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As numerous statistical studies have noted, the modern Supreme Court has overruled itself at a rate that far exceeds that which prevailed during the Court's early years. But is the accelerated rate a result of a decay in the Court's doctrine of stare decisis? Several critics have presumed so without engaging in any historical analysis. In this Article, Professor Lee offers a detailed historical examination of the evolution of the Supreme Court's overruling rhetoric. The author traces the evolution of important strands of the Rehnquist Court's doctrine of stare decisis from founding-era treatises to early applications in the Marshall and Taney Courts.

For the most part, Professor Lee concludes that the internal inconsistencies and contradictions in the Rehnquist Court's overruling rhetoric are the product of an inherent tension in the countervailing policies at stake, not of a recent deterioration of historically stringent standards of stare decisis. In the founding era, as in the Rehnquist Court, the primary tension in the doctrine concerned the extent of the Court's power to overrule decisions now deemed erroneous. The solution conceived in the founding era and applied in the Marshall Court was the recognition of a single exception to the rule of stare decisis, an exception that charted a compromise course between the extreme positions advocated in the Rehnquist Court's opinions. History also supports the Rehnquist Court's notion that the rule of stare decisis is strongest in cases involving commercial reliance interests, but that error-correction is freely available where no such interests are at stake.

Professor Lee identifies one strand of the Rehnquist Court's doctrine of precedent that does appear to be a product of the twentieth century. The notion that the constitutional or statutory nature of a precedent affects its susceptibility to reversal was largely rejected in the founding era and did not gain majority support until well into the twentieth century.

Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court

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I. INTRODUCTION

The Supreme Court's doctrine of stare decisis has been variously condemned as a "backwater of the law,"[1] "a mask hiding other considerations,"[2] and a matter of "convenience, to both conservatives and liberals," whose "friends . . . are determined by the needs of the moment."[3] Some critics presume that the unprincipled state of the doctrine is the product of a relatively recent process of deterioration. Justice Scalia, for one, has complained that the past decades have been "marked by a new found disregard for stare decisis:"

> As one commentator calculated, "[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions." It was an era when this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious "heave-ho."[4]

Almost a century ago, one commentator lauded the eventual disappearance of the doctrine of stare decisis as "the inevitable course

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1. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988). Despite this and other epithets, Easterbrook concludes that the absence of a principled theory of stare decisis is a necessary evil. *See id.* at 422-24 (asserting that we "do not have—never can have—a comprehensive theory of precedent, any more than we can have a complete theory of the 'just price' of wheat, or of when to spend more time studying the attributes of securities").

2. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

3. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988); *see also* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 72 (1991) (noting that "conservatives criticize the Warren Court's disregard for precedents, but not the Rehnquist Court's assault on liberal precedents," while "liberals denounce the Rehnquist Court's attacks on their icons, but not the Warren and Burger Courts' overrulings of conservative precedents").

4. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 108-09 (1993) (Scalia, J., concurring) (quoting Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467).

of human progress."[5] Since then, some scholars have asserted, with little or no historical analysis, that this prophecy has been fulfilled, and that the Supreme Court's standards of stare decisis have substantially deteriorated.[6] To paraphrase Justice Scalia, the Justices of the early Supreme Court are thought to have jettisoned past decisions only after solemn and careful consideration of certain strict guiding principles of precedent, whereas current members of the Court are seen as participating in an "unceremonious 'heave-ho' " of both the prior decisions and the previously applicable standards of stare decisis.[7] Indeed, Scalia has subsequently suggested that "the doctrine of stare decisis has appreciably eroded" in the modern era.[8]

Scalia's statistical assertion is undoubtedly accurate. There is no question that the Justices in the latter part of the twentieth century have "cast overboard" significantly more "settled decisions" than their predecessors.[9] Absent further analysis, however, this explanation for the statistical phenomenon seems less than obvious. For one thing, today's vast body of constitutional case law presents an ever-expanding target of "settled decisions" that may affect the issues that come before the Court. Whereas the Court in Chief Justice Marshall's day consistently wrote on a clean slate as it addressed fundamental questions of constitutional law, today's Court routinely is faced with the task of reconciling or distinguishing prior decisions.[10]

It is not only the number, but also the nature of Supreme Court precedents that may affect the statistics. As noted in detail below, the Court has long held that certain kinds of decisions (principally those affecting property rights) are entitled to an en-

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5. Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 94 (1904).

