, just as among all the rest of us, as to what are the more important values and standards of behavior. If decisions were unconstrained by precedent, then each judge could decide according to her perception of propriety in social intercourse. In other words the judge could decide differently from a prior judge simply because she disagreed, or thought herself wiser, smarter, more moral, or better informed. If that were the case, then we would truly have a government of men and not of laws. But under stare decisis a judge may not justifiably modify or overrule a precedent unless she can show that the world has changed in a manner relevant to the behavior in question. Stare decisis thus provides a presumption that a precedent will be followed unless the court demonstrates sufficient exogenous change in the relevant social world to overcome the intrinsic value of stability and continuity.

¹⁷⁶ von Moschzisker, *supra* n. __ [about 15 back] at 419 (but noting in contrast that when vested interests would not be impaired, the court should overrule.) [*Stare Decisis in Courts of Last Resort*, 37 HARV.L.REV. 409, 419 (1924)]

¹⁷⁷ Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 63 (1921)

Here is a simple and clear example. To be valid, a patent must be novel, embody an original idea; accordingly it must not have been anticipated in a “printed publication.”¹⁷⁸ But what is a printed publication for these purposes? In particular, would a microfilm of a German patent application on file in the Library of Congress count? In 1958 the Court of Customs and Patent Appeals (now called the Federal Circuit) faced that question in *Application of Tenney*,¹⁷⁹ but with the additional fact that the relevant microfilm had been wrongly indexed in the library’s catalogue.¹⁸⁰ The court held that “printed publication” meant as in books, journals and the like, requiring considerable production expense and to provide a reasonably substantial circulation.¹⁸¹ Microfilm was as inexpensive per copy for a single issue as for many, not requiring and in this case not receiving wide distribution, so it was held not to count as “printed publication.”¹⁸² Notice that the erroneous indexing is of no relevance to the reasoning; only circulation counted. A mere eight years later in *I.C.E. Corp. v. Armco Steel Corp.*,¹⁸³ the district court for the southern district of New York faced the very same question, except that the microfilm this time had been correctly indexed. On the reasoning of *Tenney* the indexing is irrelevant, the decision must be the same. Under the enactment theory or Langdell’s theory the outcome is easy: the microfilm is not a “printed publication.” But no: in the eight years separating the cases, the technology of distribution of microfilms had sufficiently advanced to make Library of Congress microfilm patent applications more readily and widely accessible. Were this not to count as a printed publication a person might take such an idea, gain a patent, and reap where he has not sown.¹⁸⁴ Accessibility is the key to the reasoning. *Tenney* is easily distinguished by the fact –irrelevant to its decision –that the microfilm had been

¹⁷⁸ 35 U.S.C. §102(b) (1982); the relevant statute at the time was 35 U.S.C. §102(b) (19__); although the example involves statutory interpretation, the determination of the meaning of the words “printed publication” is a common law process, just as is constitutional interpretation.

¹⁷⁹ 254 F.2d 619 (C.C.P.A. 1958).

¹⁸⁰ 254 F.2d at 621.

¹⁸¹ *Id.*

¹⁸² *Id.*, 254 F.2d at 627.

¹⁸³ 250 F.Supp. 738 (S.D.N.Y. 1966); note that the Court of Customs and Patent Appeals outranks this court as circuit court outranks district court, so this is a question of vertical as well as horizontal *stare decisis*.

¹⁸⁴ *Id.*, 250 F.Supp. at 743.

erroneously indexed, thus not discoverable.¹⁸⁵ The change in the technological world of microfilm accessibility brought with it a change in the court's reasoning and a change in the meaning of "printed publication" for these purposes.

How big a change is necessary? Of course we fight over the answer; it differentiates conservatives (in the traditional sense) from liberals (in the American sense.) This is the tension between wisdom handed down from the past and the rationality of the present.¹⁸⁶ But generally that tension is not very great. Most of our law is very stable; basic torts have been with us for our entire history; we just expand into new fields as we recognize new harms or the social significance of old ones. Basic contracts similarly. The above example is especially apt because the relevant change was technological, large, and in a short period of time. Most societal change is relatively sedate. Think of the change in sexual mores and society's willingness to interfere that has brought the changes in our constitutional right to privacy in interpersonal relationships: *Griswold v. Connecticut*¹⁸⁷ started it in 1965, and it has taken nearly forty years to work through to the constitutional protection of sodomy.¹⁸⁸

The conundrums of common law notice and retroactivity are similarly resolved. In reliance behavioral domains, where a party has, with or without professional assistance, taken notice of and acted in reliance on prior decisions, that reliance is a significant, often overwhelming value. Those are the kinds of action in which "one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules."¹⁸⁹ But in all that everyday interpersonal behavior, in which we act without thinking of the law, in which it would be utterly inappropriate to consult statute or precedent, we take our standards from the prevailing culture.

