

THE SUPREME COURT IN BONDAGE: CONSTITUTIONAL STARE DECISIS, LEGAL FORMALISM, AND THE FUTURE OF UNENUMERATED RIGHTS*

*Lawrence B. Solum***

I. INTRODUCTION: CONTEMPORARY DEBATES ABOUT CONSTITUTIONAL STARE DECISIS

Constitutional stare decisis is a hot topic. One reason for the heat is the reemergence of originalism as an important movement in constitutional theory and practice. Originalism calls into question the legitimacy of many of the Supreme Court's constitutional decisions—including the unenumerated rights decisions of the Warren and Burger Courts. This destabilizing potential of originalism has led originalists to debate among themselves the role that precedent should play in constitutional adjudication.¹ But this debate is of more

* © 2006 by the Author. Permission is hereby granted to duplicate this paper for scholarly or teaching purposes, including permission to reproduce multiple copies or post on the Internet for classroom use and to quote extended passages in scholarly work, subject only to the requirement that this copyright notice, the title of the article, a citation to the original publication, and the name of the author be prominently included in the copy or extended excerpt. Permission is hereby granted to use short excerpts (500 words or less) with an appropriate citation and without inclusion of a copyright notice. In the event of the death or permanent incapacity of the author, all claims to copyright in the work are relinquished and the work is dedicated to the public domain in perpetuity.

** John E. Cribbet Professor of Law, University of Illinois College of Law. I am grateful to the participants at faculty workshops at Georgia State University School of Law and Rutgers-Camden School of Law and at the *University of Pennsylvania Journal of Constitutional Law's* Ninth Annual Symposium, "The Future of Unenumerated Rights." I owe special thanks to Dennis Patterson and Randy E. Barnett for their helpful comments, criticisms, and suggestions.

¹ See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1773–74 (1997) (criticizing the attempt to use stare decisis to reconcile originalist interpretive tendencies with respect for cases decided on non-originalist grounds); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL'Y 487, 487–88 (1996) (contrasting robust and moderate originalism in terms of their approaches to precedent); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 516–17 (1996) (arguing that attempting to combine originalism with conventional reliance on precedent leads to unpredictability because one never knows when an originalist judge will bow to precedent at the expense of the historical understanding and when he will not); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3 (2001) (developing a theory of stare decisis that does not include a presumption against overruling precedent); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 616–17 (2006) (discussing the problem faced by originalists who wish to ignore the decisions of

than theoretical interest. The recent nominees for Justice and Chief Justice—Judges Samuel Alito and John Roberts—were questioned extensively about their views on stare decisis.² And this debate has an odd flavor. In the Warren Court era, the political, judicial, and academic left seemed to view constitutional stare decisis as the enemy of progressive (living constitution) constitutionalism. In the Roberts Court era, stare decisis may be the last defense of Warren Court precedents against conservative (originalist) constitutionalism on the ascendancy.

Current debates about constitutional stare decisis take place in a jurisprudential and legal context. Contemporary thinking about the role of precedent in constitutional adjudication is influenced by many sources, but two ideas shape current debates. The first shaping idea is the realist (or “legal instrumentalist”) view of precedent. Crudely put, legal realism rejects the idea that precedent is a source of binding rules as part and parcel of a wholesale rejection of legal formalism. If all legal reasoning should be instrumentalist, then, it would seem to follow, reasoning about constitutional precedents should focus on policy or a balancing of relevant interests. The second shaping idea is the Supreme Court’s well-settled doctrine that it has unfettered power to overrule its own prior decisions.³ Whereas a three-judge panel of the United States Court of Appeal is bound to follow circuit precedent⁴ and the lower federal courts are bound to follow the decisions of the United States Supreme Court,⁵ the Supreme Court considers its own prior decisions as entitled to deference or a presumption of correctness but not as binding.

Given these two shaping ideas—realism and the Supreme Court’s freedom to overrule itself—it is not surprising to find contemporary theorists groping for some notion of precedent that has more “oomph” than a mere presumption. One product of this theoretical

the Marshall Court in favor of constitutional interpretations favored by Anti-Federalist contemporaries of the Court); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 767 (2004) (examining the constitutionality of court rules that limit the precedential value of decisions).

² See, e.g., T.R. Goldman, *Senators Question Alito on Abortion, Stare Decisis, Executive Power*, LEGAL TIMES, Jan. 11, 2006, <http://www.law.com/jsp/article.jsp?id=1136887514780>; Jeffrey Rosen, *Liberals Shouldn't Fight Roberts*, NEW REPUBLIC ONLINE, Sept. 12, 2005, <https://ssl.npr.com/p/docsub.mhtml?i=20050919&s=rosen091905>.

³ See Lawrence B. Solum, *Stare Decisis, Law of the Case, and Judicial Estoppel*, in 18 MOORE’S FEDERAL PRACTICE § 134.02[1][b], at 134-14 to -15 (Daniel R. Coquillette et al. eds., 3d ed. 2005) (describing the Court’s philosophy on overturning its own precedents).

⁴ See *id.* § 134.02[1][c], at 134-16 to -18 (“The published decision of a panel of a court of appeals is a decision of the court and carries the weight of stare decisis.”).

⁵ See *id.* § 134.02[2], at 134-25 to -26 (“[T]he district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and ordinarily must follow it until the court of appeals overrules it.”).

floundering has been the idea of “super-precedent,” “super-stare decisis,” or even “super-duper-precedent.”⁶ The particular focus of this discussion is usually the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷ the relevant paragraphs of which are quoted in full in the footnote accompanying this text.⁸ In *Casey*, the Supreme Court suggested that *Roe v. Wade* should only be overruled if “found unworkable” and not if its overruling would create “serious inequity to those who have relied upon it or significant

⁶ See Posting of Randy Barnett to The Volokh Conspiracy, <http://volokh.com/posts/1130273312.shtml> (Oct. 24, 2005, 16:48 EST) (describing developing academic recognition of the idea of super-precedent); Posting of Feddie to Confirm Them, <http://www.confirmthem.com/?p=1901> (Nov. 11, 2005, 13:44 EST) (discussing a verbal exchange, attributed to Judges Luttig and Easterbrook, over the concept of “super-precedent” attributing the use of “super-stare decisis” to Judge Luttig); Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1130824707.shtml> (Nov. 1, 2005, 12:58 EST) (recounting online colloquy regarding precedent, super-precedent, and super-duper-precedent).

⁷ 505 U.S. 833 (1992).

⁸ The opinion of the Court states:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, *Stare Decisis and Judicial Restraint*, 1991 *Journal of Supreme Court History* 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was, for that very reason, doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an “inexorable command,” and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–411 (1932) (Brandeis, J., dissenting). See also *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e.g., *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, e.g., *Burnet, supra*, at 412 (Brandeis, J., dissenting).

So in this case, we may enquire whether *Roe*’s central rule has been found unworkable; whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law’s growth in the intervening years has left *Roe*’s central rule a doctrinal anachronism discounted by society; and whether *Roe*’s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

damage to the stability of the society governed by it.”⁹ Senator Arlen Specter’s Op-Ed in *The New York Times* gave the phrase popular currency:

The confirmation precedents forcefully support the propriety of a nominee declining to spell out how he or she would rule on a specific case. Abraham Lincoln is reputed to have said pretty much the same thing: “We cannot ask a man what he will do, and if we should, and he should answer us, we would despise him. Therefore, we must take a man whose opinions are known.”

This, of course, does not foreclose probing inquiries on the nominee’s general views on jurisprudence. For example, it would be appropriate to ask how to weigh the importance of precedent in deciding whether to overrule a Supreme Court decision. Some legal scholars attach special significance to what they call superprecedents, which are decisions like *Roe v. Wade* that have been reaffirmed in later cases.¹⁰

The first use of the term “super-stare decisis” that appears in Westlaw’s database of journals and law reviews is by Earl Maltz in 1992, who wrote of *Casey*:

The theoretical problems with the Court’s opinion are even more troubling. The implications of the argument are breathtaking. The analysis reverses the accepted view that interventionist constitutional decisions should be granted less protection under the doctrine of stare decisis because they cannot be corrected by other branches of government. In essence, the opinion asserts that if one side can take control of the Court on an issue of major national importance, it can not only use the Constitution to bind other branches of government to its position, but also have that position protected from later judicial action by a kind of super-stare decisis.¹¹

The same database does not reveal subsequent uses of “super-precedent” or related terms in a similar context, although the term is used on several occasions to refer to precedents that have been very influential, frequently cited, or often followed.¹²

The notion of super-stare decisis is difficult to square with the realist conception of legal rules and with the Supreme Court’s power to overrule its own prior decisions. What is so super about super-

⁹ *Id.* at 855.

¹⁰ Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005, § 4, at 12.

¹¹ Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeast Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 26 (1992) (internal citations omitted).

¹² This usage traces back to William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976) (defining a “superprecedent” as a case “that is so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place”). See also Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 339 n.18 (1998) (citing the Landes & Posner definition).

precedent if it can be overruled for instrumentalist reasons? This question is highlighted by the joint opinion of Justices Kennedy, O'Connor, and Souter in *Casey*, which made the question of whether *Roe* should be overturned a matter of the balance of instrumental concerns, like workability, reliance, and so forth. For realists, super-precedents are really just super reasons to follow precedent or super interests to balance against those interests that favor a change in the law.

In this essay, I shall advance a very different approach to constitutional stare decisis. I shall argue that instrumentalist accounts of precedent are inherently unsatisfying and that the Supreme Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions. These moves are embedded in a larger theoretical framework—a revival of formalist ideas in legal theory that I shall call “neoformalism” to distinguish my view from the so-called “formalism” caricatured by the legal realists (and from some other views that are called “formalist”).¹³

Here's the roadmap. In Part II, *The Critique of Unenumerated Constitutional Rights*, we set the stage by briefly recalling why the unenumerated rights precedents are under theoretical (and political) siege. Then, in Part III, *Neoformalism, Stare Decisis, and the Rule of Law*, we examine the jurisprudential roots of a formalist revival that would create theoretical space for the idea that the Supreme Court should regard itself as bound by precedent. In Part IV, *A Neoformalist Conception of Constitutional Stare Decisis*, that theoretical framework is deployed to develop the outline of a neoformalist theory of constitutional stare decisis. This conception is brought down to earth in Part V, which answers the question posed by its title: *Does the Neoformalist Conception of Constitutional Stare Decisis Support Contemporary Unenumerated Rights Jurisprudence?* We wrap it all up in Part VI, *Unenumerated Rights and the Future of Constitutional Doctrine*.

Let's get down to business.

II. THE CRITIQUE OF UNENUMERATED CONSTITUTIONAL RIGHTS

Why all the fuss about unenumerated rights? Before we dig into constitutional stare decisis, it is worth taking a quick tour of the critique of unenumerated rights jurisprudence. I won't develop the critique in a thorough or sophisticated way—that's the topic of another

¹³ In particular, my views are very different than those of Ernest Weinrib. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 953–54 (1988) (“Formalism can accordingly be summed up as proffering the possibility of an ‘immanent moral rationality.’”) (citing Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983)).

very long article or book. What I will do is touch on some of the highlights.

There are many different ways of criticizing the Supreme Court's unenumerated rights decisions. For example, it might be argued that decisions like *Griswold*, *Roe*, and *Lawrence* are wrong as a matter of political morality: in other words, one might argue that an ideal polity would not afford the specific rights those cases created. Another line of criticism might focus on democratic theory. It might be argued that unelected judges should not act legislatively, and that judicial review should be limited to representation reinforcement, i.e. enforcing only those rights that are necessary to democratic self-governance. But I will not pursue either of these criticisms—instead, my focus will be on “formalist” criticism of the Supreme Court's unenumerated rights jurisprudence—the argument that the unenumerated rights cases constitute judicial lawmaking without sanction from the original meaning of the written text of the Constitution.

A. Unenumerated Rights as Judicial Lawmaking

One way of getting at formalist discomfort with the Court's unenumerated rights jurisprudence is via the notion of judicial legislation. The core idea is simple. It begins with a proposition of general normative legal theory: the proper role of judges is to interpret and apply the law. The next move is to characterize the unenumerated rights cases as judicial lawmaking. At an intuitive level, this move is at least plausible. The sentence, “The Supreme Court created the right of women to choose whether to have an abortion in *Roe v. Wade*,” does not seem to rest on an egregious factual error.

The question is whether that characterization of the unenumerated rights cases as judicial legislation is correct. That question is, of course, complex. At this point, I should like to set aside the possibility that cases like *Griswold*, *Roe*, and *Lawrence* might be defended on textualist and originalist grounds; we'll return to that possibility in Section D, *A Caveat: The Possibility of an Originalist Defense of Unenumerated Rights Based on the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment*. But might there be other ways of defending the Court's unenumerated rights jurisprudence as application of the law and legal interpretation? Answering that question in full will take us far afield: the attempts to rationalize the Court's privacy cases have consumed the energies of generations of constitutional theorists. Nonetheless, we can take a quick peek at one strategy to defend the privacy cases—a strategy rooted in Ronald Dworkin's theory of law as integrity.

A Dworkinian defense of the Supreme Court's privacy cases would not concede that these decisions are examples of judicial lawmaking. Dworkin himself developed such a defense in his book *Life's Domin-*

ion.¹⁴ Dworkin's general strategy is to sever the connection between constitutional interpretation and the meaning of specific provisions of the constitutional text. Rather than parsing the language of the Due Process Clause, the Dworkinian enterprise requires judges to identify the general principles of political morality that best "fit and justify" our constitutional practice.¹⁵ By equating these principles with "the law," Dworkin's theory creates the possibility of resisting the characterization of the Supreme Court's unenumerated rights cases as judicial lawmaking.

From a formalist perspective, Dworkin's defense of cases like *Griswold*, *Roe*, and *Lawrence* has the great virtue of attempting to square those cases with the idea that judges should not simply make the law. In that respect, Dworkin's defense parts company with legal realism and instrumentalism. But formalists are unlikely to accept Dworkin's key move—the conceptual ascent from constitutional text to principles of political morality and the accompanying conceptual descent to a justification of a general constitutional right to privacy. *Why not?* Once again, a complete and thorough answer will take us too far afield.