6. *See, e.g.*, Henry Paul Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 388 (1981) ("The general decay of stare decisis reflects more than the need of a rapidly changing society for new accommodating principles. It is the manifestation in legal thought of the marked, accelerating, and apparently irreversible decline in the belief of permanent ordering . . . a development that has been in 'progress' since the seventeenth century.").

7. *Harper*, 509 U.S. at 108-09; *see also* Carolyn D. Richmond, Note, *The Rehnquist Court: What Is in Store for Constitutional Law Precedent?*, 39 N.Y.L. SCH. L. REV. 511, 512 (1994) ("The standards have become so distorted that stare decisis may no longer be relied upon as a consistent indicator of the direction of constitutional law jurisprudence in the Supreme Court.").

8. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* 18 THE TANNER LECTURES ON HUMAN VALUES 79, 87 (Grethe B. Peterson ed., 1997).

9. *See* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 tbl.1 (1992) (indicating that 56.3% of all reversals from 1789 to 1991 occurred between 1953 and 1991, and that 33.9% occurred between 1969 and 1991).

10. *See* Gerhardt, *supra* note 3, at 78 (1991) (asserting that "[i]t is practically impossible for the Court to decide any constitutional issue without first trying to determine the scope of prior decisions").

hanced level of deference. In the days of *Swift v. Tyson*,[11] the Court often focused its efforts on important matters affecting property rights.[12] Today's Court has been criticized for eschewing important commercial issues in favor of high-profile questions of constitutional significance.[13] It should hardly be surprising that a Court that devoted its attention to cases involving property rights would maintain a relatively stable body of precedent in comparison to a Court that now focuses more substantially on questions of constitutional law. These and other factors[14] could explain the twentieth-century Court's increasing tendency to overrule its prior decisions, even if the prevailing doctrine of stare decisis had remained relatively constant.

Without the baggage of an implication from statistics, the stage is set for an examination of the premise that the Supreme Court's principles of precedent have been significantly loosened in recent decades. This Article examines that heretofore unexplored premise by tracing the primary aspects of the Rehnquist Court's doctrine of stare decisis from founding-era commentary to their origins in decisions of the Supreme Court.[15] In so doing, the Article need not

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11. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

12. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 52 (1993) (noting that during the Marshall years, "[m]any of the cases involved adjudication of real property disputes, and the decisions furthered the change in the legal conception of land from a static locus to a commodity that could be bought and sold in a market economy").

13. *See* Kenneth W. Starr, *Rule of Trivial Pursuits at the Supreme Court*, WALL ST. J., Oct. 6, 1993, at A17.

14. One statistical study has suggested, for example, that the Courts that have disproportionately altered precedent have been characterized by significant changes in membership. *See* Banks, *supra* note 9, at 263. A familiar example is the Hughes Court, which overturned 15 precedents during its last nine years after the Court's entire membership was transformed between 1937 and 1941. *See id.* at 265-66, 266 tbl.3. Similarly, most of the Warren Court's decisions overruling precedent were handed down after Justice Frankfurter's retirement in 1962, while most of the Burger Court's overruling decisions came after Douglas' retirement in 1975. *See id.* at 266-68, 266 tbl.3. These Courts' increased willingness to overturn precedents may be best explained by significant changes in the Court's membership, and not necessarily by any overt adjustment in the Court's doctrine of precedent. Indeed, this phenomenon of reversal logically would tend to compound itself over time. Courts have long held that decisions that themselves ignore precedent are particularly susceptible to reversal. *See* discussion *infra* accompanying noto 201. Thus, one Court's willingness to ignore past precedent would logically invite future reversals even without a deterioration in the doctrine.

15. The discussion will focus on the legal doctrine as it existed at the time of the founding and as it has evolved in opinions of the Court over the past two centuries. Thus, the Article will not have occasion to examine any of several extra-doctrinal variables that may (and probably do) affect the outcomes and voting patterns in the Court's decisions as to whether to overrule precedent. *See, e.g.*, SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992, at 110 (1995) ("The Vinson, Warren, Burger, and Rehnquist Courts overwhelmingly overturned precedents because of the ideology—the personal policy preferences—of their members. Conservative justices, such as the majority of those

presuppose agreement about an originalist theory of stare decisis. Whether or not one accepts the notion that stare decisis inheres in the judicial power conferred in Article III,[16] the argument could certainly be made that the founding generation must have contemplated that this common-law doctrine of judicial management did not foreclose further development of the considerations that inform the decision whether to retain a judicial precedent. Thus, even under an originalist conception of the judicial power, further development of the standards of stare decisis need not be rejected categorically as ahistorical.