¹⁸⁵ Otherwise the district court judge in *I.C.E. Corp.* would have needed rather more courage and determination to defy the court of appeals above and reach the correct decision.

¹⁸⁶ See text *supra* at n__ [beginning of §1]

¹⁸⁷ 381 U.S. 479 (1965)

¹⁸⁸ ...bother –what's that big texas case of a year or two ago? ***

¹⁸⁹ Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb.8, 1908), reprinted in Richard A. Posner, *THE ESSENTIAL HOLMES* 201 (1992).

In other words we take notice from society, and should only be held to have violated the law when we have transgressed society's standards of reasonable decency. Those are exactly the standards that judges, too, should draw upon in deciding cases,¹⁹⁰ whether by determining the application of precedent or out of whole cloth.¹⁹¹ There is no retroactivity in such a decision.¹⁹²

How does the standard theory account for the concept of super-precedent? A super-precedent is one where the change in society would have to be very, very great for it to come into question. *Marbury v. Madison* is paradigmatic: the change in socio-legal culture necessary for *Marbury* no longer to suit our needs would be so great that we would no longer recognize it as the United States.¹⁹³ *Brown v. Board of Education*¹⁹⁴ should be another. Unlike *Marbury v. Madison*, the contrary of *Brown* is easy to envision; we just have to look to our history before it. But society now recognizes the moral abhorrence of that state of affairs, and would surely find a return to it socially repulsive. *Erie Railroad v. Tompkins*,¹⁹⁵ is another example, nicely illustrating the fundamental change in societal thinking since “the collapse of the authority of theology and scholastic metaphysics”:¹⁹⁶ no longer could morality, politics and law be founded in the universal brooding omnipresence of *Swift v. Tyson*,¹⁹⁷ so the universal federal common law had to go. To reverse that change would require a revolution in social

¹⁹⁰ Arthur L. Corbin, *The Law and the Judges*, 3 YALE REVIEW 234, 250 (1914): “The judge is just and wise who draws from the weltering mass the principle actually immanent therein and declares it as the law. This has always been the judicial function in all countries, and for its performance the judge must bear the responsibility.”

¹⁹¹ The usual complaint is that judges are much too respectful of their predecessors, much too reluctant to change. Arch-positivist John Austin wrote:

But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future). ... [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

Austin, *supra* note ___ at 647.

¹⁹² This is why Bentham's wonderful analogy to dog training, *supra* n. __ [about 30 back], is wrong.

¹⁹³ Two hundred years ago the administrative state as we know it today did not exist, so the question of administrative agency interpretation of statutes delegating rule-making authority did not arise; one can only speculate on Chief Justice Marshall's reaction to *Chevron* and its progeny, requiring judicial deference in many circumstances.

¹⁹⁴ 347 U.S. 483 (1954)

¹⁹⁵ 304 U.S. 64 (1938)

¹⁹⁶ Isaiah Berlin, *POLITICAL IDEAS IN THE ROMANTIC AGE*, 260 (2006)

¹⁹⁷ 41 U.S. 1 (1842)

epistemology of Enlightenment scale.¹⁹⁸ *Miranda v. Arizona*¹⁹⁹ is another example. In 1974, then Justice Rehnquist, writing for a minimal majority in *Michigan v. Tucker*,²⁰⁰ had been overtly hostile to *Miranda*, minimizing its impact. By 2000, however, without changing his own view he had to concede that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture”²⁰¹ and thus, in effect, immune from overruling, a super-precedent.