But a short answer is possible, if not fully satisfying. One way of putting it is to say that Dworkin relies too little on "fit" and not enough on "justification" at the stage of conceptual ascent. For a theory to really fit the United States Constitution, it is not sufficient that it would justify a Constitution that included general provisions guaranteeing free expression, procedural fairness, and equality. Real fit requires a justification of the actual text of the Constitution. And the actual text of the Constitution does not, with a few possible exceptions,¹⁶ create general and abstract rights of political morality—especially if that text is understood in historical context. Another way of expressing discomfort with Dworkin's view focuses on the stage of conceptual descent—from general and abstract principles of political morality to particular cases. When Dworkin descends, it seems as if the reasoning goes straight from abstract notions to results without reengaging the authoritative legal materials—i.e., the constitutional

¹⁴ See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993) (detailing Dworkin's defense of the named cases); Gerard V. Bradley, Essay, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993) (same).

¹⁵ See DWORKIN, *supra* note 14, at 111 ("Any interpretation of the Constitution must be tested on two large and connected dimensions. The first is the dimension of the fit . . . The second is the dimension of justice.").

¹⁶ For example, there is no "equality clause" of the Constitution, although there is a clause that guarantees equal protection of the laws. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."). There is no "procedural fairness clause," although there is a clause that guarantees due process of law. See *id.* amends. V & XIV, § 1 (guaranteeing due process of law).

text—at the level of detail. Even if the United States Constitution were justified, in part, by a general right to privacy, it does not follow that the provisions justified by the political right are identical to it. It might be that the best justification for the Constitution is not best instantiated in the Constitution we actually have. Yet another way of expressing formalist dissatisfaction with Dworkin focuses on the claim that the role of law is to settle questions about which there is moral disagreement. If the content of the positive law depends in a strong and direct way on underlying principles of ethics and political morality, then it is difficult to see how law can perform its settling function.

Finally, it should be noted that many defenders of the Supreme Court's unenumerated rights jurisprudence will not contest the judicial lawmaking characterization. Realists and instrumentalists of various stripes are likely to reply instead: "Of course, these cases involve judicial lawmaking. All judging is judicial lawmaking. If cases like *Griswold*, *Roe*, and *Lawrence* had come out the other way, that too would have been judicial legislation—simply with a different outcome." That's what instrumentalists might say, but, as I shall argue in the remainder of this article, we would not be required to take their word for it.

B. Unenumerated Rights and a Written Constitution

The second line of critique is related to the first, but with a slightly different focus. The difficulty with "unenumerated rights"—it might be argued—is that they are unenumerated in the context of a written constitution. Because the Constitution is written, so the argument goes, unenumerated rights are contrary to the Constitution. Judges are not merely legislating; they are legislating in a manner that is fundamentally contrary to the constitutional scheme. The most obvious line of reply to this objection would be to contest its premise that the Constitution itself is opposed to the notion of unenumerated rights: we will get to that possibility in Section D below.

Another line of reply denies the premise that the Constitution of the United States is entirely written. Instead, it might be argued that the Constitution of the United States is partially "unwritten" as is the Constitution of the United Kingdom. This possibility is explored by Tom Grey in a famous essay entitled "Do We Have an Unwritten Constitution?"¹⁷ Michael Moore,¹⁸ Suzanna Sherry,¹⁹ and others have en-

¹⁷ Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710–14 (1975) (considering the implications of literal constitutional interpretation).

¹⁸ Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 115 (1989) (noting "weak" and "strong" conceptions of the "unwritten constitution," in which non-textual material "supplements" and "supplants" the written document, respectively, for the purpose of interpretation).

gaged with this idea. Once again, an adequate resolution of this controversy is beyond the scope of this article. Some formalists may respond that the rule-of-law values that justify legal formalism are inconsistent with the notion of an open-ended unwritten constitution, with the content to be determined by the discretionary decisions of individual judges. Thus, they will ask how judges can determine the content of the unwritten constitution without opening the door to open-ended moral and political considerations. Other formalists will argue that the United States Constitution is not “unwritten” or that its unwritten provisions do not extend to unenumerated rights. For the purposes of this essay, the point is not to establish the warrant for the objection but rather to limit its shape and form.

C. Unenumerated Rights and Original Meaning

A third objection to the Supreme Court’s unenumerated rights jurisprudence rests on the notion that cases like *Griswold*, *Roe*, and *Lawrence* are inconsistent with the original meaning of the relevant provisions of the United States Constitution. This criticism focuses particularly on claims that these cases are warranted by interpretation of particular constitutional provisions, such as the Due Process Clauses of the Fourteenth and Fifth Amendments of the United States Constitution. For example, John McGinnis and Nelson Lund have written: “The *Griswold-Roe-Lawrence* line of cases has no apparent basis in the text or original meaning of the Due Process Clauses, and the Justices have never tried to show that there is one.”²⁰ Let’s not add to the vast quantities of ink already spilled in the debates about originalism. Instead, let me simply observe that the core of contemporary originalism is the idea that the Constitution should be interpreted in light of the original public meaning of the constitutional text. That core idea appeals to formalists because (as compared with the alternatives), it seems to provide a method for reducing disagreement about constitutional meaning. To the extent that the Supreme Court’s unenumerated rights cases require a more latitudinarian approach to constitutional interpretation, formalists will be suspicious.

¹⁹ Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (“[T]he founding generation . . . envisioned multiple sources of fundamental law.”).

²⁰ Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1597 (2004).

D. A Caveat: The Possibility of an Originalist Defense of Unenumerated Rights Based on the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment

At this stage of the argument, I need to introduce an important caveat. The Supreme Court's unenumerated rights cases can (and have been) defended on textualist and originalist grounds. One important example²¹ of this approach is found in the work of Randy Barnett²²—a participant in this symposium.²³ Barnett's argument for unenumerated rights is, at its core, quite obvious and direct. Barnett argues that the Constitution itself posits the existence of such rights in at least two places. First, the Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."²⁴ Second, the Privileges or Immunities Clause of the Fourteenth Amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²⁵ The conjunction of these two provisions can plausibly be read as a legal requirement for the judicial enforcement of unenumerated rights, and hence as the foundation for a formalist justification for cases like *Griswold*, *Roe*, and *Casey*.

Formalist critics of the Supreme Court's unenumerated rights jurisprudence can reply to Barnett in at least two ways. First, they might contend that Barnett has gotten the original meaning of the Ninth and Fourteenth Amendments wrong. Kurt Lash, for example, has contested Barnett's interpretation of the Ninth Amendment.²⁶ Reso-

²¹ There may be other formalist defenses of unenumerated rights. For example, it might be argued that the phrase "due process of law" did, in fact, have a public meaning that supports the Supreme Court's unenumerated rights jurisprudence. For a gesture in this direction, see Kermit Roosevelt's contribution to this symposium. Kermit Roosevelt, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006).

²² See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–66 (2003) (arguing that constitutional "privileges" and "immunities" included unenumerated liberty rights); see also Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 431 (2004) (citing the Ninth, Tenth, and Fourteenth Amendments as sources of unenumerated rights and corresponding limits on government); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21, 24–29 (focusing on the prominence of the Ninth Amendment in recent substantive due process jurisprudence).

²³ See Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1 (2006).

²⁴ U.S. CONST. amend. IX.

²⁵ *Id.* amend. XIV, § 1.

²⁶ See Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 600–02 (2005) (noting that, prior to the New Deal, the Ninth Amendment was interpreted to protect state autonomy); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 360–62 (2004) (contending that with the Ninth Amendment, Madison sought to prevent the "constructive enlargement of federal power"). But see Randy E. Barnett, *The Ninth Amendment: It Means What It Says* 2 (Boston Univ. Sch. of Law Working Paper No. 05-14, 2005), avail-

lution of that debate is a topic for another day and, I might add, another author. Second, the critics might concede that Barnett is right as a matter of original meaning, but nonetheless contend that these provisions of the Constitution should be disregarded for formalist reasons. That is, one might argue that the rule-of-law values of predictability, certainty, and stability require judicial nullification of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment on the ground that these provisions create an unrestrainable judicial discretion—especially if combined with a weak doctrine of stare decisis.

For the purposes of this article, I will neither take issue with nor endorse Barnett's originalist defense of unenumerated rights. Rather, I will simply assume that these issues are still in play. For the sake of argument, I will assume when the Supreme Court decided cases like *Griswold*, *Roe*, and *Lawrence*, those cases were not and could not be justified on formalist grounds. Later in this article, that assumption will be relaxed in various ways. Enough of the formalist critique, it is time to move on to a more systematic consideration of legal formalism itself.

III. NEOFORMALISM, STARE DECISIS, AND THE RULE OF LAW

I recently had one of those embarrassing moments. I was having a lunchtime conversation with distinguished colleagues and we were discussing the topic *du jour*—the Alito confirmation hearings. One of my colleagues, whom I consider to be one of the greatest legal philosophers of the post-war period, was discussing Justice Roberts's analogy between judging and umpiring. You may remember the following testimony:

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ballgame to see the umpire.²⁷

My colleague then proceeded to ridicule Roberts's view. I can't remember the exact words, but they amounted to something like the following: No one (serious) could possibly think that judges are like umpires. Of course, judges make law—they have to. Who could (seriously) think otherwise?

able at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=789384 ("The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before . . .").

²⁷ Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee).

I bravely raised my right hand, branding myself as beyond the jurisprudential pale—as someone who takes seriously the idea that judges should apply the law rather than make it. I felt like I should go to a peculiar sort of twelve-step meeting, where I would be required to say, “My name is Lawrence Solum and I am a legal formalist.”

Well, my name is Lawrence Solum, and I am a legal formalist. I do think that judges should apply the law rather than make it—with some limited exceptions. I believe that Justices of the Supreme Court should consider themselves bound by the Court’s prior decisions. I even think there is something to the umpire analogy—although not as much as Justice Roberts’s testimony suggests.²⁸ Let’s begin with the big picture and situate contemporary formalism in the context of the contemporary domination of the academy, bench, and bar by instrumentalist thinking about law.

A. *Formalism and Realism*

We swam in a Legal Realist sea. If anything united the American legal academy in the late-twentieth century it was an opposition to legal formalism. If American law students learned anything in their first year, it was that “black letter law” was in disrepute and that law school was about *policy* or maybe *fairness*—or even *politics* or *empirical research*—but not unadorned *doctrine*. If there was any uncontroversial advice for an ambitious young law professor, it was to stay away from doctrinal scholarship that is “merely descriptive.” If any legal theory was a bad one, then it was “legal formalism” or “mechanical jurisprudence”—the view that disputes can be resolved by the unthinking application of abstract and general rules without appreciation of their purposes and without regard to the consequences for welfare or fairness. The disreputability of legal formalism was reflected in a revolution in legal scholarship—the flowering of law and economics, law and philosophy, empirical legal studies, and a variety of other approaches to the study of law. Of course, there were exceptions. Formalism of a sort was found in originalism in constitutional theory as

²⁸ Umpires are unlike judges in many respects. Umpires make their calls in real time—without the leisure of deliberation. Umpirical decisions do not set authoritative precedents—although the collective actions of many umpires may establish a practice that constitutes a sort of interpretation or gloss on the rules of a particular sport. The division of authority between trial and appellate judges, which is key to understanding common-law adjudication, has no clear counterpart in umpiring. Arbitrators, and not judges, are the closest legal equivalent to umpires.

well as plain meaning approaches to statutory interpretation. But these were the exceptions that proved the rule.²⁹

And the rule was acceptance of what might be called *the instrumentalist thesis*: roughly, the proposition that the outputs of legal decision-making processes (paradigmatically, appellate adjudication) are, and should be, determined by extralegal considerations—that is, by (extralegal³⁰) considerations of policy or principle.³¹ Contemporary American legal thought accepted as an almost dogmatic truth that legal decisions are (and should be) made on instrumental grounds—shaping outcomes to serve normative concerns. We were all instrumentalists. Weren't we? Aren't we still?

We swim in a Legal Realist sea—or *do we*? The most extreme form of legal instrumentalism embraced what has been called *the strong indeterminacy thesis*: roughly, the notion that the outputs of legal processes are not constrained by formal legal considerations.³² Stated baldly, the claim was that the law does not constrain the choices of legal actors: *because any possible outcome can be squared with the law, something else (principle, policy, or politics) must be doing the real work of determining which outcomes are selected.* We are most familiar with the version of the strong indeterminacy thesis associated with the critical legal studies (CLS) movement and expressed in the slogan, “Law is Politics.”³³ Characteristically, CLS rejected claims that legal decisions could be explained by a consistent normative theory—whether it be the welfarism of normative law and economics³⁴ or the rights theory

²⁹ One of the most common objections to constitutional originalism is that it is a “flag of convenience”—originalist judges adhere to the original meaning of the Constitution when it serves their ideological objectives, but ignore it when it does not.

³⁰ Whether considerations of policy and principle are *extralegal* is itself a complex question, implicating debates about the nature of law in general and the controversy between inclusive and exclusive legal positivism in particular.

³¹ Fully stated there are actually several instrumentalist theses: (1) a descriptive claim about existing legal practice, (2) a stronger empirical (or conceptual) claim about possible legal practice, (3) a normative claim of ideal legal theory, and (4) a normative claim of nonideal legal theory.

³² See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987) (“The strong version of the indeterminacy thesis claims that . . . in every case any result can be derived from the preexisting legal doctrine.”).

³³ See, e.g., Peter Gabel, *What It Really Means to Say “Law is Politics”: Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1143–44 (2002) (offering *Bush v. Gore* as an example of “the political nature of all legal reasoning”); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 211–14 (1979) (asserting that “collective coercion” impacts all legal decisions); Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 256–57 (1989) (discussing the importance of viewing law as a “form of politics”).

³⁴ See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 465 (2002) (advocating welfare economics analysis of legal policy). Simplifying somewhat, we can say that welfarism is a form of utilitarianism—in the philosophical sense of that term—that has a preference-based conception of utility.

of Dworkin's law as integrity³⁵—and claiming that political struggle between and among oppressed and powerful groups did the explanatory work. American legal theory ended the twentieth century with a decisive rejection of critical legal studies—albeit a rejection that was soon tempered by the academic firestorm created by the Supreme Court's decision in *Bush v. Gore*.³⁶ Legal rules may underdetermine outcomes while constraining them. More fundamentally, systematic normative legal theory—whether it comes from the left, right, or center in consequentialist or deontological form—needs legal formalism, the mechanism by which normative conclusions can be translated into rules that can guide low-level legal actors (trial judges and other bureaucrats) who cannot be expected to engage in de novo normative theory every time they must make a decision.