But that concession does not render history irrelevant. Newly minted standards of stare decisis need not be rejected automatically, but they may be properly subjected to increased scrutiny. To the extent that speculation about the modern deterioration of stare decisis is accurate, the points of detorioration may merit further examination by courts and commentators.

After an initial summary of the Rehnquist Court's stare decisis standards in Part II, this Article traces three principal strands of the modern Court's overruling rhetoric from founding-era commentary to their initial applications in decisions of the Supreme Court. For the most part, this Article concludes that the modern muddle over stare decisis has been with us since the founding era. Thus, whereas the Rehnquist Court has often equivocated about its power to overturn precedent based on a current perception of error, Part III first establishes that similar doctrinal tensions trace their origins to early American commentary and to decisions of the Marshall Court. Second, although the Rehnquist Court's notion that stare decisis is most powerful in cases involving vested property rights is sometimes challenged as ahistorical, Part IV identifies founding-era commentary on this issue and traces its application in early Supreme Court decisions. Finally, Part V identifies one strand of the Rehnquist Court's overruling rhetoric that is a product of the twentieth century.

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who sat on the Rehnquist Court, formally altered liberal precedents. In contrast, the liberal overrulings of the later Warren Court voided conservative precedents.").

16. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994) ("[T]he precept that like cases should be treated alike—[is] rooted . . . in Article III's invocation of the 'judicial Power.' "); Monaghan, *supra* note 2, at 754 (noting the theory that "the principle of stare decisis inheres in the 'judicial power' of article III"); *cf.* Plaut v. Spendthrift Farms, 514 U.S. 211, 218 (1995) (suggesting that an attempt by Congress to reopen a final judgment may violate a "postulate" of Article III). *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 29-30 (1994) (arguing that the "judicial [p]ower" includes a "structural inference" that "the Constitution is supreme . . . over all competing sources of law," including precedent).

The modern dichotomy that allocates deference based on the statutory or constitutional basis of the precedent finds no support in the founding era and very little support in Supreme Court decisions of the nineteenth century.

II. STARE DECISIS IN THE MODERN COURT: POLICIES AND PRACTICES

The proper treatment of precedent, like any complex issue, involves a careful balance of competing goals. The task of identifying the competing policies is straightforward. On one side of the ledger (the side favoring adherence to past decisions), the Court has recognized the policies of economy, stability, and legitimacy.[17]

The economies of a system of precedent are obvious. As Justice (then-Judge) Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[18] Thus, a general rule of adherence to precedent "expedites the work of the courts by preventing the constant reconsideration of settled questions."[19]

The policy of stability may encompass any of several related concerns. First is the goal of assuring stability in commercial relationships. In some cases, contracts or title to property may be premised on a rule established by case law; overruling such precedent

17. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). Other considerations in favor of adherence to precedent have been identified in academic commentary. *See* Monaghan, *supra* note 2, at 744-53 (arguing that precedents help limit the Court's agenda, illuminate areas in which the Court has been consistently divided, and legitimate judicial review); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) (asserting that a "doctrine of precedent" promotes, *inter alia*, efficient decisionmaking, "predictability in our affairs," and increased attention to the "stakes" of resolving a legal dispute). *See generally* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 56-83 (1961) (identifying certainty, consistoncy, fairness, equality, efficiency, and predictability as justifications for adherence to precedent).

18. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

19. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924); *see also* Easterbrook, *supra* note 1, at 423 (asserting that "[p]recedent decentralizes decisionmaking" and "economizes on information"); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989) (noting that stare decisis enables judges "to *avoid* having to rethink the merits of particular legal doctrine" in many cases).

would undermine vested contract and property rights.[20] Second, even where vested commercial rights are not implicated, a doctrine of reliance on precedent furthers the goal of stability by enabling parties to settle their disputes without resorting to the courts.[21] Finally, the Court has sometimes suggested that the goal of stability encompasses reliance interests that extend beyond the commercial context, including the preservation of "the psychologic need to satisfy reasonable expectations,"[22] or even the retention of governmental action undertaken in reliance on precedent.[23]

Stare decisis is also thought to preserve the Court's legitimacy. Under this view, public respect depends on a perception that the Court's decisions are governed by the rule of law, and not by the vagaries of the political process.[24] In Justice Thurgood Marshall's words, stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by preserving the presumption "that bedrock principles are founded in the law rather than in the prochivities of individuals."[25]

Blind adherence to precedent in all cases, however, threatens to undermine the principal policy on the other side of the stare decisis

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20. *See Payne*, 501 U.S. at 828 (noting that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *see also infra* text accompanying notes 214-34.

21. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

22. Helvering v. Hallock, 309 U.S. 106, 119 (1940); *cf.* Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (asserting that relevant reliance interests include admittedly immeasurable "ordering" of the "thinking and living" of women who understood *Roe v. Wade* to recognize a constitutional right to an abortion).

23. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part) (suggesting that approval of the Seventeenth Amendment may have been premised on the validity of *Hans v. Louisiana*, 134 U.S. 1 (1890)), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996); *see also infra* notes 259-61 and accompanying text.

24. *See* Maltz, *supra* note 4, at 484:

> The Court's continued ability to function effectively in this structure as the ultimate arbiter of constitutional law depends on the willingness of the public to accept the Court in this role; this acceptance in turn depends upon the public perception that in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes.

25. Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986); *see also Moragne*, 398 U.S. at 403 (suggesting that stare decisis preserves the perception of "the judiciary as a source of impersonal and reasoned judgments"). *But see Payne*, 501 U.S. at 834 (Scalia, J., concurring) (arguing that "the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes" would undermine the Court's legitimacy); Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (" 'The jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, te diminish respect for the courts and for law itself.' " (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959))).

ledger: assuring accurate judicial decisions that faithfully apply correct principles of law. Judges are fallible and an ironclad requirement of adherence to precedent in all cases would transform the doctrine of stare decisis into an "imprisonment of reason,"[26] requiring the perpetuation of an error in future cases for the sole reason that it was once enshrined as case law by the votes of five Justices.[27] Thus, the countervailing interest in accurate legal judgments must be weighed against the above policies of stability and legitimacy. The result is a fragile doctrine under which the Court "must seek principles of change no less than principles of stability."[28]

With these competing policies in mind, the most basic question that any system of precedent must answer is whether a prior decision is entitled to deference when it is later thought to be in error. In run-of-the-mill cases, the policy of judicial economy dictates adherence to precedent in order te economize the resources involved in reinventing the legal wheel in each case. To borrow Justice Cardozo's terms, the Supreme Court's workload would be pressed beyond "the breaking point"[29] if it were to reexamine every possible issue presented in every case, right down to a daily reconsideration of the very foundations of judicial review established in *Marbury v. Madison*.[30] But the Cardozo efficiency argument begs all of the important questions. The difficult issue for any system of precedent is not whether a court *may* rely on precedent in the run-of-the-mill case, but whether it *must* do so when it perceives an error in the ways of the past.

The modern Court has sent conflicting signals as to the effect of a current perception of error in a past decision. On one hand, the Court has suggested that stare decisis cannot require blind adherence to plainly erroneous decisions;[31] if it did, a principal goal of the doctrine would be undermined because public confidence in the Court depends on an ability to correct clear defects in past decisions. On the other hand, an exception to the rule of stare decisis that openly invites a reexamination of the rationality or justice of prior precedents threatens to swallow the rule. With this concern in mind, the Court

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26. United States v. International Boxing Club, 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting) (arguing that stare decisis is used for a purpose, and that the application of the doctrine to uphold baseball in an antitrust challenge was not arbitrary).

27. *See Payne*, 501 U.S. at 834 (Scalia, J., concurring).

28. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923); *see also* Easterbrook, *supra* noto 1, at 423 (suggesting that the "possibility of improvement makes precedent unstable," and indeed that "[i]t ought to be unstable").

29. CARDOZO, *supra* note 18, at 149.

30. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

31. *See infra* notes 42-45, 52-58 and accompanying text.

has sometimes offered the contradictory suggestion that the basis for overruling an earlier decision must go beyond the identification of an error.[32]

The above conflict in the Court's overruling rhetoric is further complicated by a number of other factors that are sometimes introduced into the Court's decisions. The Rehnquist Court has suggested, for example, that its capacity for error correction may be enhanced where an earlier decision has been undermined (although not actually overruled) by subsequent authority.[33] It has also asserted that its power to correct erroneous precedent may depend on whether and to what extent a reversal of course in the Court's jurisprudence would upset reliance interests.[34] Under this view, even clear errors in precedent should be preserved where substantial commercial reliance interests are at stake, but error correction is freely available where they are not.[35] Finally, the Rehnquist Court has frequently indicated that its power to correct erroneous precedents may depend on the statutory or constitutional nature of the decision.[36] Whereas the Court purports to give "great weight to stare decisis in the area of statutory construction,"[37] it has also claimed that the doctrine "is at its weakest when [it] interpret[s] the Constitution."[38]