It is sometimes said that when a case is affirmed many times, that increases its value, even makes it a super-precedent.²⁰² This would fit Langdell’s theory of precedent. But it is wrong. A case is only affirmed or upheld when it comes into question. As Max Radin said “Indeed, the fact that a case is in the reports is in itself evidence that when the situation arose, the law was uncertain, in spite of generations during which *stare decisis* has been dominant.”²⁰³ Being upheld many times means the precedent has been questioned many times. Being cited many times does not.²⁰⁴ A case may be cited for many reasons, including the intellectual honesty of acknowledging a foundational presupposition. *Marbury v. Madison* for example, has been a foundational icon for two hundred years, unchallenged and unchallengeable. (Indeed, the idea of challenging it would be seen as a *reductio ad absurdum* on one’s argument.) It may be often cited, but only because it is a presupposition of so many arguments; it is never challenged and so doesn’t get upheld. *Erie Railroad v. Tompkins*, although somewhat younger, is similarly foundational, citable and cited.

¹⁹⁸ Berlin, *supra* n__ [2 up: , POLITICAL IDEAS IN THE ROMANTIC AGE] at 11 (“It was certainly the largest step in the moral consciousness of mankind since the end of the Middle Ages, perhaps since the rise of Christianity. No step of comparable magnitude has occurred since –it was the last great ‘transvaluation of values’ in modern history.”)

¹⁹⁹ 384 U.S. 436 (1966)

²⁰⁰ 417 U.S. 433 (1974)

²⁰¹ 384 U.S. at 443

²⁰² It was said by Judge Samuel Alito before the Senate Judiciary Committee on January 11, 2006, although he wouldn’t say “super-precedent”; it was said in the New York Times’ lead editorial on January 12, 2006 (“When offered a chance to say that Roe is a “super-precedent” because it has been upheld so often, he refused” New York Times, p.A26, col.1, January 12, 2006.)

²⁰³ Max Radin, *The Trail of the Calf*, 32 CORNELL L.QUARTERLY 137, 148 (1946)

²⁰⁴ *But see* Landes & Posner, *supra* n.__ [3 or 4].

Here one can see the idea of super-precedent as the extreme of precedential power: a super-precedent stands for a fundamental pillar of social structure. Other cases may be powerful, but not of that stature. According to the substantiality of change in society necessary to bring it into question, a case could be evaluated on a gradation, from weak, temporary, *ad hoc*, through major to super precedent.

Does *Calder v. Bull*²⁰⁵ (interpreting the Constitution's ban on retroactivity²⁰⁶ to apply only to criminal legislation) count as super-precedent? It was a problematic decision when made and its justice and efficiency have been suspect ever since,²⁰⁷ but it has been used and relied upon by legislatures for more than two centuries.²⁰⁸ Changing it would not greatly disturb reliance interests in the general public, but on the other hand it has worked itself into the fabric of our law. It must be marginal, powerful but not unshakable. Would *Federal Baseball Club v. National League of Professional Baseball Clubs*²⁰⁹ (holding baseball not to be a business, thus not in violation of anti-trust laws for its many restraints on trade) count? The Supreme Court itself seemed to think so, but perhaps only because of the legislature's thirty years of acquiescence.²¹⁰ For baseball to fall from its favored pinnacle as our national sport would be a change, but not so very great ... would it?

Of course this discussion arises in the context of the right to terminate a pregnancy and the status of *Roe v. Wade*²¹¹ and its successor in principle, *Planned Parenthood v. Casey*.²¹² Some would like the

²⁰⁵ 3 U.S. (3 Dall.) 386 (1798)

²⁰⁶ U.S.CONST. art. I, §9, cl.3 and art. I, §10, cl.1.

²⁰⁷ See Ricciardi and Sinclair, *Retroactive Civil Legislation*, 27 U.TOLEDON L.REV. 301, 302-28 (1996) for a history of retroactive legislation and the jurisprudential arguments about it.

²⁰⁸ See, e.g., *United States v. Carlton*, 512 U.S. 26 (1994)(a retroactive tax statute cost Carlton's trustee, who had relied on the old law, over \$600,000, but was upheld.)

²⁰⁹ 259 U.S. 200 (1922)

²¹⁰ *Toolson v. New York Yankees*, 346 U.S. 356 (1953) an illustration of changing *ratio decidendum*. See *Flood v. Kuhn*, 407 U.S. 258 (1972). But football and boxing didn't make it to such a pinnacle –*Radovich v. National Football League*, 352 U.S. 445 (1957) –*United States v. International Boxing Club*, 348 U.S. 236 (1955) (“Congress, on the other hand [*i.e.* of the judiciary], may yield to sentiment and be capricious, subject only to due process.” Frankfurter, J., dissenting.)