Thus, we find ourselves in a familiar but disquieting situation. On the one hand, we affirm the instrumentalist thesis, rejecting legal formalism as a naïve and unattractive legal theory. On the other hand, we embrace the formalist picture of legal practice in myriad ways—blithely deconstructing doctrinalism in the parts one of our articles and reconstructing new doctrinal paradigms in the parts penultimate. In the classroom, we ridicule our students' quest for the easy certainty of black letter law, and then on exam day we test them for their mastery of intricate formal rules. We might call this predicament *the antinomy of realism and formalism*—our simultaneous affirmation and rejection of fundamentally inconsistent ideas about the nature of law.

What to do? Faced with this sort of existential dilemma, the easy way out is always tempting. Ignore it! After all, the antinomy of realism and formalism doesn't really interfere with our ability to go on with our business—writing books and articles, teaching classes. Tempting, because, as Yoda would say it, "bliss, ignorance may be." But the subtle ecstasy of rational ignorance often eludes the serious and thoughtful. Once you notice the alligator in the bathtub, it becomes hard to ignore.

All is not lost: a more principled avoidance option is available. Leave it to the experts! Talk about legal realism and legal formalism—that's for the jurisprudes and legal philosophers. If the experts are able to work out the antinomy of realism and formalism, more power to them. In the meantime, there are other fish to fry. I take

³⁵ See, e.g., RONALD DWORKIN, LAW'S EMPIRE 225 (1986) (law as integrity "insists that legal claims are interpretive judgments [that] combine backward- and forward-looking elements"). See generally RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) (providing further information about the concept of "law as integrity"); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (same).

³⁶ 531 U.S. 98 (2000).

the defer-to-the-experts option seriously, and use it myself on occasion in other contexts. But this technique of avoidance will not do for most of us who do normative legal theory—especially constitutional theory. It is one thing to engage in work with assumptions that might be undermined by the work of specialists in another discipline—there is no way that legal scholars can entirely avoid that risk. It is quite another thing to proceed on the basis of assumptions that you know to be contradictory or incoherent.

The antimony of realism and formalism cannot be avoided. It must be confronted. Head on.

B. Formalism and Neoformalism

The core of formalism may sound naïve and platitudinous. Formalists believe assertions like the following:³⁷

- Judges should apply the law and not make it.³⁸
- There are legal rules that constrain what legal actors may lawfully do.³⁹
- There is a difference between following the law and doing what you think is best.⁴⁰
- Judges should decide cases in accordance with the text of the applicable constitutional or statutory provision or with the holding of controlling precedents.⁴¹

I've got a million of them, but you get the general idea. The core idea of formalism is that the law (constitutions, statutes, regulations,

³⁷ See generally Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994) (providing an overview of legal formalism); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999) (same).

³⁸ This notion is closely related to critiques of “judicial legislation.” See generally Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975) (discussing critiques of “judicial legislation”).

³⁹ The idea that legal rules constrain judges was the subject of the “indeterminacy debate.” See generally William A. Edmundson, *Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies*, 24 SETON HALL L. REV. 557 (1993) (detailing ways that formalism constrain action).

⁴⁰ This idea is captured by the following passage from an article by Scott Altman: She differs from Houdini, however, both because she feels obligated to follow the law when she thinks it wrong, and because she feels obligated candidly to offer the reasons that convince her.

An activist judge might believe that the goal of judging is to do what is best for the world in every case, and that she must consult her own moral vision in order to do so. Like Houdini, she does not have the goal of trying to follow law.

Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 311 (1990).

⁴¹ See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing the revival of plain meaning); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (advocating the use of “practical reason” when interpreting a statute and its plain meaning); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997) (arguing that the plain meaning of a statute is a common ground on which to resolve disputes).

and precedent) provides rules and that these rules can, do, and should provide a public standard for what is lawful (or not).

That is, the core of legal formalism entails a commitment to a set of ideas that more or less includes the following:

1. The law consists of rules.
2. Legal rules can be meaningful.
3. Legal rules can be applied to particular facts.
4. Some actions accord with meaningful legal rules; other actions do not.
5. The standard for what constitutes following a rule *vel non* can be publicly knowable and the focus of intersubjective agreement.

These core notions of legal formalism are *thin* (they don't assume much). So far, I've only said that legal rules *can* be meaningful, applied to particular facts, and the subject of intersubjective agreement.⁴² I haven't yet said that most or all legal rules are, in fact, meaningful, applicable, or the focus of intersubjective agreement. Those are further claims.

Let me try to be just a bit more concrete before moving on. The core idea of legal formalism is that constraining law is a real possibility. Courts *could* follow the text of the Constitution, *could* follow the plain meaning of statutes, and *could* follow precedent. No contemporary formalist is likely to believe that legal formalism is inevitable. Even if it turns out that the formal constraint of law is quite powerful and pervasive, no one who is familiar with contemporary American legal practice could reasonably believe that every outcome in every legal dispute is, in fact, determined by the formal constraints of the law. That claim would be just plain silly. If it were true, no appellate court would ever reverse a trial court and no decision of a multi-member court would ever be less than unanimous. Moreover, it seems quite clear that some legal officials are overtly or covertly realist in their orientation to the law. The Supreme Court has an ambivalent attitude towards the constraining force of its own prior decisions and towards the text of the United States Constitution. Some lower federal court judges seem to ask, "What can I get away with?," rather than "What does the law require?" The lawyers and judges of today were raised on realism and it would be very surprising if they did not practice what their professors preached at least some of the time. The core idea of legal formalism is that a formalist legal practice is a choice-worthy possibility and not that the United States Supreme Court hews the formalist line.

⁴² This thin version of legal formalism is similar to what Frank Michelman calls "minimal legal formalism" in his contribution to this symposium. See generally Frank Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121 (2006).

C. *Misconceptions: What Formalism Is Not*

Contemporary discourse is full of misconceptions about formalism. Let's clear the brush.

1. *Misconception One: Formalism Entails Mechanical Jurisprudence*

The first misconception is that formalism entails "mechanical jurisprudence."⁴³ In truth, this is likely a bundle of interrelated but inconsistent ideas. One version of the "mechanical jurisprudence" critique concedes that formalist legal practice can and does translate legal texts into more or less determinate outcomes in particular cases, but points to the costs of relative rigidity, precluding the intelligent consideration of purpose or foreclosing the practice of equity. If these are the real arguments, then the charge of "mechanical jurisprudence" is really just a pejorative label for other objections, which I address separately below.⁴⁴

Another variant of the objection goes to the possibility of formalism—arguing that, for formalism to get off the ground, truly mechanical jurisprudence would be required. But, the objection goes, the application of legal rules is not truly mechanical—judgment is required for rules to be applied to particular facts. Because mechanical jurisprudence is impossible, legal formalism is a myth. One premise of this version of the objection is true: truly mechanical jurisprudence—the kind that could be performed by a machine—is impossible (without major breakthroughs in artificial intelligence). The error lies in the assumption that legal formalism must be mechanical. That assumption is simply false. Formalism requires rule-following—sure enough! But rule-following need not be mechanical in any literal sense of that word. The application of rules to particular facts may require sensitivity to context and purpose, but that does not mean that there are no rules or that the rules do not have constraining force.

⁴³ See, e.g., Arthur J. Jacobson, *The Other Path of the Law*, 103 YALE L.J. 2213, 2218 (1994) (asserting that mechanical application is a characteristic of formalist law); Mann, *supra* note 37, at 1058 (describing formalism as involving "the mechanical application of rules"); William H. Simon, *Conceptions of Legality*, 51 HASTINGS L.J. 669, 669–70 (2000) (describing a formalist conception of law that requires rote compliance with straightforward rules). The phrase "mechanical jurisprudence" was made famous by Roscoe Pound's article of that title. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

⁴⁴ See *infra* Parts III.C.2, III.C.3.

2. *Misconception Two: Formalism Excludes Consideration of Purpose*

The second misconception is closely related to the first. The charge of mechanical jurisprudence sometimes refers to the idea that formalists apply rules without attention to their underlying purposes. Of course, sometimes rule application can proceed without explicit consideration of or deliberation about the purpose of the rule being applied. But this need not be the case. Formalists can take the purposes of rules into account in a variety of ways, including (but not limited to) the following:

- The purpose of a rule may be relevant to an initial determination of its salience. Rules are sometimes formulated in very general and abstract language. Appreciation of the purpose of the rule may help distinguish those contexts where the rule is salient from those outside its domain of application.
- The purpose of a rule may assist in the resolution of ambiguity or vagueness. This point is so familiar that elaboration is hardly necessary. Formalism does not deny that rules are sometimes ambiguous or vague, and there is simply no reason for formalists to deny reference to purpose when interpreting a vague or ambiguous rule.
- The purpose of a rule may aid in discerning its original public meaning. Purpose is relevant evidence of meaning, and hence anyone concerned with discovering meaning will have reason to consider purpose.

Of course, there may be difficulties with ascertaining the purpose of a legal rule, but these difficulties must be overcome by instrumentalists who wish to employ purposive analysis as a component of rule application. If purposes are indiscernible, instrumentalists are in a real sticky wicket.

3. *Misconception Three: Formalism Precludes Equity*

The third misconception is a close sibling of the first two. It might be argued that formalists must “follow the rules” no matter where they lead, even if the results are absurd or disastrous. There is something to this objection because there are different conceptions of legal formalism and different institutional mechanisms by which formalism can be implemented. One might be opposed to the practice of equity for formalist reasons—on the ground that a general power of equity cannot be constrained and therefore is inconsistent with formalism. Or one might argue for institutional constraints on the power of equity—confining the power to a special tribunal or, in criminal cases, to the exercise of clemency by the executive.

But formalism need not eschew equity. Indeed, the classical (Aristotelian) conception of equity is entirely consistent with some versions of legal formalism. Here is how Aristotle framed the issue in Book V, Chapter 10 of the *Nicomachean Ethics*:

What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behavior is essentially of this kind.⁴⁵

Aristotle's notion of *epieikeia* is usually translated as "equity," but can also be translated as "fair-mindedness." As Roger Shiner puts it:

Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those hardened customs and written laws that constitute for some society that institutionalized system of norms that is its legal system.⁴⁶

Of course, formalism cannot incorporate the practice of equity if that involves a commitment to an unconstrained power to substitute private judgments about fairness for the law—that would be the antithesis of formalism. But there is no reason for formalism to reject a practice of equity that refuses to apply a legal rule when it would lead to absurd consequences.

4. *Misconception Four: Formalism Entails Conceptualism*

Yet another misconception about formalism is that formalism entails conceptualism⁴⁷—the idea that legal rules can be deduced from the "heaven of legal concepts"⁴⁸ to use von Ihering's notorious satirical phrase. One might use the term "formalism" to describe a conceptualist approach to the common law, but that is not the kind of formalism this essay is about. A formalism that emphasizes fidelity to legal texts—constitutions, statutes, and precedents—cannot fairly be

⁴⁵ ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 199 (J.A.K. Thomson trans., Penguin Books 1984) (1953).

⁴⁶ Roger A. Shiner, *Aristotle's Theory of Equity*, 27 *LOV. L.A. L. REV.* 1245, 1260–61 (1994) (internal citations omitted).

⁴⁷ See Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 *IND. L. REV.* 57, 61 (2003) ("[A]ntiformalists can be characterized as arguing that [l]egal decision should not proceed then from fidelity to the heaven of legal concepts, but rather from consideration of the consequences of alternative decisions.").

⁴⁸ MORRIS R. COHEN & FELIX S. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 678–89 (1951) (translating excerpts from RUDOLF VON IHERING, *Im Juristischen Begriffshimmel*, in *SCHERZ UND ERNST IN DER JURISPRUDENZ* (1884)).

characterized as conceptualist, much less as relying on some form of Platonism.⁴⁹

5. *Misconception Five: Formalism Entails the Right Answer Thesis*

This one is really important. Formalism is sometimes thought to entail a “right answer” thesis, a view that in each and every case there is one and only one “right answer.”⁵⁰ Of course, formalists can affirm the right answer thesis, but the insistence on a single right answer in each and every case is not a necessary feature of formalism. Formalism does require two things that are related to (but distinct from) the right answer thesis. First, formalism requires that there be wrong answers—that is, formalism requires that the legal rules exclude at least some possible outcomes as legally incorrect. Second, formalism requires that the choice among the legally acceptable outcomes proceed by some method that is legally sanctioned—including discretion if the legal rules grant discretionary authority to the relevant legal actor.

All that was awfully abstract. What do I really mean? Formalism can and should accept the proposition that more than one outcome in a case can be legally correct. And formalism can and should accept the notion that the law sometimes confers discretionary authority on legal actors, including judges. At a conceptual level, formalism need not say more, but a fully developed legal formalism will go beyond the conceptual level. Normative legal formalism will argue that legal systems should minimize the role of discretion and provide mechanisms of institutional settlement that provide as much certainty and predictability as is appropriate and sensible. In a common law system, one prominent mechanism is the system of precedent (or

⁴⁹ Cf. Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9, 39 (2000) (“Perhaps the most significant feature of legal realist legal theory (taking Holmes and Dewey as leading representatives) is its vigorous rejection of any ‘tender minded’ metaphysical view (often labeled ‘natural law’) according to which legal rules are timeless eternal truths in some kind of Platonic heaven of legal concepts.” (quoting William James, *The Present Dilemma in Philosophy*, in PRAGMATISM AND OTHER ESSAYS (1963) (using the term “tender minded”))); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1134 (1995) (“By ‘conceptualism,’ I mean a style of legal thought and reasoning that emphasizes definitions, categories, and syllogistic logic. The ‘heaven of legal concepts’ features belief both in the relative coherence and integrity of bright-line legal categories and in the relative objectivity of language. Thus, conceptualist theorists and judges generally prefer rules over standards, certainty over flexibility, questions of law over questions of fact, and, at a deeper level, individualism over community.”).

⁵⁰ See James W. Bowers, *Incomplete Law*, 62 LA. L. REV. 1229, 1234 (2002) (“To the classical formalists, law . . . meant a scientific system of rules and institutions that were *complete*, in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system.” (quoting Pildes, *supra* note 37, at 608)).

stare decisis) that narrows the range of legally correct outcomes over time.