III. STARE DECISIS AND ERROR CORRECTION

The conflicted state of the modern Court's overruling rhetoric is nowhere more evident than on the basic question of the Court's capacity to correct the errors of the past. Justice Scalia argued in favor of an error-correction standard in his concurrence in *Payne v. Tennessee*,[39] in which the Court set aside *Booth v. Maryland* and

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32. *See* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring). For further discussion of this conflict in the Court's overruling rhetoric, see the discussion *infra* accompanying notes 39-63.

33. *See* Agostini v. Felton, 521 U.S. 203, 235-38 (1997). For further analysis, see the discussion *infra* accompanying notes 374-79.

34. *See infra* Part IV.C.

35. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 317-18 (1992); *see also* Payne v. Tennessee, 501 U.S. 808, 827 (1991). This strand of analysis is discussed in further detail in Part IV.

36. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (suggesting that "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents"); Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (claiming the Court has a "considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases").

37. Neal v. United States, 516 U.S. 284, 295 (1996).

38. *Agostini*, 521 U.S. at 235.

39. *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

South Carolina v. Gathers[40] in holding that the Eighth Amendment does not preclude the admission of victim-impact evidence.[41] As Scalia noted, Justice Marshall's dissenting argument in *Payne* was that stare decisis "demands of us some 'special justification'—*beyond* the mere conviction that the rule of *Booth* significantly harms our criminal justice system and is egregiously wrong—before we can be absolved of exercising 'power, not reason.' "[42] Scalia responded in his characteristically energetic fashion:

> I do not think that is fair. In fact, quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.[43]

Other members of the Court have offered variations on this theme in several other opinions. In several cases, Justice Stevens has quoted Justice Cardozo for a standard that purportedly would enable the Court to overrule prior decisions on the basis of their inconsistency with the current Justices' "sense of justice," the "social welfare," or the "*mores* of their day."[44] Elsewhere, Stevens has suggested that the error-correction bar is substantially higher, indicating that the Court's precedents should be set aside only if deemed "egregiously incorrect."[45] Finally, Justice Powell's concurring opinion in *Mitchell v.*

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40. Booth v. Maryland, 482 U.S. 496 (1987); South Carolina v. Gathers, 490 U.S. 805 (1989).

41. *See Payne*, 501 U.S. at 827, 830.

42. *Id.* at 834 (Scalia, J., concurring) (quoting *id.* at 844 (Marshall, J., dissenting)).

43. *Id.*

44. Johnson v. Transportation Agency, 480 U.S. 616, 644-45 & n.4 (1987) (Stevens, J., concurring (quoting CARDOZO, *supra* note 18, at 149, 150-52)); *see also* Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring). This same standard appears in Justice Kennedy's opinion for the Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989). In the course of refusing to overrule *Runyon*, which had held that 42 U.S.C. § 1981 prohibits racial discrimination in private contracts, the *Patterson* Court noted that "it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being ' "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." ' " *Patterson*, 491 U.S. at 174 (quoting *Runyon*, 427 U.S. at 191 (Stevens, J., concurring) (quoting CARDOZO, *supra* note 18, at 150)). Because the *Patterson* Court found *Runyon* to be "entirely consistent" with "the prevailing sense of justice in this country" and with "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin," however, it concluded that this standard provided no basis for abandoning *Runyon*. *Id.* at 174-75.

45. *Compare* Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring) (adhering to *Edelman v. Jordan*, 415 U.S. 651 (1974), despite his view that it incorrectly interpreted the Eleventh Amendment, on the ground that it "had previously been endorsed by some of our finest Circuit Judges; [and] therefore cannot be characterized as unreasonable or egregiously incorrect"), *with* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (indicating that "additional study has

W.T. Grant Co. concluded that it was the Court's "duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question."[46]