²¹¹ 410 U.S. 113 (1973)

²¹² 505 U.S. 833 (1992)(affirming a woman's core right to chose but with a shift in rationale.)

sequence to be considered unchallengeable. But there is a significant portion of the population²¹³ ardently against permitting a woman to control her own reproductive function, significant enough to influence elections. Judicial sensitivity to societal demands thus puts the adaptivity of *Roe v. Wade* in question as it is repeatedly challenged in state legislation. It can hardly be called a super-precedent.

Gregg v. Georgia,²¹⁴ the 1976 decision in which the Supreme Court reinstated the death penalty as constitutional has had a similar history. It has survived at least as many appellate challenges as *Roe v. Wade*, and yet we would not be inclined to call it a super-precedent. These challenges, coming not from legislatures but from the significant proportion of society²¹⁵ seeing the retributive killing of criminals as a moral blot on our system of justice, similarly show *Gregg v. Georgia* to of uncertain adaptivity to the needs of present society.

Section 6: ‘Super-precedent’ in Senatorial Hearings

Stare decisis was on the minds of the Senate Judiciary Committee when it interrogated Judge Roberts on September 12-15, 2005. Chairman Specter even went so far as to rehearse quotable definitions, to which Roberts added, making a thorough list of the doctrine’s virtues.²¹⁶ The point was to

²¹³ With which the author fervently disagrees.

²¹⁴ 428 U.S. 153 (1976)

²¹⁵ With which the author fervently agrees.

²¹⁶ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S.Comm. on the Judiciary, 109th Cong. 144, ___ (2005)(“Roberts’ Hearings”)[Specter]:

... I begin collaterally with the issue of stare decisis and the issue of precedents.

Black’s Law Dictionary defines stare decisis as “let the decision stand, to adhere to precedents and not to unsettle things which are established.” Justice Scalia articulated, “The principal purpose of stare decisis is to protect reliance interests and further stability in the law.”

Justice Frankfurter articulated the principle, “We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations.”

Justice Cardozo in a similar vein, “No judicial system could do society’s work if each issue had to be decided afresh in every case which raised it.”

In our initial conversation, you talked about stability and humility in the law. Would you agree with those articulations of the principles of stare decisis as you had contemplated them, as you said you looked for stability in the law?

Judge Roberts. Yes, Mr. Chairman, I would. I would point out that the principle goes back even farther than Cardozo and Frankfurter. Hamilton, in Federalist No. 78, said that, “To avoid an arbitrary discretion in the judges,

probe the nominee’s attitude to *Roe v. Wade* and *Planned Parenthood v. Casey*, but Judge Roberts would not budge from a refusal to comment on the status of those cases as precedent, let alone super-precedent. When pressed about preserving stability, expectations, and the Court’s legitimacy by not overruling the core holding of *Roe*, the candidates’ strategy²¹⁷ was to segue quickly to *Brown v. Board of Education*’s²¹⁸ overruling of *Plessy v. Ferguson*.²¹⁹ It was rhetorically effective. Jurisprudential theory was not going to be expounded in great depth in a senatorial hearing.

Shortly after introducing the topic of the doctrine of precedent, Senator Specter raised the idea of super stare decisis, attributing it to Judge Luttig²²⁰ and referring also to Professors Farber and Estrich, and asked: “Do you think that the cases which have followed *Roe* fall into the category of a super-stare decisis designation?”²²¹ Of course Judge Roberts, having refused to say any more in the discussion of ordinary stare decisis, was not going to bite: “I think one way to look at it is that the *Casey* decision itself, which applied the principles of stare decisis to *Roe v. Wade*, is itself a precedent of the Court, entitled to respect under principles of stare decisis. . . . And under principles of stare decisis, that would be where any judge considering the issue in this area would begin.”²²²

they need to be bound down by rules and precedents." So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, the appearance of integrity in the judicial process.

They continued with a discussion of the importance of not disturbing “settled expectations” and reliance.²¹⁷ It was first used by Senator Brownback, Roberts’ Hearings, *supra* n__ at __ (“I would note that the Supreme Court frequently has overruled prior precedents. A case founded in my State, *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*, fits within a broad pattern of revising previous decisions since the founding.”) Judge Roberts picked up the theme early in his exchanges with Senator Specter; *see* Roberts’ Hearings, *supra* n__ at __ (“An overruling of a prior precedent is a jolt to the legal system. It is inconsistent with principles of stability and yet-- . . . the principles of stare decisis recognize that there are situations when that’s a price that has to be paid. Obviously, *Brown v. Board of Education* is a leading example, overruling *Plessy v. Ferguson*.”)