6. *Misconception Six: Formalism Excludes the Exercise of Practical Judgment*

The notion that legal formalism somehow excludes the exercise of practical judgment⁵¹ is closely related to the claim that formalism is mechanical and excludes consideration of purposes. The application of rules to particular situations necessarily involves practical judgment, and legal formalism does not seek to deny this. Legal formalism is inconsistent with the idea that legal actors should simply make all-things-considered practical judgments and ignore the law. But the notion that law requires practical judgment does not require that rules be ignored or relegated to the status of a “factor” to be balanced against other first-order reasons.

7. *Misconception Seven: Formalism Requires Perfect Compliance*

Another important point. Some critics of formalism seem to assume that formalism requires perfect compliance in implementation. This point is frequently made in connection with originalism in constitutional interpretation. If some originalist judges sometimes fail to act in conformity with the demands of originalist theory, then originalism is bankrupt. More generally, if formalist judges are sometimes influenced by ideology or their own judgments about what the law should be, then—the argument goes—formalism does no better than instrumentalism in constraining judicial power. Stated in this bald fashion, this argument is simply awful. Humans are imperfect; judges are no exception to this rule. Welfarist judges will sometimes fail to maximize welfare. Deontologist judges will sometimes fail to respect rights. Heck, instrumentalist judges may find themselves blindly following the rules! Formalist judges will sometimes fail to follow the law. Of course! Perfection isn't the relevant standard. That is not to say that there is no standard. For formalism to get off the ground as a live possibility, it must be the case that a viable formalist legal practice could come to exist. If there were no practical plan of institutional design and judicial selection that could produce outcomes constrained by law, then formalism would be a mere conceptual possibility. The important point is that the existence of im-

⁵¹ Cf. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 678–79 (2005) (characterizing Mark Tushnet as contrasting formalism with “all-things-considered . . . practical judgment”); James Steven Rogers, *Policy Perspectives on Revised U.C.C. Article 8*, 43 UCLA L. REV. 1431, 1535 n.155 (1996) (contrasting “formal consistency” with “practical judgments attuned to particular circumstances”).

perfection does not, by itself, entail that formalist judging is impossible.

D. The Case for Neoformalism

What is the rationale for formalism in general and rule-of-law neoformalism in particular? My answer to that question will proceed in three stages. In stage one I shall limit myself to shallow arguments—arguments that do not rely on deep premises about moral or political philosophy. In stage two, I will deepen the argument by discussing the distinction between private and public judgment and making the case for law's function in providing public standards for the resolution of disputes where coordination through agreement in private judgments is likely to fail. In stage three, I will skim the surface of an even deeper set of arguments that would make the case for neoformalism on the basis of the deep premises of moral and political philosophy.

1. Stage One: The Shallowest Case for Rule-of-Law Neoformalism

Why would we want legal actors (paradigmatically, judges) to follow preexisting, publicly available rules when they could do what they believe is the all-things-considered best action? Why be lawful when you could be just? We can begin answering these questions by imagining a world in which an extreme form of legal instrumentalism prevailed. That will set the stage for a consideration of the connection between legal formalism and the virtues of the rule of law.

Imagine a world in which legal practice was thoroughly instrumentalist—a world with the absolute minimum constraining force of law.⁵² In this world, judges are realist through and through. The constitutional text is just a starting point for the real work of normative analysis. Statutes are applied when their purposes are served—even if the legislature got the text mucked up. Courts of last resort don't even pretend that their own prior decisions have binding force—*stare decisis* is reduced to a rule of thumb, with the advantages of stability weighed against the costs of adopting the optimal legal rule. Lower courts follow the decisions of their superiors, but not slavishly, modifying the rules formulated by higher courts when that will serve the underlying purposes of the law and ignoring the precedents altogether when some great evil can be avoided.

⁵² Extreme legal instrumentalism is *legal* instrumentalism—not a world without law. So we imagine a world with legal institutions (and hence power-conferring and jurisdictional rules). For legal instrumentalists, judges may decide in accord with the rationale of a rule and not its letter, but even extreme instrumentalists might require that the text of the rule and facts about its history be relevant to determining its purpose.

Continue with the thought experiment. The last vestiges of legal formalism have fallen away, but human nature has not changed. These realist judges have the same beliefs about politics and morality that our judges have. They are from the left, right, and center. Some of them believe in rights, others in consequences. Some are libertarians; others are cultural conservatives. Some believe that women have a fundamental human right to choose whether or not to give birth; others believe that the unborn have the same moral status as other humans with the consequence that abortion is murder. Some believe we are a Christian nation; others believe in strict separation of church and state. Some believe in free markets; others believe that justice requires a radical redistribution of income and political power. This instrumentalist world—like ours—is characterized by the fact of pluralism.⁵³

Pluralism and instrumentalism interact. The fact that judges view themselves as policymakers—as legislators with fancy robes—does not escape the attention of presidents and senators, governors and legislators, parties and pundits. Judicial selection is politicized with a vengeance. No one believes that litmus tests are improper: political actors should obviously select judges on the basis of their political ideologies (unless there are compelling reasons of political patronage to do otherwise). The members of multimember courts begin to read game-theoretic analyses of their tactical options with relish—seeking to manipulate their agendas. Logrolling becomes the norm—votes are traded across cases and courts. The line is drawn and the proposal to create a market for vote trading is rejected.

Once instrumentalism is firmly established, it begins to affect the way that other institutions and individuals perceive judicial authority. Of course, there may be reasons for executives, administrative agencies, and legislators to defer to the general rules articulated by the courts but these reasons are merely instrumental. The advantages of complying with the rules must be weighed against the costs. The same goes for ordinary citizens. It does not escape their notice that the rules contained in the supposedly authoritative legal texts are only rules of thumb.

Instrumentalism can be put to good ends, but not all ends of legal actors are good. The instrumentalism of high principle leads to the instrumentalism of low politics. Why should judges be neutral arbiters in election law cases? The costs of using judicial power to throw a presidential election to someone who will appoint like-minded judges may be high, but those costs must be weighed against enormous benefits. Even trial judges have the ability to affect political processes

⁵³ See JOHN RAWLS, *POLITICAL LIBERALISM* 144 (1993) (describing “a political conception of justice” as accommodating “the fact of reasonable pluralism”).

in important ways. An able judge can influence the outcome of a high-stakes class action lawsuit to the benefit of politically-active parties or lawyers, who can return the favor in the form of campaign donations that will advance the cause by assisting the election of legislators and executives who sympathize with the judge's policy preferences.

Assuming that the fact of pluralism obtains, the world of extreme instrumentalism is a world without the virtues of the rule of law.⁵⁴ The outcome of disputes in trial courts and in multimember appellate courts that sit in panels would depend on the luck of the draw. In courts of last resort that sit en banc, outcomes would be stable so long as the membership of the court remained the same, but when the median justice—the one whose political ideology was at the midpoint of the court's left-to-right alignment—shifted, whole areas of doctrine would undergo tectonic shifts, the magnitude of which would vary with ideological distance between the old and new midpoints. Of course, these shifts might not be quite as destabilizing as we imagine since lower court judges view vertical stare decisis as a mere factor to be considered in their all-things-considered decision-making process.

Some aspects of the world of extreme instrumentalism may sound disturbingly familiar. Others may sound like wild exaggerations. And the advocates of legal instrumentalism will surely cry foul: "We don't mean that kind of extreme realism. The rule-of-law values—stability, certainty, predictability—are important instrumental values. There are instrumentalism reasons for judges to place a thumb on the scale in favor of orderly processes that give substantial weight to formal legal rules."

What should the formalist say to the instrumentalist who argues for moderation? At this stage in the argument, the formalist should lay claim to the territory that has been conceded. If moderate instrumentalists concede that the great value of the rule of law provides good and sufficient reasons for some degree of legal formalism, then the question becomes, "How much?" The contested ground is now all occupied by substantial formalist elements—rules of vertical stare

⁵⁴ Extreme instrumentalism might be consistent with the rule of law in a world where there was a very high degree of consensus about morality and politics. In such a world, values would be highly cohesive, and this cohesiveness might well create the predictability, certainty, and stability associated with the rule of law. Ironically, however, given this high degree of cohesion, one would expect that the formal legal materials—the constitutions, statutes, and prior decisions—would be in agreement with judicial preferences. Given this fact, legal practices might, in fact, be quite formalist—because the need to depart from the result dictated by the formal legal materials would be rare. Even if judges were willing to be extreme instrumentalists, the world of moral and ideological cohesions would give them few reasons to practice what they preach.

decisis, substantial prudential weight for horizontal state decisis, rules of jurisdiction, respect by coordinate branches for the authority of courts, and so forth. We are asking a new set of questions. How much instrumentalism is too much? Do particular instrumentalist practices lead to slippery slopes? Does the practice of instrumentalism by some actors in the system—judges or those who select judges—lead others to retaliate with instrumentalist countermoves, and if so, are their stable equilibria at points with substantial amounts of instrumentalist legal practice? Once the ground of argument has shifted to these questions, we have a debate about which version of formalism is best and *not* whether legal formalism is incoherent or utopian.

2. *Stage Two: Formalist Legal Practice Provides Public Standards for the Resolution of Disputes*

Stage one of the argument is easy. Although there may be advocates of perfect instrumentalism, they are few and far between. Stage two of the argument is difficult. In our post-realist age, moderate instrumentalists—or as I would put it, moderate formalists—are legion. *You are probably one of them.* How can moderate formalists be persuaded to take several steps in the direction of robust formalism? Or failing that, how can they be persuaded to take formalism seriously—to view contemporary neoformalism as a live option, a serious intellectual contender? More directly, how can I persuade *you*—the reader—to reconsider your resistance to formalist legal theory?

I believe that there is a master argument that serves as the key to a radical shift in perspectives in the debate between formalists and realists. You've heard this argument before—in various forms. If your jurisprudential orientation is instrumentalist, it's quite likely that it has nagged at you at some point. The easiest way to introduce the argument is with a question:

Are you willing to entrust the power to engage in instrumentalist legal practice to those with whom you disagree on matters of political ideology and morality? Or would you prefer that your opponents be constrained by formalism?

If you are a libertarian, how do you feel about instrumentalist judges who are cultural conservatives? If you are a liberal Democrat, how about instrumentalist judging by conservative Republicans? If you are a deontologist, how about instrumentalist judging by utilitarians?

It seems to me these questions are likely to elicit one of the following answers:

- Answer 1: Judges with whom I agree with should be instrumentalists, but judges who are my opponents should be formalists. That's because I am right and they are wrong. So, when my opponents act in an instrumen-

talist fashion, I will condemn their departures from the rule of law, but when my friends are instrumentalist, I will praise their wisdom.

- Answer 2: All judges should be instrumentalists. That's why it is important to get control of the mechanisms of judicial selection, so that only (or mostly) judges who agree with me are on the bench. I won't criticize my opponents for their instrumentalism, but I will criticize them for their ideology and values.

You might think that no one could possibly give answer number one—which is charitably described as stupid and more accurately characterized as unprincipled—but, of course, we have all seen answer one in action. So, we are left with answer two. What is good for the goose is good for the gander.

Of course, at this stage, some instrumentalists might have reason to pause, contemplating the possibility that instrumentalism in the hands of ideological opponents who control the mechanisms of judicial selection might do more evil than instrumentalism in the hands of ideological allies does good. At best, the value of instrumentalism seems to be contingent on the politics of judicial selection. The deep premises of instrumentalism would seem to support formalism under unfavorable political conditions. But of course, that position collapses into a version of answer one:

- Answer 1a: Judges should be instrumentalists when my allies control the judicial selection process but, during periods when my opponents dominate judicial selection, judges should be formalists. I will criticize my opponents for the selection of instrumentalist judges when they are in power but work for the selection of instrumentalists when my allies hold sway.

Answer 1a is no better than Answer 1. The hypocrisy of this position may be less apparent, because it is diachronic rather than synchronic, but hypocrisy it is. So, we are back to Answer 2, with a twist:

- Answer 2a: Judges should be instrumentalists regardless of who controls the judicial selection process. During periods when my ideological allies are out of power, I won't criticize my opponents for their instrumentalism, but I will criticize them for their ideology and values.

Of course, you may be willing to live with the positions outlined in Answers 2 and 2a. But you may not. If not, then you must either embrace Answers 1 and 1a or consider the alternative—a consistent formalism.

There is a larger and more subtle point to this exercise. The question and answers outlined above are designed to elicit an appreciation of the scope-of-decision problem. What do I mean by "scope of decision?" Sometimes our scope of decision is a single action—the decision in a single case or the appointment of a single judge. But not all issues take single actions as their scope of decision. The choice between instrumentalism and formalism has a very large scope of decision. When we are asking whether legal instrumentalism or

legal formalism is more attractive, we are not asking whether a particular judge should be a formalist or whether a single case should be decided instrumentally. The natural domain of decision for the choice between instrumentalism and formalism extends across the entire practice of law, including judicial selection and adjudication, although there may be room for carving out subdomains of legal practice that would be governed by special principles.

Let me try to express that same point in a different way, approaching the problem from a different angle. The decision between formalism and instrumentalism cannot be made on a case-by-case basis. Why not? Suppose you tried to decide in each case whether to employ formalist or instrumentalist methodology. How would you make that decision? You might make an ad hoc, all-things-considered judgment whether it would be better to be instrumentalist or formalist. But if you proceeded in that way, then you simply have made an instrumentalist decision. If you choose the formalist outcome on instrumental grounds, you are deciding in an instrumentalist fashion. It's the method, not the outcome that counts. The alternative would be to use formalist methodology to make the decision. But then you have made a formalist decision. Of course, the formal method may authorize the judge to employ instrumentalist techniques: for example, Congress may pass a statute that employs the term "reasonable" or a rule of procedure may employ a case-by-case multifactor balancing test. But even when formal methods use instrumentalist techniques, the outcome is derived from within formalism. Let me repeat the main point: *the decision between formalism and instrumentalism cannot be made on a case-by-case basis*. The scope of decision is larger: we are choosing a practice to apply to a whole domain.

The next step in the argument concerns the purpose of law as an institution. The point of law is to provide public standards for the resolution of disputes. We need law because private judgments about how disputes ought to be resolved will inevitably be in conflict. One reason for the conflict in private judgment is the problem of partiality. The parties to a dispute will frequently disagree about who should prevail on the basis of an all-things-considered ad hoc judgment about what is best because of self-interest and differences in perspective. But self-interest is not the only source of disagreement in private judgments about what resolutions of disputes are best. In a free society, there will be a plurality of views about morality, justice, and politics. These differences are crystallized in the political context by competing ideologies. Even if the problem of partiality could be overcome, the fact of pluralism would remain. So the point of law is to provide a public standard for the resolution of disputes.

How can law serve this function? What is required for the law to provide public standards for the resolution of disputes? First, legal standards for dispute resolution must be made publicly available.

And how can that be accomplished? The classic solution is to write them down. One mechanism for writing them down is codification. Write a code. Frame a constitution. Another mechanism is for judges to write opinions when they resolve disputes; this mechanism may require that someone else, for example treatise writers, summarize the cases to reduce the costs of access to the law.⁵⁵

There is a second requirement that must be satisfied for the law to provide public standards for the resolution of disputes. The meaning of the law—the principles that will guide its application to particular cases—must be the subject of substantial intersubjective agreement. Having a code is not enough. There must also be a relatively high degree of consensus about what the code means and how it applies.

Given these two desiderata—publicity of the laws and intersubjective agreement on their meaning—the choice between instrumentalism and formalism begins to come into focus. In a pluralist society characterized by problems of partiality, instrumentalist judging is likely to fail on both scores. First, given an instrumentalist practice, the real work of deciding disputes will frequently be done by the private judgments of adjudicators. The statute doesn't decide the case; rather, the judge's opinion about the purpose of the statute and what would constitute good policy does the real work. Second, given the fact of pluralism, instrumentalist standards of judging are unlikely to serve as the focus of intersubjective agreement. On the bench, the disagreements are characteristically seen as the product of the clash of ideologies. In the academy, similar disagreements may be characterized as theoretical differences—Nozick versus Rawls or Posner versus Dworkin.

By way of contrast, formalism seems to do a comparatively better job of satisfying the two desiderata. Indeed, the satisfaction of these desiderata explains much of the shape of contemporary formalism. Formalists emphasize the need for publicly available standards for the resolution of disputes. They are keen on the plain meaning of legal texts precisely because this methodology provides the best mechanism for making the law accessible. Likewise, the need for intersubjective agreement explains why formalists prefer *plain* meaning to meanings that are dependent on contestable judgments about purposes or intentions.

The argument of stage two is now complete. When we decide between formalism and instrumentalism, we are making a decision about which practice shall be applied to a domain—not how a particular case shall be decided or whether a particular judge shall be

⁵⁵ In societies in which there is a high degree of social cohesion, much of the law may be embodied in unwritten or customary law that is transmitted through the informal sanctions that enforce social norms.

appointed. The practice is a legal method and the domain is a legal system. When we make that decision, we need to consider the function of law, which is to provide publicly available standards for the resolution of disputes. Formalism aims at publicity and intersubjective agreement on the standards of legal judgment. Instrumentalism is the legal theory that subordinates those aims to another goal—producing the best outcome as determined by the private judgment of the legal actor, in other words, by the judge. Law must be substantially formalist to do its work.

Of course, this does not mean that the law will come tumbling down if a single judge decides a single case in an instrumental fashion. So long as the system is sufficiently formalist, the rule-of-law values of predictability, stability, and certainty can be achieved. The difficulty is not with one judge in one case. The difficulty is with the systematic adoption of a case-by-case approach that authorizes individual judges to decide instrumentally when their private judgment suggests that the advantages outweigh the disadvantages. This kind of case-by-case approach leads to the tyranny of small decisions. The rule of law is undermined, not by a single judge in a single case, but by the accumulation of many decisions in many cases. This is a real slippery slope—once we start to slide, it really is hard to stop.⁵⁶ If right-wing judges see left-wing instrumentalism, they will be tempted to respond in kind—and vice versa, of course. If one great social issue is resolved by judicial fiat in favor of one side of the ideological divide, it seems quite rationale to retaliate in kind when the balance of power shifts. If the balance of power shifts back and forth with some frequency, political and judicial actors may see the system as a prisoners' dilemma, with ideological judging and judicial selection as the dominant move. In other words, even a little instrumentalism may be a dangerous thing.

3. *Stage Three: Deep Justifications for Formalism*

So far, the case for formalism has been relatively shallow. I have avoided the deep waters of moral and political philosophy. This strategy of avoidance serves an important purpose. The question of whether the unenumerated rights cases should be considered authoritative for neoformalist reasons can easily lead us to the more general question of whether legal formalism is consistent with more general views about political morality and ethics. And from there it is just a hop, skip, and a jump to debates in political and moral philosophy about which theories of political morality and ethics are best

⁵⁶ See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (writing in detail about the concept of a "slippery slope" argument).

or correct. Obviously, we'll never get anywhere if we try to tackle those big questions on their merits. Nonetheless, the question of ultimate justification is a fair one. After all, if legal formalism is inconsistent with the best or correct views about political morality and ethics, then it should be rejected.

In this essay, all I can really do is offer promissory notes. I've already gone some distance towards the articulation of a consequentialist case for legal formalism. The argument in stage one provides consequentialist reasons for rejecting legal instrumentalism. The argument in stage two gives reasons why the scope of decision should be whole practices rather than individual cases. These two arguments can be combined in predictable ways with consequentialist premises about moral philosophy. The deontological case for legal formalism is likely to begin from a different starting point. Deontological formalists are likely to emphasize the idea that individuals have a right to have their dispute decided in accordance with the existing law; consequentialist judging, with an emphasis on the *ex ante*, inevitably involves the violation of these rights when it requires a change in the rules, in other words, when it makes a difference. And the aretaic case for legal formalism would begin in an entirely different place—with the virtue of justice. In the language of virtue jurisprudence, the case for legal formalism begins with the notion that a virtuous judge must be *nomimos*—respectful of the laws and the widely-shared and deeply-embedded social norms of her community.

E. A Neoformalist Theory of Constitutional Law

For the sake of argument, let's assume that the case for neoformalism is sufficiently strong to be taken seriously. What are the implications for constitutional law? What would a neoformalist theory of constitutional law look like? These are not easy questions: American constitutional law is a tough nut for formalists to crack. *Why?* First, the Supreme Court's constitutional jurisprudence has always included prominent realist elements. Second, the United States Constitution contains a variety of abstract and general provisions—"executive Power,"⁵⁷ "freedom of speech,"⁵⁸ etc.—which seem to invite the judges to invest their own ideology or values into the process of constitutional interpretation. In other words, we are familiar with a realist practice of constitutional interpretation and have a difficult time imagining a formalist practice. But constitutional realism is not inevitable. We can imagine a much more formalist style of constitutional interpretation—one that takes the constitutional text and stare

⁵⁷ U.S. CONST. art. II, § 1, cl. 1.

⁵⁸ *Id.* amend. I.

decisis seriously. Consider the following six principles as one version of constitutional formalism:

Constitutional Formalism, Principle One, Precedent: Judges in constitutional cases should follow an adequate and articulated doctrine of stare decisis. Among the features of such a doctrine is that even courts of last resort (i.e., the United States Supreme Court) should regard their own constitutional decisions as binding, overruling prior cases (or limiting them to their facts) only when the precedents themselves require this result.

Constitutional Formalism, Principle Two, Plain Meaning: When the precedents run out, judges should look to the plain meaning of the salient provisions of the constitutional text.

Constitutional Formalism, Principle Three, Intratextualism and Structure: When the text of a particular provision is ambiguous, judges should construe that provision so as to be consistent with other related provisions and with the structure of the Constitution as a whole.

Constitutional Formalism, Principle Four, Original Meaning: If ambiguity still persists, judges should make a good faith effort to determine the original meaning, where original meaning is understood to be the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters) (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.⁵⁹

Constitutional Formalism, Principle Five, Default Rules: And when ambiguity persists after all of that, then judges should resort to general default rules that minimize their own discretion and maximize the predictability and certainty of the law.

Constitutional Formalism, Principle Six, Lexicality and Holism: The first five principles are to be understood as lexically ordered in the following sense: Judges should order their deliberations by the first five principles, attempting to structure their conscious deliberations by attending to the features highlighted by each principle in order before proceeding to the next principle. But this requirement does not entail that judges either will not or should not recognize that the considerations thematized by

⁵⁹ This formulation is an adaptation of Grice's famous distinction between speaker's meaning and sentence meaning. See Paul Grice, *Utterer's Meaning and Intentions*, in *STUDIES IN THE WAY OF WORDS* 86 (1989) (detailing the distinction between what the speaker says and what the written language of the speaker's message conveys); Paul Grice, *Utterer's Meaning, Sentence Meaning, and Word Meaning*, in *STUDIES IN THE WAY OF WORDS*, *supra* at 117, 118 ("I wish to make within the total signification of a remark: a distinction between what the speaker has said . . . and what he has implicated . . ."); see also Lawrence B. Solum, *Constitutional Texting* 5 (May 16, 2006) (unpublished manuscript, on file with author) ("We have to live with their text message. Can't we choose what meaning to assign it? Or get involved in high politics and choose the judges who choose the meaning? Or choose the judges who choose the *unmeaning*—after all, it's just a text message."); Richard E. Grandy & Richard Warner, *Paul Grice*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2005), <http://plato.stanford.edu/entries/grice> ("Grice contends sentence and word meaning can be analyzed in terms of what speakers . . . mean. Utterers' meaning . . . can be analyzed without semantic remainder in terms of utterers having certain intentions.").

one principle may be relevant to deliberations explicitly organized by another principle. Thus, the interpretation of a precedent will sometimes (perhaps always) require consideration of the text, structure, original meaning, and so forth.⁶⁰ These are principles, not rules, and lexical ordering operates as a methodological heuristic and not as a rigid rule.

These six principles are appropriate to the commitments of rule-of-law neoformalism, but they do not represent the only form that constitutional formalism could take.⁶¹ In particular, the first principle affirms the role of stare decisis but does not specify that role in detail. We now have the theoretical resources in place to tackle that task.

IV. A NEOFORMALIST CONCEPTION OF CONSTITUTIONAL STARE DECISIS

The Supreme Court should consider itself bound by its own prior decisions—that's my claim. I don't think anyone else is making this claim, and that doesn't surprise me. The mainstream of constitutional theory is antiformalist—opposed to hard constitutional law whether it is derived from the text, history, or precedents. Originalists may be formalists, but they too are usually opposed to really strong stare decisis; if Supreme Court decisions were considered binding, it would be very difficult to "restore the lost constitution."⁶²

Nonetheless, it is surely worth investigating how neoformalism might articulate a conception of constitutional stare decisis. That's the enterprise of this part of the article.

A. Distinguishing Realist and Formalist Approaches to Stare Decisis

The best place to start is with the contrasts between realist and formalist approaches to precedent. Two distinctions are important: first, the difference between instrumentalist consideration and binding legal force, and second the opposition between the legislative conception of holdings and the idea of holding as *ratio decidendi*.

⁶⁰ Lexical ordering is a guideline for structuring deliberation and is not inconsistent with the observation that interpretation involves what Gadamer called the hermeneutic circle. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 235–36, 257–58 (1986) (describing the concept of the "hermeneutic circle").

⁶¹ An actual practice of constitutional neoformalist judging would need to take into account the differences among the various versions of rule-of-law formalism. Some differences may be conventional; with respect to conventional differences, one might reasonably expect that judicial practice will converge over time. Other differences may be more substantive, reflecting different judgments about how best to achieve the rule of law or about the appropriate balance between the rule of law and other values. With respect to these differences, it seems utopian to hope for perfect agreement. Rather, one would expect that different neoformalist judges and courts would have distinct styles, reflecting their differing conceptions of the best version of neoformalism.

⁶² The allusion is to the title of Randy Barnett's book. BARNETT, *supra* note 22.

1. *Instrumentalist Consideration versus Binding Force*

What role should precedent play in the constitutional decisions of the Supreme Court? The conventional view is that the Supreme Court should afford its own prior decisions a presumption of validity. *What does that mean?* One possibility would be that this “presumption” is a mere “bursting bubble.”⁶³ Precedents will be followed until and unless there are good reasons to depart from them. If this were the only role for precedent, then it would be virtually no role at all—it takes only a slender needle of flimsy argument to burst a bubble. Likewise, the presumption view is virtually meaningless if it only decides cases in which the arguments for and against sticking with the precedent are in equipoise. Of course, there will be some cases in which the arguments for and against a change in the law are perfectly balanced, but such cases are likely to be rare.

The presumption view of the force of precedent is implausible. A more reasonable view is that precedents are entitled to weight because of the costs of legal change. One such cost is associated with reliance and expectations. Individuals and institutions may fail to receive expected benefits or incur avoidable costs. Another set of costs may be related to the implementation of new legal rules; at a minimum, the treatises will need to be rewritten. The instrumentalist view of precedent conceives of the decision whether to overrule existing precedent as simply adding another factor to the balance of factors that are relevant to the selection of an optimal rule. From the realist perspective, precedents should be overruled when the benefits of overruling exceed the costs and precedents should be followed when they already provide the optimal rule or when the costs of changing the law are greater than the marginal benefits the better rule would provide.

The instrumentalist view of precedent is peculiar, because it denies that Supreme Court precedents should be treated as legally authoritative by the Supreme Court itself. One way of drawing out this

⁶³ For discussion of the “bursting bubble” theory of presumptions, see D. Craig Lewis, *Should the Bubble Always Burst? The Need for a Different Treatment of Presumptions under FRE 301*, 32 IDAHO L. REV. 5, 6 (1995) (“Under the ‘bursting bubble’ approach a presumption does not affect the burden of persuasion on an issue. Instead, it serves only to shift to the party opposing the presumption the burden of coming forward with some substantial evidence contradicting the presumed fact. When that burden is met, the ‘bubble bursts’—the presumption disappears, and the factual issue addressed by the presumption is decided based solely on the evidence presented concerning the issue.”). See also JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336 (Boston, Little, Brown & Co. 1898) (“[T]he presumption . . . goes no further than to call for proof of that which it negatives . . .”); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2491, at 304–07 (James H. Chadbourne ed., 1981) (explaining that the effect of a presumption is to compel the jury to reach a certain decision “in the absence of evidence to the contrary from the opponent.”).

peculiarity is by comparing the situation in which there is a prior Supreme Court precedent on a particular point of law to the situation in which there is no prior decision and a new case presents a novel issue of law. Of course, it is possible that the former case involves greater reliance interests than the latter case, but this is not necessarily so. It might well be that the relevant individuals and institutions have made plans based on guesses about the Supreme Court's likely decision or that they have made plans for no good reason at all. From the instrumentalist perspective, reliance interests are valued in terms of consequences of disappointed expectations. Stare decisis is simply one mechanism by which reliance interests could be generated. The point is that the instrumentalist conception reduces the force of precedent to a contingent policy concern—one that may drop out entirely in some cases.