²¹⁸ 347 U.S. 483 (1954)

²¹⁹ 163 U.S. 537 (1896)

²²⁰ *See* text *supra* at n_ [quote in intro]

²²¹ Roberts’ Hearings, *supra* n__ at __.

²²² Roberts’ Hearings, *supra* n__ at __.

Would iterated affirmation make a decision super-precedent? Senator Specter

produced a chart showing

38 occasions where Roe has been taken up, not with a specific issue raised but all with an opportunity for Roe to be overruled. ... would you think that Roe might be a super-duper precedent in light-- ... [Laughter.] ...--of 38 occasions to overrule it?²²³

Judge Roberts did not make the contrary argument, that such frequent examination suggested maladaptivity rather than super-precedential qualities,²²⁴ but simply ducked, reiterating that *Casey* “I think is the decision that any judge in this area would begin with.”²²⁵ Toward the end of the hearings Senator Specter took the opportunity to try this argument on Professor Charles Fried, who agreed that, despite being “wrongly decided initially”, *Roe v. Wade* had, by repeated affirmance, become a super-precedent.

Chairman Specter. Only super with 38 chances to reverse it?

Mr. Fried. Super duper, if you wish.

Chairman Specter. Oh, I do. Thank you very much.²²⁶

What about the passage of thirty-two years with stable expectations of a right to abortion, so central to *Casey*? Senator Specter cleverly connected this with Judge Roberts’ characterizing “An overruling of a prior precedent [as] a jolt to the legal system ... inconsistent with principles of stability...”.²²⁷ hadn’t the late Chief Justice Rhenquist

²²³ Roberts’ Hearings, *supra* n__ at __.

²²⁴ In the Alito hearings, Senator DeWine came prepared with a brief against the super-precedential status of *Roe v. Wade*, including this argument; *see* Alito hearings, *supra* n__ at __ (“Third, from the start, Roe has been criticized by lawyers, scholars and judges, whether Democrats or Republicans and, to date, it does remain controversial. ... In other words, super precedent is precedent that is so firmly entrenched in our legal system that people simply don’t question it.”)

²²⁵ Roberts’ Hearings, *supra* n__ at __.

²²⁶ Roberts’ Hearings, *supra* n__ at __. Fried then added, expounded, using other super-precedent bases: “It is not only that it has been reaffirmed as to abortion, but that it has ramified, it has struck roots, so it has been cited and used in the Lawrence case, the homosexual sodomy case, in some of the opinions in the right-to-die cases, in the Troxall case, which is the grandparent visiting right case. So it is not only that it is there and it is a big tree, but it has ramified and exfoliated, and it would be an enormous disruption.” ‘exfoliated’ brought some humorous byplay. *Id.*

²²⁷ Or, as Professor Fried was later to put it, “this is something that is so well understood that it would be really extremely disruptive and unfortunately disruptive to overrule it.” Alito hearings, *supra* n__ at _

overtly opposed *Miranda*²²⁸ in 1974,²²⁹ but acquiesced in *Dickerson*²³⁰ twenty-five years later precisely because “it became ``so embedded in routine police practice to the point where the warnings have become a part of our National culture.”²³¹ Judge Roberts (correctly) doubted that the late C.J.’s personal “views of the underlying correctness of *Miranda* had changed,”²³² but then evaded, refusing to face the analogy. He did not, as he easily might have, cite the time between *Plessy* and *Roe*, or point out that *Miranda* had not been under the constant hostile fire suffered by *Roe* in those thirty-two years.

Surprisingly, there is something to be learned about the concept of super-precedent in this rhetorical fencing, and it also is suggestive of the (then) future Chief Justice’s attitude to it. For Senator Specter, clearly well primed, durability and surviving attack add to a case’s stature, enhancing its claim to be a super-precedent. If the concept ever gains common currency in law talk, these factors will presumably be intrinsic to it. But the future Chief Justice would have none of it. A precedent is a starting point, to be considered deferentially, with, as he was fond of repeating, modesty, as were the views of his colleagues on the bench.²³³ Super-precedent would not seem to have a place in this jurisprudence.