What is the alternative? The formalist conception of stare decisis is based on the idea that precedents are legally-binding or authoritative. That is, a formalist believes that precedents provide what are sometimes called "content independent" or "peremptory" reasons for action. Of course, the formalist conception of precedents as legally binding is quite familiar, even in our realist legal culture. When it comes to vertical stare decisis, the conventional notion is that the decisions of higher courts are binding on lower courts. A court of appeals may not decide to overrule a Supreme Court decision because the advantages of the better rule outweigh the costs of changing legal rules. The idea of binding precedent also operates at the level of intermediate appellate courts. Three judge panels of the United States Courts of Appeal are bound by the prior decisions of the court; they are not free to decide that the benefits of a better rule outweigh the benefits of adhering to the law of the circuit.

The neoformalist conception of stare decisis is based on the idea that precedents are more than mere presumptions and that they have binding legal force that cannot be reduced to the instrumental reasons for adhering to them.

2. *Legislative Holdings versus Ratio Decidendi*

There is a second contrast between realist and formalist conceptions of precedent. Realist courts are inclined to view their power as legislative in nature. This is clearest in the case of courts of last resort, as is the Supreme Court of the United States in constitutional cases. This leads to the emergence of what might be called the *legislative holding*, in which the opinion of the Court includes a phrase that may begin, "We hold that . . ." and then states a broad rule that decides the case at hand but may go far beyond its facts. Lower courts may be inclined to treat legislative holdings as authoritative. For one thing, courts of last resort have a power that real legislatures lack:

they can actually intervene in particular cases and address direct orders to the lower courts. Legislative holdings blur the familiar distinction between *dictum* and holding. From a realist perspective, a firm statement of the rule joined by a clear majority may constitute good evidence of the court's future actions—even if the statement is unnecessary to the resolution of the dispute at hand.

Even formalists may be tempted by the practice of legislative holdings;⁶⁴ after all, they do facilitate predictability and certainty about the content of the law. There are, however, formalist reasons for adhering to the traditional view of stare decisis—that opinions are binding only insofar as they decide the case before the court. This is the traditional theory of the *ratio decidendi*, “the reason for the decision,” which is limited by the legally salient facts of the case that is decided. Given this traditional view, case law is slow moving. It takes many decisions to create a general rule, and many more to change one. Given the realist practice of “legislative holdings,” a single case could create a right to abortion with an elaborate three trimester scheme. And a single case could abolish that right. Given the formalist alternative, a right to abortion could only have been created through many decisions; once established, it would take many more to modify or extinguish that right.

3. *Binding Force and Ratio Decidendi in Tandem*

Before proceeding any further, it is worth noting that the two distinguishing features of the realist idea of precedent work in tandem. When legal rules are emerging, they are built slowly, piece by piece. Once established by a body of precedent, a legal rule can only change slowly. Each alteration must be consistent with the binding force of prior decisions. New cases can only move the law by small steps, whose limits are demarcated by the facts which define *ratio decidendi* of the new case. Working in tandem, these two features of the neoformalist doctrine of precedent operate to create predictability, certainty, and stability in the law—not by declaring broad rules in single cases but through the accumulated decisions of many cases over time.

B. *Constitutional Stare Decisis as Institutional Self-Binding*

At this point, there is likely to be some theoretical resistance to the neoformalist conception of constitutional stare decisis. Is it even

⁶⁴ The phrase “legislative holding” is familiar, but little used in academic legal writing. See, e.g., Note, *Implementing Brand X: What Counts as a Step One Holding?*, 119 HARV. L. REV. 1532, 1552 (2006) (using the term to describe the nature of Supreme Court holdings as a result of a limited docket).

possible for the Supreme Court to bind itself? This question is illuminated by contrasting the situation of the Supreme Court from that of the lower federal courts with respect to vertical stare decisis and three-judge panels of the court of appeals with respect to horizontal stare decisis with respect to the law of circuit. The obvious contrast concerns institutional mechanisms for the enforcement of the binding effect of precedent. If a lower court disregards a Supreme Court precedent, the Supreme Court can reverse, summarily if necessary. If a three-judge panel ignores the law of the circuit, the whole circuit can reverse en banc, acting as a sort of internal appellate court for this purpose. But if the United States Supreme Court fails to follow its own prior decisions, no higher court will reverse them. Without an institutional enforcement mechanism, does it even make sense to say that the Supreme Court could treat its own prior decisions as "binding?"

This is a familiar problem in general jurisprudence. The conventional solution to this problem is what H.L.A. Hart called "the internal point of view."⁶⁵ The notion that a norm can be law only if it is enforced by someone other than the addressee of the norm has an obvious regress problem. If the Supreme Court cannot bind itself to precedent, how can it bind itself to the Constitution or federal statutes? Of course, some extreme realists might deny that the Constitution is law, but this is an extreme and unusual position, even in this realist age.

C. Qualification One: Formalist Reasons for Overruling Precedent

I am arguing for the idea that the Supreme Court should regard its own prior decisions as binding. A simple version of this idea might regard binding constitutional precedents as permanent fixed points, subject only to the modifying force of constitutional amendment. That is not my view. I shall argue that the idea of a permanent fixed point is not the best expression of a neoformalist conception of constitutional stare decisis. Instead, precedents can be overruled (or confined to their facts) for formalist reasons, including because a precedent is no longer consistent with precedent.

"Overruling precedent for formalist reasons"—*how would that work?* Some will detect a faint odor of paradox in the claim that

⁶⁵ See H.L.A. HART, *THE CONCEPT OF LAW* 54, 198 (1961) (articulating the dependency of a legal system upon voluntary allegiance); see also NEIL MACCORMICK, *H.L.A. HART* 45 (1981) (noting the value Hart places in "[t]he observance of shared or common rules"); Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 *SMU L. REV.* 167, 173 (1999) (differentiating Hart's internally binding "rules" from less consequential "habits"); Dennis Patterson, *Explicating the Internal Point of View*, 52 *SMU L. REV.* 67, 74 (1999) ("Hart was right to look for the uniqueness of law . . . in the intersubjective relations of legal actors.").

precedents can be overruled on the basis of precedents. Wouldn't really strong stare decisis mean that precedents are "fixed points" which can *never* be overruled? And how could precedents be overruled on the basis of precedents?

The idea that precedents have binding force does not entail that precedents must be understood as permanent fixed points. The core idea of a neoformalist conception of *constitutional* stare decisis is that precedents are legally-binding. But a legal norm can be both binding and subject to change. And one way that a binding precedent can be changed is through the force of other precedents. The argument to establish this conclusion can be made in three steps.

Step One: Binding Precedents Can be Overruled and Still be Binding. This claim is actually quite simple and uncontroversial. Take the case of a Supreme Court decision that is binding on the lower federal courts because of the doctrine of vertical stare decisis. The idea that such decisions have binding force is uncontroversial, but so is the idea that a Supreme Court decision can be overruled or modified by other legal norms. The clearest case would be a constitutional amendment. *Chisholm v. Georgia* was binding on the lower federal courts, but it was overruled by the Eleventh Amendment.⁶⁶ Similarly, the Supreme Court's interpretation of a statute can be overridden by another statute. We have no trouble conceptualizing the notion that binding precedent can be modified or nullified by other authoritative legal materials.

Step Two: The Legal Norms Generated by Stare Decisis Can Change Over Time. This claim is just a teensy weensy bit controversial. Sometimes we think of holdings as "judicial legislation"—that is, we view the statement that follows "We hold that X" establishes a legal norm with content X. But this is not the neoformalist conception of the way in which precedents generate legal norms. Individual cases have holdings that are limited to their legally salient facts. Only a line of cases can develop a rule that approximates legislation. That means that the doctrine of precedent allows for the evolution of the law—a point that is basic to almost every theory of common law. As precedents are added to a line of authority, the legal norms created by the line can change, becoming broader, wider, deeper, and more articulated. Isolated holdings become general rules which acquire exceptions. One way of establishing this point is via the familiar maxim: "The law works itself pure."⁶⁷

Step Three: The Accumulation of Precedent Can Create a Legal Rule that Invalidates a Prior Holding. Once again, this is basic stuff. I'm not do-

⁶⁶ 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

⁶⁷ *Omychund v. Barker*, 26 Eng. Rep. 15, 23 (Ch. 1744) (argument of solicitor-general, the future Lord Mansfield).

ing anything fancy here. A case is decided, subsequent cases distinguish the prior cases. Early in the development of the line of authority, the original case is taken as representing a rule and the later cases represent exceptions. As the exceptions grow, the field is reversed and the original case is now seen as an exception. But as time goes on, the exception is confined to a narrower and narrower zone of circumstances. Eventually, it becomes clear that the zone has narrowed to the vanishing point and the original case is now seen as a "mistake"—which once could but no longer can be reconciled with the whole line of cases. Finally, a court will acknowledge that the original case is "overruled" or "confined to its facts."

Does it make a difference whether we say that a precedent is overruled or confined to its facts? Legal realists are inclined to view these two descriptions as functionally equivalent, and there is a sense in which this realist insight is correct: in either case the decision loses all generative force. But within neoformalism, there is a point to using the old-fashioned "confined to its facts" locution. *What point is that?* When we say that a precedent is "confined to its facts," we emphasize the idea that holdings are not legislation. The holding of a case is always the product of the nexus of fact and law in a particular dispute. When we say "confined to its facts," we are making the boundedness of precedent explicit. When we start talking about holdings being overruled, we may be tempted to analogize to the repeal of a statute—exactly the wrong idea. I don't think it matters much whether we use the language of overruling or the language of confining, as long as we are clear what we *do* mean and what we *don't*!

D. Qualification Two: Unlawful Decisions, Antiformalist Precedents, and the One-Way Ratchet

There is another qualification to the idea that precedents are binding. This qualification is complex. It begins with the idea of "unlawful decision" and then proceeds to consider a very thorny question: whether antiformalist precedents should be considered as lawful and binding, and if so, in what circumstances.

1. Unlawful Decisions and the Limits of Binding Force

Let's begin with a fairly obvious point. The idea that precedent should be binding can be qualified by distinguishing between "lawful" and "unlawful" decisions. Not just anything that the Supreme Court could issue would constitute a lawful decision. Let's illustrate this point with an example. Sometimes absurd examples are the best ones. Here's a doozy. Suppose that in *Bush v. Gore* the Supreme Court had issued a decision that declared that neither Bush nor Gore had been elected and that for reasons of policy and national security,

the Court had decided to make Chief Justice Rehnquist the President of the United States. It is hard to imagine how this decision could be justified as lawful—as within the legal authority of the Supreme Court. Similarly, the Supreme Court would lack legal authority to decide a case in which no appeal or writ of certiorari was ever filed.

If the Supreme Court were to render an unlawful decision, paradigmatically, a decision beyond the outer boundaries of its authority, then the unlawfulness of the decision would be a good reason, a formal legal reason, to deny the decision binding precedential force. There is no reason why neoformalism should be committed to giving unlawful decisions the same binding force as lawful decisions.

2. *The One-Way Ratchet and Self-Defeating Formalism*

At this point, I'm going to back up and start from a new angle by exploring a formalist argument against precedent—which is sometimes called “the ratchet” or “the one-way ratchet.” The argument called “the ratchet” is actually a cluster of related arguments. All of the arguments share a common structure. Let me begin with a fairly standard statement of the argument:

Suppose that the conservative critiques of the Warren Court are correct—that the decisions of the Warren Court (or at least many of them) cannot be defended on formalist grounds. What then would be the effect of a return to formalism? Why, it would lock in the realist decisions of the Warren Court era. But it would do more than that. Even if formalist judging were to prevail for years or decades, the pendulum might swing back to realism at some point in the future. But the realists of the future will not be constrained by the formalist decisions of their predecessors. And hence during future periods of realism, the law would be distorted by yet another increment.

You can see where the argument goes. If formalists respect precedent and there are alternating periods of realism and formalism, then we have a ratchet. For emphasis, we might use the redundant phrase, one-way ratchet. If this argument were correct, then it might be argued that formalist theory should not incorporate a strong doctrine of precedent, because a strong doctrine would make formalism self-defeating. Formalism would actually operate to entrench realist decision making—if we assume that judicial selection will result in periods during which realist judges dominate the courts.

How can formalists avoid the ratchet? Consider the following two options: (1) rejection of the doctrine of stare decisis, and (2) reservation of full stare decisis effect for *formalist* precedent.

The first possibility is to eschew precedent. That is, formalists could accept a sort of realist attitude about precedent in order to achieve formalist goals. For example, originalists might reject the doctrine of stare decisis in order to accelerate the pace at which the

Constitution in the courts approaches the original meaning. There are, however, difficulties with this approach. Originalists are unlikely to embrace the idea of an originalist "big bang," in which the original meaning was restored at once. Such a big bang might impose intolerable costs—requiring, for example, a substantial realignment of state and federal authority and a restructuring of the separation of powers. As an alternative, originalists might adopt an instrumentalist attitude about precedent—changing doctrine in the direction of the original meaning at a gradual pace by balancing the value of restoration with costs of constitutional change. This avoids the disruption that would accompany a "big bang," but also puts every case in an instrumentalist frame. If the goal is formalist judging, then instrumentalism about precedent is a poor means.

Wholesale rejection of precedent would create another problem, which we might call doctrinal instability. Sensible formalists need not deny that some constitutional questions are close, even if one is committed to textualism and originalism. Without constitutional stare decisis, there would be no guarantee of stability and predictability of constitutional law. Each time a constitutional issue reached the Supreme Court, the Justices would be obligated to consider the question afresh and shifting opinions or changes in the Court's composition could result in the law shifting back and forth. For all of these reasons, the complete rejection of constitutional stare decisis seems undesirable.

The second alternative is for formalists to distinguish between what we might call "formalist precedents" and "realist precedents." Prior decisions which rest on formalist grounds could be given full binding force, whereas precedents that rest on instrumentalist grounds could be treated as entitled only to presumptive validity. This option avoids the one-way ratchet: instrumentalist precedents are not locked in. Giving stare decisis effect to formalist precedents would create stability and predictability as the body of binding formalist precedent grows.

3. Precedent About Precedent: Formalism in a Realist Era

I am going to back up yet a third time and tackle this problem from yet another angle. It might be argued that a formalist approach to precedent is inconsistent with the Supreme Court's own realist practice. In other words, it might be argued that the Supreme Court's modern cases are precedents establishing a rule that precedents are not binding. Of course, the instrumentalist cannot endorse this argument, because the argument relies on a formalist premise. And the formalist need not accept the proposition that instrumentalism can entrench itself by formalist methods; after all, that claim

would be internally inconsistent. Once these points are in place, we are in a position to appreciate yet another reason for formalists to be skeptical about treating instrumentalist precedents as formally binding. Instrumentalist decisions just aren't constructed in a way that they can be considered binding; because of the instrumentalism built into the decision, the case simply cannot bear the burden of being treated as binding law.

But the fact that instrumentalist precedents are poor candidates for treatment as binding law does not mean that they are irrelevant. Given the realist nature of contemporary legal practice, any movement towards a neoformalist conception of constitutional stare decisis will inevitably encounter transition problems. In the actual world, the transition to formalism could only happen gradually. Most judges have strong instrumentalist habits, and old habits die hard. Even if judicial selection processes overwhelmingly favored formalist judges, it would still take a generation for the bench to turn over. And even if the bench were occupied entirely by formalist judges, the work of reshaping all of American law would surely take another generation.

Given the practical realities that put breaks on any movement towards constitutional formalism, it is inevitable that instrumentalist precedents will persist for quite some time. The law may work itself pure, but the work is done one case at a time.

E. Three Objections and Answers

Before we wrap up the elaboration of a neoformalist conception of constitutional stare decisis, let's briefly examine three objections: (1) the objection that precedent is inconsistent with the authority of the Constitution; (2) the objection that neoformalism is unfeasible or utopian; and (3) the objection that stare decisis would lock in evil precedents.

1. The Objection that Precedent is Inconsistent with the Authority of the Constitution

Some originalists may object to constitutional stare decisis on the basis of the notion that *only* the Constitution itself should be considered to be legally authoritative. If the precedents are consistent with the meaning of the Constitution, then the doctrine of stare decisis doesn't make a difference. If the precedents are inconsistent with the Constitution, then judges are obligated to follow the Constitution itself, not the precedents—so the argument would go.

There is something to this argument. Affording strong stare decisis effect to precedents that disregarded the Constitution would, in fact, be to elevate the status of judicial decisions above the Constitu-

tion itself. And such elevation would be inconsistent with the formal rule that the Constitution is the supreme law of the land. In addition, giving precedents the power to overrule the Constitution would create questions of legitimacy. It is unclear whether there is any theory that would legitimate the assignment of a power to overrule the Constitution to the Supreme Court.

But these same problems do not exist if we are dealing with precedents that are based on formalist legal reasoning that aims at the interpretation and application of the original meaning of the Constitution. Such decisions do not involve an implicit claim that the Supreme Court may overrule or modify the Constitution; quite the contrary, they assume the opposite.

Of course, it is possible to disagree about the meaning of the Constitution. We may come to believe that a prior decision—although formalist in method—involved a mistake. The question then becomes, can we legitimately give *stare decisis* effect to a formalist decision if we believe the decision is mistaken? The answer to this question is “yes, we can.” Once we are operating within the realm of formalist precedents, the question is not “Are we respecting the authority of the Constitution?” but is instead, “What is the institutional mechanism by which disputes about the meaning of the Constitution are to be settled?” At one extreme, we can imagine that we would entitle each and every government official the authority to decide for herself what the Constitution means. The problems with that system are obvious: it would create uncertainty, unpredictability, and instability that would undermine the rule of law. Various other possibilities exist. We could give every judge the power to interpret the Constitution *de novo*, with no horizontal or vertical *stare decisis*. That system would not be as chaotic as one which gave the authority to every official—high and low—but it would, nonetheless, be a real mess. We could imagine a system in which every Supreme Court Justice has interpretive authority, but a doctrine of vertical *stare decisis* binds the lower courts. That system would be more stable, but would still involve shifts in constitutional meaning as the composition of the Court changes and as individual Justices change their minds. And at the other extreme from total hermeneutic polycentricism would be a system in which the decisions of the Supreme Court which respect that text and original meaning are given binding effect, granting earlier Supreme Courts the power to constrain the interpretations made by later Supreme Courts. This final option maximizes the rule-of-law values of stability, predictability, and certainty.

2. *The Objection that Neoformalism is Unfeasible or Utopian*

The final objection expresses what for many readers will be a nagging doubt. Is there any point in discussing a neoformalist concep-

tion of stare decisis given political reality? Isn't neoformalism "pie in the sky?" Even if neoformalism is a "theoretical possibility," is it a "practical impossibility?"

I take the feasibility question to be an important one, but before I answer this objection I should note that feasibility is not a conversation stopper—at least not so far as legal theory is concerned. *Why not?* One way of answering this question draws upon the familiar distinction between "ideal" and "no ideal" theory.⁶⁸ Even if we were convinced that current political realities make neoformalism impracticable, we still would have good reason to think about an ideal constitutional system.

Another way of answering the feasibility question would be to argue that neoformalism is not utopian but represents a live option for constitutional practice in the actual world. This is not the occasion to develop that argument in full, but we can preview the way the argument might go. Let's begin with the intuitive reasons for suspecting that formalism is pie in the sky. One such reason might proceed from a theory of human nature. It might be thought that actual world judges are simply incapable of following precedent when it conflicts with their own policy preferences. No doubt, there are some judges who are incapable of restraining themselves. Neoformalist judging will be feasible, in this sense, so long as there are judges who are capable of self restraint. It's possible that someone can produce evidence that humans simply are incapable of following the law and suppressing their own preferences, but absent such evidence, the case for the infeasibility of neoformalist judicial practice has not yet been made.

But even if judges are capable of fidelity to law, this merely moves us over to the domain of judicial selection. It might be argued that the judicial selection process is tilted towards the selection of ideological judges, and hence that it is unrealistic to believe that formalist judges could be selected by our actual politicians. Given current political circumstances, this might be right. It's true that many politicians profess allegiance to legal formalism. What could be more platitudinous than a politician saying that judges shouldn't make the law? But this may be "cheap talk." Underneath the formalist platitudes, it may be that cynical politicians not only know that almost all

⁶⁸ See JOHN RAWLS, A THEORY OF JUSTICE § 2, at 7–8 (1971) (defending the value of principles of justice that may not work for all situations); Legal Theory Lexicon 011: Second Best, Legal Theory Lexicon, http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_1.html (Nov. 23, 2003, 10:26 EST) (describing the theory as follows: "[W]hen the first-best policy option is unavailable, then normative legal theorists should consider second-best solutions.").

judges are realists but covertly want to select realist judges who match their own policy preferences.

Is it feasible for the judicial selection process to produce a formalist judiciary? Consider two scenarios, each of which expresses a different route by which political actors might come to select formalist judges. The first scenario begins with the assumption that the politicians who select judges today pay lip service to the value of formalism but actually want realist judges who share their political preferences. In this case of the federal system, this assumption means that liberal Democrats want liberal judges, conservative Republicans want conservative judges, and so forth. And let's further assume that they want judges who will vote their politics, for example, that all politicians actually want realist judges. But these preferences are not set in stone. One can imagine that the political actors might come to believe that it was actually in their interest to select formalist judges. *How might such a belief form?* The answer to this question can begin with the idea that even the most cynical of politicians are likely to believe that what we might call "ultrarealist judging" could have disastrous consequences. Imagine a world where judges openly decided each and every case based on the political impact. Elections were always reversed when a majority of the court of last resort wanted the other candidate to win. The political affiliations of the lawyers determine the outcome when the case itself has no big political consequences. Presumably, even thoroughgoing realists see the value of the rule of law and formalist constraint in this sort of extreme case. If this is correct, then political actors already have a preference for at least a modicum of formalism. And if this is so, then we can also imagine that politicians could prefer even more formalism if the case were made that more formalism produces more net political benefits than costs. Of course, this case may be difficult in the current political context: for example, the politics of *Roe v. Wade* make it difficult for Democrats to nominate or confirm judges who will overrule *Roe* and difficult for Republicans to nominate or confirm judges who will consider themselves bound by *Roe*. So the case for the political value of formalism would have to rest on the idea that politicization of the judicial selection process and of the judiciary leads to very bad consequences—that politicizing *Roe v. Wade* makes it difficult to avoid the politicization of *Bush v. Gore* and a continuation of this trend heads us in the direction of ultrarealism and the degeneration of the rule of law. If this case were convincing, then political actors might come to prefer the selection of formalist judges.

The second scenario is based on a different premise. Let's assume that politicians care only (or mostly) about short run political consequences. But now, let's make the further assumption that judicial selection requires the cooperation from a wide range of political opinion that includes the political center. In the case of the federal

system, this assumption seems fairly realistic, since confirmation requires the cooperation of at least 51 members of the Senate. Even if the presidency is held by someone at the political extremes, the fifty-first vote required for confirmation must come from the so-called "median Senator," who by definition is at the center of the Senate's ideological spectrum. If selection requires the cooperation of actors with a wide range of political beliefs, then it follows that the judges who are selected cannot match the political ideology of all the selectors. Of course, when political actors decide whether to nominate or confirm, their decision always takes place against the backdrop of the status quo. In this case, the status quo is the judiciary as it exists when the vacancy arises and the legal outputs that the status quo judiciary would create. A rational political actor will only cooperate in the selection of judges who either leave the status quo intact or who move the status quo towards the actor's own political preferences. Formalist judges who respect stare decisis are judges who are unlikely to change the status quo. So, formalist judges are almost always within the feasible choice set for the judicial selection process—even if we assume that political actors are motivated entirely by the desire to influence the decisions that judges will make. In a wide variety of possible political configurations, maintaining the status quo will be the only possible outcome, because there will be no change from the status quo upon which the President and 51 members of the Senate can agree.

I have presented the two scenarios as alternatives, but they could be combined. That is, political actors might come to see that formalist judges both preserve the political status quo and that they create rule-of-law benefits. Both perceptions could work together to create a preference for the selection of formalist judges.

At this point, I need to make the nature of my claim explicit. I am not trying to argue that the selection of formalist judges is inevitable or even likely. Rather, my aim is to fend off the claim that formalism is "pie in the sky" or impossibly utopian. In order to meet this objection, I need to show that some potential judges are capable of being formalists and that judicial selection systems are capable of choosing formalist judges. That is, I need to make a *prima facie* showing that formalism is possible. If I have made such a showing, then the burden shifts to those who make the opposite claim. They need to provide arguments that establish the impossibility of formalism.

3. The Objection from the Existence of Evil Precedents

Let's assume that the rule of law provides very great benefits. We can nonetheless imagine that the benefits of the rule of law can be outweighed if the substance of the legal status quo is sufficiently bad. In particular, we can imagine circumstances in which a strong doc-

trine of constitutional stare decisis would lock in an *evil* precedent—*Plessy v. Ferguson*,⁶⁹ for example. Formalism is faced with similar problems with other sources of legal evil, e.g., evil statutes or evil constitutional provisions. What can formalists do about the problem of evil?

Let's begin by noting that the problem of evil can be posed for any legal theory. Formalists must face the problem of evil when the sources—the authoritative legal texts—require evil results, and a departure from formalism is a feasible option for avoiding evil. But realists must face the possibility of evil instrumentalist judges under conditions where a move to legal formalism is the only feasible technique for constraint.

Let's also note that there is no guarantee that realism about precedent will avoid the problem of evil. It will depend on the circumstances. For example, the harms done by an evil precedent could be made worse, rather than better, by a move from formalism to instrumentalism. After all, unbound evil instrumentalist judges may do even more evil if they were released from the constraints of the rule of law.

Given these considerations, it is clear that from the possibility of evil precedents, it does not follow that we must prefer realism to formalism as our approach to constitutional stare decisis. It is a complex empirical question whether realism or formalism as a general method for constitutional adjudication will produce more evil.

Nonetheless, it seems fair to assume that formalist judges committed to a strong doctrine of constitutional stare decisis may someday face the problem of an evil precedent. Of course, the problem of evil precedents will be different in different circumstances. In the case of an evil precedent that is embedded in a wicked legal system, the best course of action will depend entirely on how one can do the most good. One might join the resistance or attempt to undermine the system from inside. A neoformalist theory of constitutional adjudication simply need not address this case. Thoroughly wicked societies are special cases.

But what about the case of a wicked precedent embedded in a legal system that is reasonably just as a whole. This is a difficult problem, and the remarks that I offer here are tentative rather than final. I am inclined to think that in this case, as in the case of a wicked legal system, the case of evil precedents is different from the case of precedents that are merely wrong or unjust. The value of the rule of law, although great, can be trumped by true evil, with the consequence that judges are morally released from the legal obligation to regard binding precedents as peremptory reasons for actions. The question

⁶⁹ See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" accommodations for African-Americans).

then becomes what action will best avoid the evil while doing the least damage to the rule of law. Several options might be considered. One is frank acknowledgement of the problem, a decision that admits that the law is being avoided for moral reasons. Another option is obfuscation, a decision that pretends the avoidance of evil is legally sanctioned. Yet another option might be a decision that complies with the evil precedent, but limits the damage done as much as the law allows. One can imagine several other possible courses of action. The point is that if one is released from the obligation to follow precedent, one then must make a nonlegal decision about the best available course of action under the circumstances. Notice, however, that this does not entail that a neoformalist conception of constitutional stare decisis is incorrect and that legal realism is a superior theory. The implication is simply that a neoformalist theory of constitutional adjudication has a bounded domain.

Having said all this, I should address the applicability of this analysis to the Court's unenumerated rights cases. I begin with the premise that most of these cases do not involve problems of grave evil. One might think that *Griswold* or *Lawrence* is morally wrong, but few will think that a society governed by these cases suffers from grave evil that would warrant judicial lawlessness. But there may be some critics of *Roe v. Wade* who believe *Roe* does pose such a problem. Those who hold such a belief can still affirm a neoformalist conception of constitutional stare decisis as a general matter, so long as they view such cases as outside the scope of the theory.