²²⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966)

²²⁹ *Michigan v. Tucker*, 417 U.S. 433 (1974)

²³⁰ *United States v. Dickerson*, 530 U.S. 428 (2000)

²³¹ Roberts’ Hearings, *supra* n__ at __, quoting *Dickerson v. United States*, 530 U.S. at 443; *see text at n.__ supra*.

²³² Roberts’ Hearings, *supra* n__ at _

²³³ For example, *see* Roberts’ Hearings, *supra* n__ at __ (“... and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.”) or responding to an encomium from Senator Hatch, Roberts’ Hearings, *supra* n__ at __ (“ Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge ... It means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they’re not to legislate, they’re not to execute the laws. Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*. Part of that modesty has to do with being open to the considered views of your colleagues on the bench.”). Senator Schumer took up the notion of modesty with Judge Roberts (“But when you have the conflict, a past error decision that was fundamentally immodest, let us say, and then years and years of it being on the books, stability argues keep it on the books, and even modesty, with its respect for precedent argues keep it on the books. How do you draw

Other senators recurred to the topic, but none with the thoroughness or determination of Senator Specter. Senator Hatch was “not sure that a super-duper precedent exists”²³⁴ but nevertheless worked on undermining the concept as it might apply to the *Roe—Casey* line by counting votes: “There were only a few votes to simply reaffirm *Roe*, were there not, in the *Casey* case?”²³⁵ If ‘super-precedent’ becomes common currency, quite possibly the solidity of the Supreme Court justices in a decision could become a factor.

Senator Hatch then went to work on the relative weakness of constitutional precedents as further undermining the possibility of ascribing “super-precedent” to them.²³⁶ It is a valid point. Even if in the legal literature we like to focus on constitutional cases, foundational common law cases are likely to provide better examples of super-precedents: think of cases like *Hadley v. Baxendale*²³⁷ or *Dickinson v. Dodd*²³⁸ in contracts, or foundational negligence cases like *Brown v. Kendall*²³⁹ in tort.

Although Judge Roberts would not acknowledge super-precedents when pressed by Senator Specter, he later acknowledged different levels of precedential value –different “planes” –putting *Marbury v. Madison* and *Brown v. Board of Education* on a higher plane than commerce clause precedents. Senator Schumer had been questioning him on the sequence *Wickard v. Filburn*,²⁴⁰ -- *United*

that? Can you just elaborate a little bit on how you weigh those two different concepts of ‘modesty?’” Roberts’ Hearings, *supra* n__ at __); Roberts reply added to his prior discussions of stare decisis that a modest judge recognized that “we’re not smarter than our fathers who laid down this precedent.”, a thought he attributed to Professor Ford. Id.

²³⁴ Roberts’ Hearings, *supra* n__ at __

²³⁵ Id; Judge Roberts in response simply explained *Casey*.

²³⁶ See Roberts’ Hearings, *supra* n__ at __ (“Is precedent equally authoritative in, for example, regulatory or statutory cases as in constitutional cases?...”) Judge Roberts simply agreed; see Roberts’ Hearings, *supra* n__ at __ (“The Court has frequently explained that stare decisis is strongest when you’re dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different. Obviously, short of amendment, only the Court can fix the constitutional precedents.”)

²³⁷ 9 Exch. 341 (1854)

²³⁸ 2 Ch.D. 463 (1876)

²³⁹ 6 Cush. (60 Mass.) 292 (1850)

²⁴⁰ 317 U.S. 111 (1942)

*States v. Lopez*²⁴¹ -- *Gonzales v. Raich*.²⁴² The candidate Chief Justice's response illustrates exactly the distinction that casts doubt on *Roe -- Casey* and *Gregg v. Georgia* as super-precedents.

Nobody in recent years has been arguing whether *Marbury v. Madison* is good law. Nobody has been arguing whether *Brown v. Board of Education* was good law. They have been arguing whether *Wickard v. Filburn* is good law. Now, it was reaffirmed in the *Raich* case and that is a precedent of the Court, just like *Wickard*, that I would apply like any other precedent. I have no agenda to overturn it. I have no agenda to revisit it. It's a precedent of the Court.

But I do think it's a bit much to say it's on the same plane as a precedent as *Marbury v. Madison* and *Brown v. Board of Education* ... [o]r *Griswold*. The fact that it was just reconsidered and reargued last year in the *Raich* case suggests that it's not that same type of case.²⁴³

It also suggests that even if the Chief Justice does not use the nascent jargon, he recognizes the superiority of some precedents.²⁴⁴

The confirmation hearings for Judge, now Justice Samuel Alito, in January of 2006,²⁴⁵ included much discussion of precedent and super-precedent, but did not add anything of interest. For the most part the Senators' questions were designed to induce the nominee to agree or disagree that the *Roe v. Wade* --- *Casey* line of cases was super-precedent or "settled law", or, more often, to pronounce loudly the questioner's position. Judge Alito, like Chief Justice Roberts four months earlier, was not going to say any more than that it was precedent entitled to respect as such. And, again like the Chief Justice before him, Judge Alito was prepared to produce a set piece on *stare decisis* at a moment's notice and as often as possible.

As to Judge Luttig's neologism, Judge Alito also would have none of it. In response to questioning by Senator Specter, he iterated the factors making the doctrine of precedent important, but

²⁴¹ 514 U.S. 549 (1995)

²⁴² 545 U.S. 1 (2005).

²⁴³ Roberts' Hearings, *supra* n__ at __.

²⁴⁴ He had earlier recognized the *inferiority* of a precedent, *viz* "It's one of those cases that I don't think it's technically been overruled yet, but I think it's widely recognized as not having precedential value." Roberts' Hearings, *supra* n__ at __ (responding to a question from Senator Feinstein.)

²⁴⁵ Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States: Hearing Before the S.Comm. on the Judiciary, 109th Cong. __, __ (2006)(starting TUESDAY, JANUARY 10, 2006)("Alito hearings")

gave special emphasis to reliance.²⁴⁶ But when Senator Specter ran through the grounds on which he had posited *Casey* and its progenitor, *Roe v. Wade*, as super-precedent,²⁴⁷ and asked explicitly “Do you agree that *Casey* is a super precedent or a super stare decisis as Judge Luttig said?” Judge Alito simply rejected the classification. “Well, I personally would not get into categorizing precedents as super precedents or super duper precedents.”²⁴⁸ He expressly rejected iterated reaffirmation as creating super-precedent, although said it was “a factor that should be taken into account in making the judgment about stare decisis,”²⁴⁹ especially as it enhanced reliance.²⁵⁰ And he added that “when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.”²⁵¹

In the hearings, the terms “super-precedent” and “super stare decisis” were often used but hardly accepted as established jargon. To the contrary, they were often treated with scepticism:

Senator Cornyn: “...*Roe v. Wade*, and some have suggested, law professors and maybe others, that somehow that is a super precedent, or in the words of our inimitable Chairman, a super-duper precedent. I think we are introducing new words to the legal lexicon as this hearing goes on.”²⁵²

²⁴⁶ Alito hearings, *supra* n__ at __ (“Well, reliance is ... one of the important foundations of the doctrine of stare decisis. It is intended to protect reliance interests, and people can rely on judicial decisions in a variety of ways. There can be concrete economic reliance. Government institutions can be built up in reliance on prior decisions. Practices of agencies and Government officials can be molded based on reliance.”), or at __ (“Different Justices and different judges have different views about stare decisis, but my view is that you need a special justification for overruling a prior precedent and that reliance and reaffirmation are among the factors that are important.”).

²⁴⁷ Alito hearings, *supra* n__ at __:

Chairman Specter. Judge Alito, the commentators have characterized *Casey* as a super precedent. Judge Luttig, in the case of *Richmond Medical Center*, called the *Casey* decision super stare decisis. In quoting from *Casey*, Judge Luttig pointed out, the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. Then in support of Judge Luttig's conclusion that *Casey* was super stare decisis, he refers to *Stenberg v. Carhart*, and quotes the Supreme Court, saying, “We shall not revisit these legal principles.” That is a pretty strong statement for the Court to make, that we shall not revisit the principles upon which *Roe* was founded, and the concept of super stare decisis or super precedent arises as the commentators have characterized it, by a number of different Justices appointed by a number of different judges over a considerable period of time.

²⁴⁸ Alito hearings, *supra* n__ at __

²⁴⁹ Alito hearings, *supra* n__ at __

²⁵⁰ Alito hearings, *supra* n__ at __ (“when a decision is challenged and it is reaffirmed that strengthens its value as stare decisis for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it”)

²⁵¹ Alito hearings, *supra* n__ at __ (without mentioning the problem of vicious circularity in that statement.)