F. A Restatement of the Neoformalist Conception

In sum, the neoformalist conception of constitutional stare decisis views the force of precedent as binding rather than as instrumental and rejects the idea of legislative holdings. In particular, the neoformalist conception rejects the power of the Supreme Court to overrule its own prior decisions for instrumentalist reasons, while affirming the Court's authority to overrule (or limit) precedents for formalist reasons, including the special reason that a prior decision is inconsistent with the whole body of precedent. In addition, the neoformalist conception does not require that unlawful decisions be regarded as binding; one reason a decision may be regarded as unlawful for this purpose is that the decision rests on instrumentalist rather than formalist grounds.

V. DOES THE NEOFORMALIST CONCEPTION OF CONSTITUTIONAL STARE DECISIS SUPPORT CONTEMPORARY UNENUMERATED RIGHTS JURISPRUDENCE?

Given the neoformalist conception, what can we say about the Supreme Court's unenumerated rights jurisprudence? My answer to this question will take three steps. Step one is the recognition that there is a *prima facie* case for affording these decisions stare decisis effect. Step two poses two questions: (1) Do the unenumerated rights cases qualify for treatment as binding precedent? and (2) Are unenumerated rights in harmony or tension with the original meaning of the constitutional text? Step three uses the answer to these two questions to generate four possibilities and analyzes each of the four cases. Finally, I will consider an alternative possibility, unqualified binding stare decisis effect for the unenumerated rights cases.

A. *Step One: The Prima Facie Case for Stare Decisis*

The Supreme Court has recognized a variety of "unenumerated rights," most contentiously the right to choose whether to have an abortion,⁷⁰ but also rights to the use of contraceptives in the marital relationship,⁷¹ of parents to send their children to religious schools,⁷² the right to engage in gay sex in private,⁷³ and so on. Let's take three of these cases, *Roe v. Wade*, *Griswold v. Connecticut*, and *Lawrence v. Texas*, as exemplars of the Supreme Court's unenumerated rights jurisprudence.

There is a *prima facie* case for affording *Roe*, *Griswold*, and *Lawrence* stare decisis effect. The reason for this is obvious: these are cases decided by the Supreme Court. They have been extended, qualified, and limited in various ways, but they have not been overruled. They have been cited and relied upon, both by the Supreme Court⁷⁴ and by numerous lower courts.⁷⁵ Although *Roe*, *Griswold*, and

⁷⁰ See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

⁷¹ See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) ("The very idea [of not allowing the use of contraception] is repulsive to the notions of privacy surrounding the marriage relationship.").

⁷² See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that it is "entirely plain that the [Oregon law] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

⁷³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

⁷⁴ See, e.g., *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) (looking to *Roe* in evaluation of a parental notification law); *Stenberg v. Carhart*, 530 U.S. 914, 920-22 (2000) (applying principles of *Roe* in striking down a partial-birth abortion ban);

Lawrence are controversial—*Roe* and *Lawrence* more than *Griswold*—no one argues that the Supreme Court's decisions in these cases were the products of fraud by the Court or a manifest abuse by the Court of its legal authority. Even the harshest critics of the Court's unenumerated rights jurisprudence do not argue that the cases were so plainly unlawful that they are null and void.⁷⁶ Crucially, legal practice recognizes *Roe*, *Griswold*, and *Lawrence* as legitimate and lawful decisions by the Supreme Court.

What does it mean to say that there is a "prima facie case" for affording *Roe* and *Griswold* stare decisis effect? Nothing fancy or subtle. That the Supreme Court decided these cases without some grave procedural defect is sufficient to create a rebuttable presumption in favor of their legal validity. If *Roe* and *Griswold* are to be deprived of their precedential effect, then some argument must be offered for their invalidity or unlawfulness.

One more point about the prima facie authority of *Roe* and *Griswold*: If this subsection of the article were read out of context, it might be argued that it is question begging, i.e. that I have assumed but not argued for the proposition that precedent should play a role in constitutional adjudication. The argument for that proposition was presented in Part III. The prima facie case for affording stare decisis effect to the Supreme Court's unenumerated-rights cases assumes the general case for constitutional stare decisis.

B. Step Two: Two Questions

The prima facie case for giving the unenumerated rights cases stare decisis effect is rebuttable, depending on whether the decisions are regarding as binding and whether they are in harmony with the original meaning of the constitutional text. Each of these two questions deserves a comment or two.

1. *Question One: Do the Unenumerated Rights Cases Qualify for Treatment as Binding Precedent?*

The first question about the unenumerated rights cases concerns the nature of the grounds upon which they rest. If a decision rests on instrumentalist grounds, then the prima facie case for regarding the

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

⁷⁵ The search string "Roe v. Wade" in the allstates and allfeds databases on Westlaw yielded 3458 hits on September 2, 2006.

⁷⁶ This assertion may not be strictly true. For all I know, there may be some critics who have argued that the decisions in *Roe* or *Griswold* were the result of fraud or a usurpation of authority. But these are not the arguments offered by well-informed and reasonable critics.

decision as binding is rebutted. Not so, if the grounds for the decision were formalist in nature.

On this occasion, I shall not engage in the exegetical work required to determine whether *Griswold*, *Roe*, or *Lawrence* are correctly characterized as instrumentalist, formalist, or mixed. The inquiry depends on the nature of the grounds offered by the Court. If the Court relies on the constitutional text or precedent as the basis for its decision, then it is formalist. If the Court relies directly on the moral goodness or consequences, then it is instrumentalist. If the Court relies on both, then the decision is mixed.

2. *Question Two: Are Unenumerated Rights in Harmony or Tension with Original Meaning?*

The second question is not about the reasoning of the cases, but rather is about their real relationship to the original meaning of the constitutional text. One possibility is that the decision is supported by the text. Three subcases need to be distinguished here. One subcase is that in which the decision is compelled by the text—no other decision is possible. A second subcase is one in which more than one interpretation of the text is reasonable—the original meaning of the text is ambiguous, with reasonable arguments supporting more than one interpretation. A third subcase is one in which the constitutional text is vague—for example, it is highly abstract—and what is called a “constitutional construction” is required to apply the vague text to particular cases. All three subcases should be distinguished from cases in which the interpretation or construction of the Constitution is unreasonable.

The answers to the two questions are independent of one another, generating four possible circumstances. Exploring these four possibilities is our next task.

C. *Step Three, Four Possibilities*

The four possibilities are defined by a two by two matrix as illustrated in Table 1.

TABLE 1: FOUR POSSIBILITIES

| | Relationship with Original Meaning? | |
|-----------------|-------------------------------------|------------------|
| Binding Effect? | <u>Harmony</u> | <u>Tension</u> |
| Yes | Possibility One | Possibility Two |
| No | Possibility Three | Possibility Four |

1. *Possibility One: Binding Precedents in Harmony with the Original Meaning*

The first possibility is a binding precedent that is in harmony with the original meaning. This is the simplest case. The neoformalist conception of precedent would “lock in” these precedents. They are binding and would be reinforced by subsequent decisions. As time goes by and the surrounding body of neoformalist decision making grows, these decisions become more deeply embedded in the web of precedent.

2. *Possibility Two: Binding Precedents in Tension with the Original Meaning*

The second possibility is that there is a binding precedent in tension with the original meaning. This possibility obtains when the decision was based on formalist grounds, but would have been decided differently if the original meaning of the Constitution had been properly applied. This could happen for any number of reasons: a misunderstanding of original meaning, an attempt to follow text without attention to history, or following precedent that itself was erroneous.

Suppose that one or more of the unenumerated rights cases fall into this category. Given the neoformalist conception of constitutional stare decisis, such cases should be regarded as binding. The courts will be obligated to consider these decisions as binding. But given the neoformalist conception of holdings as *ratio decidendi*, the reach of a single, isolated erroneous precedent will be quite limited—extending only to the principles required to resolve the facts before the courts. This means that isolated precedents contrary to original meaning will have a limited effect on constitutional adjudication. When there is a coherent line of formalist but erroneous precedents, the effect will be much more substantial. Over time, the law would tend to work itself pure, as opportunities arise to distinguish the prior cases and decide in accord with the original meaning of the Constitution. But as a practical matter, this process could take many decisions over a period of decades.

3. *Possibility Three: Nonbinding Precedents in Harmony with the Original Meaning*

The third possibility consists of instrumentalist decisions that nonetheless are in harmony with the original meaning. When these decisions are discussed by subsequent decisions in a neoformalist mode, their reasoning, but not their results, will be adjusted. Once the correct legal rules have emerged from the *ratio decidendi* of the subsequent line of formalist authority, decisions in the fourth cate-

gory will acquire a new status. Touched by the healing power of formalist reasoning, such decisions will be transubstantiated from mere presumptive validity to binding force.

4. *Possibility Four: Nonbinding Precedents in Tension with the Original Meaning*

The fourth possibility is a nonbinding precedent that is in tension with the original meaning. In this case, the precedent remains "on the books" and is entitled to a presumption of validity. However, once the arguments against the precedent are presented, the case loses its binding force. Such a precedent is subject to overruling—it has no binding force. However, the neoformalist conception of constitutional stare decisis does permit subsequent courts to follow such decisions on the basis of rule-of-law considerations, the stability, continuity, and predictability of the law. Decisions that fall into this fourth category will be subject to the most rapid processes of change and correction. They will be narrowed and then overruled at the most rapid pace that is consistent with due consideration for the costs of legal change.

At this point, you will have noticed a pattern. If the neoformalist conception of constitutional stare decisis is consistently applied, precedents from categories two, three, and four will gradually become more limited in scope and finally be overruled. A mere theory cannot guarantee that no errors will occur. Presumably mistakes will be made from time to time. But as the law works itself pure, we would expect that the decisions in category one will become more numerous and eventually will constitute the overwhelming share of constitutional precedents. At this stage, the majority of constitutional doctrine will be in line with the original meaning of the Constitution.

D. *An Alternative Analysis: Unqualified Stare Decisis*

There is an alternative conception of constitutional stare decisis that deserves comment. One might view precedents as eternal fixed points—not subject to overruling even when they are contrary to legal rules that are clearly defined by surrounding precedents. If this conception were adopted, then the Supreme Court's existing fundamental rights jurisprudence would remain in force, even though it might be frozen, without additional generative force.

E. *The Bottom Line*

All of this has been fairly abstract and hypothetical. Some readers will undoubtedly be asking, "So what is the bottom line?" Would *Griswold*, *Roe*, *Lawrence*, and the rest be slowly eroded and eventually

overturned or would they be entrenched by the neoformalist conception of constitutional stare decisis? Of course, that's an interesting question. But it isn't one that can be answered in this paper. That's because the answer to that question requires a detailed exegesis of the reasoning of each of the unenumerated rights cases and an analysis of the original meaning of all of the relevant provisions of the Constitution. Those tasks are enormous, and I am disinclined to engage in armchair speculation about the results. My goal here has simply been to articulate a formalist framework within which the questions could be addressed.

VI. CONCLUSION: UNENUMERATED RIGHTS AND THE FUTURE OF CONSTITUTIONAL DOCTRINE

Justices of the Supreme Court should regard themselves as bound by legally valid precedents—by the decisions that are reasoned on formalist grounds. But this does not entail the conclusion that there are constitutional fixed points—precedents that never can be reconsidered. Quite the contrary, the best understanding of legal formalism is consistent with the idea that the law works itself pure. This means that our constitutional beliefs are inherently corrigible—subject to revision in light of new arguments and evidence about the meaning of the Constitution. Even *Marbury v. Madison*⁷⁷ or *Brown v. Board of Education*⁷⁸ could go—although we may not be able to imagine the circumstances in which that would happen—here and now. Or to put it another way, if there are constitutional fixed points, their fixity consists only in the fact that we cannot *yet* imagine how they would be dislodged. *Marbury* or *Brown* may be “set in stone,” but even stone can crumble, topple, or simply be worn away by wind and sand.

Don't get me wrong. I am not asserting that these cases were incorrectly decided. Nor am I denying the “priority of the particular” in the context of constitutional jurisprudence. Quite the contrary, it is the priority of the particular that undergirds the inherent corrigibility of constitutional jurisprudence. Because we have confident judgments about particular cases, abstract constitutional theories are always *potentially* in jeopardy: confident assertions about general jurisprudence are called into question when they run into recalcitrant beliefs about particular cases. Lines of precedent can run into each other—transforming our understanding of the meaning and force of what was once considered “settled law.”

And don't get me wrong. On the surface, there is something paradoxical about endorsing a formalist conception of stare decisis

⁷⁷ 5 U.S. (1 Cranch) 137 (1803).

⁷⁸ 347 U.S. 483 (1954).

while simultaneously denying the existence of constitutional fixed points. After all, aren't precedents supposed to be the points that are fixed by the doctrine of *stare decisis*? And of course, they are. But they are only as *fixed* as it is possible for constitutional judgments to be—no less, but no more than that. That is to say that precedents should *be* binding precedents, but it is just plain silly to think that precedents can be “superbinding,” somehow placed beyond the power of reason and law. Belief in superprecedent rests on the same mistake as does the reduction of formalism to “mechanical jurisprudence.” The mistake is to miss the ineliminable role of judgment in practical reasoning, of which legal reasoning and constitutional reasoning are subsets.

And don't get me wrong. When I dismiss “mechanical jurisprudence” and reject the notion of “superprecedent,” I am not taking anything back. Quite the contrary. These moves are essential in order to see that formalism (or “neoformalism”) is a live possibility for constitutional jurisprudence. A neoformalist conception of constitutional *stare decisis* means treating lawful precedents as *authoritative*—as providing preemptory reasons for actions. But it does not mean treating all (or even all *lawful*) precedents as if they possessed some magical power to guide action without the intermediation of reason and judgment. That kind of formalism—the realist caricature of formalism—is simply incoherent. Neoformalism gives precedents the kind of authority that can figure as a peremptory reason in deliberation, no more but also no less.

And don't get me wrong, when I conceive of the Supreme Court in bondage, I am not thinking of a submissive Supreme Court, dominated by whips and chains wielded with intent to humiliate by cruel legislative and executive masters. Quite the contrary. What I am thinking about is a Supreme Court that submits in another sense: a Court that binds itself to the rule of law and is entangled by chains of text and ropes of precedent. What I am thinking about is a Supreme Court that does not chafe or struggle against the binding force of its own prior decisions: a judiciary empowered by self-imposed restraint.