²⁵² Roberts' Hearings, *supra* n__ at __

Or humor:

Senator Feinstein re *Roe* --- *Casey*: “as Senator Specter has said, that super-precedent is really in play? I think I even heard him once say super-duper precedent. Could that be?”

Chairman Specter. I said super-duper in the context of some 38 occasions when the Court has had the *Roe* issue before it and they could have overruled *Roe* had they decided to do so--

Senator Feinstein. Right.

Chairman Specter.--so it became a super-precedent. With the reaffirmation, it may become a super-duper or maybe even more, super-duper-duper--

[Laughter.]

Senator Feinstein. Super-duper-duper--

Chairman Specter.--38 times over.”²⁵³

An exception was Senator DeWine, who gave a detailed account of super-precedent as he saw it,²⁵⁴

including all the arguments from the Roberts hearings. His purpose was to deny that *Roe v. Wade* would count, and for the most part his speech was tailored for reading, for the record rather than for the moment. But he adopted the neologism, giving *Marbury v. Madison* as an example.²⁵⁵

Conclusion

‘Super-precedent’ really just names one extreme end of a range of precedential power we have long recognized. The variety in precedential force and its having a nameable extreme is a natural consequence of the declaratory and standard theories of *stare decisis*, fitting easily and coherently into their explanatory schema. It does not fit as easily with Langdell’s quasi-empiricism or the enactment theory; this is hardly surprising in light of their inadequacy as accounts of the doctrine. Legal realism could account for the empirical fact of our treating some cases with greater reverence but, as a denial of the power of precedent to constrain decisions, it could hardly explain it. Examining the intelligibility of

²⁵³ Roberts’ Hearings, *supra* n__ at __

²⁵⁴ Alito hearings, *supra* n__ at __ [pages beginning “During the confirmation hearing of Chief Justice Roberts, Chairman Specter showed us a chart stating that the Supreme Court had the opportunity to overrule *Roe v. Wade* in 38 cases.”]

²⁵⁵ Alito hearings, *supra* n__ at __, (. “*Marbury v. Madison*, the case establishing the power of judicial review, is super precedent. It is so well settled that litigants do not challenge it in court. In fact, it is one of the fundamental assumptions upon which our constitutional system is built.”) quoting Landes & Posner, *supra* n._ [3 or 4?].

Judge Lutting's neologism in the context of these theories casts some light on both 'super-precedent' and the theories themselves.

Will the neologism catch on? Will it become a part of ordinary legal usage? It didn't at its first introduction by Landes and Posner in 1976.²⁵⁶ That might suggest it is merely classificatory, and not especially useful analytically. Yet classifications can be useful. The Linnaean system may be merely classification but it has greatly facilitated the advance of biology and the storing and communication of knowledge. Might a systematic classification of precedential power serve such a purpose?

At one end of the scale would be super-precedents, at the other end, perhaps, "mini-" or "micro-precedents". That doesn't look very plausible, or useful. We already have a vocabulary of intuitive descriptions for the purpose: "inconsequential," "fragile," "narrow," "easily avoided" for example, contrasting with Professor Farber's "bedrock precedent," "foundational," "settled" and the like. We can easily express the variety in precedential force without creating a linear gradation.

'Super-precedent' suits powerful precedents of which we approve. "Black hole" might be better for those of which we do not. Think for example of *Dickinson v. Dodd*,²⁵⁷ the progenitor of the law that an option contract is simply a contract on all fours with any other, thus requiring consideration (or, where recognized, justifiable reliance) to be enforceable. It might be described as a "black hole" because it has such gravity that it sucks in everything in its vicinity, including light. Perhaps one should say "especially light": it comes as a surprise to neophytes, as it should. But it has such power that even the drafters of the Uniform Commercial Code, setting many things right in common law contracts, would only defy it in a narrowly hedged, formalistic exception.²⁵⁸

That some cases should be more solidly ensconced and of more determinate consequence than others is hardly surprising. We already have suitably ordinary and unsystematic ways to talk about

²⁵⁶ See Landes & Posner, *supra* note [2 or 3 or so]

²⁵⁷ 2 Ch.D. 463 (1876)

²⁵⁸ U.C.C. 2-205

qualities of precedents, into which Judge Luttig's neologism fits comfortably. If it comes into common usage it will be because of its intuitive appeal and not because it purports to formal consequence or analytical significance. I'm sure Judge Lutting –and Landes and Posner a quarter century before him – intended no more. The informal, unpretentious usage of Senator Specter fits this mould.