The Court's invocation of error as the basis for self-reversal is sometimes masked in other terms, such as the notion that a previous doctrinal position has proven unworkable in practice. The Court's decision in *United States v. Dixon* illustrates this approach.[47] *Dixon* overruled *Grady v. Corbin*, which had announced a *same conduct* test under the Double Jeopardy Clause—a test that prohibited "[any] subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecutod."[48] Prior to *Grady*, the Court had applied only the *same element* test announced in *Blockburger v. United States*, which asks whether each offense contains an element not contained in the other.[49] If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.[50] *Dixon* abandoned *Grady* and reverted to the same element test as the sole inquiry under the Double Jeopardy Clause.[51]

Justice Scalia's opinion for the Court concluded that *Grady* was vulnerable because it "contained 'less than accurate' historical analysis," and had created confusion.[52] In other words, in addition to attacking the historical basis for *Grady*, the *Dixon* majority asserted

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made it abundantly clear" that *Edelman* "can properly be characterized as 'egregiously incorrect' "), *superseded by* 42 U.S.C. § 2000d-7 (1994).

Justice Harlan offered a comparable standard in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring), *overruled by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). In support of his view that the Court should adhere to its decisions in *United States v. Classic*, 313 U.S. 299 (1941) and *Screws v. United States*, 325 U.S. 91 (1945), that municipalities are immune from suit under 42 U.S.C. § 1983, Harlan suggested that "the policy of *stare decisis* . . . require[s] that it appear *beyond doubt* from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." *Monroe*, 365 U.S. at 192 (emphasis added).

46. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring). In *Mitchell*, the Court rejected a Due Process challenge to a state procedure allowing a seller to sequester property upon an allegation of default by the buyer, without prior notice te the buyer pending a hearing on the merits of the seller's claim. *See id.* at 619-20. The Court had previously invalidated similar procedures in *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972).

47. United States v. Dixon, 509 U.S. 688 (1993).

48. Grady v. Corbin, 495 U.S. 508, 521 (1990), *overruled by Dixon*, 509 U.S. at 688.

49. Blockburger v. United States, 284 U.S. 299, 304 (1932).

50. *See id.*

51. *Dixon*, 509 U.S. at 704.

52. *Id.* at 711.

that the decision was "unworkable" or "unstable in application."[53] In support of these later conclusions, Scalia noted that the Court had recognized a "large exception" to *Grady*'s principle, that lower courts had complained that *Grady* was "difficult to apply," and that Supreme Court decisions interpreting *Grady* had resulted in divided opinions.[54]

Despite the euphemistic label of unworkability, Scalia's analysis treated the perceived unworkability or confusion in application of *Grady* as evidence of its error. The Court's exception to *Grady*, in Scalia's view, "gave cause for concern that the rule was not an accurate expression of the law."[55] Ultimately, Scalia's analysis reduced to his conclusion that "[t]he case was a mistake,"[56] and his assertion that *Grady* was vulnerable as " 'unworkable or . . . badly reasoned' "[57] did not appear to accord independent significance to the notion of unworkability.[58]

On other occasions, members of the modern Court have soundly rejected the perception of error as a basis for overturning precedent. Special justification, under this view, requires something more than the conclusion that the Court's prior decision was irra-

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53. *Id.* at 709, 712.

54. *Id.* at 709, 711 n.16.

55. *Id.* at 710.

56. *Id.* at 711.

57. *Id.* at 712 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)); *cf.* BMW, Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (concluding that "[w]hen . . . a constitutional doctrine adopted by the Court is not only mistaken but also *insusceptible of principled application*, [he did] not feel bound to give it *stare decisis* effect–indeed, [he did] not feel justified in doing so" (emphasis added)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539-47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was subject to reversal because its preclusion of congressional action under the Commerce Clause "in areas of traditional governmental functions" was "unsound in principle and unworkable in practice").

The Court's reexamination of the merits of a precedent is also sometimes cast in terms of a current perception of a change in conditions underlying the earlier decision. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863-64 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (asserting that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided," but arguing that *Brown v. Board of Education* properly overruled *Plessy v. Ferguson* in light of the fact that "the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954"); *see also id.* at 960 (Rehnquist, C.J., concurring in part and dissenting in part) (asserting that the joint opinion's explanation for *Brown* was "at best a feebly supported, *post hoc* rationalization for [that] decision," and that the true basis for *Brown* was that *Plessy* was in error).

58. A brief hypothetical illustrates the point. Assume that the Fifth Amendment expressly spelled out both the "same conduct" and the "same element" standards as tests for double jeopardy. Under those circumstances, the presence of confusion or instability in application of the same conduct test might call for greater clarity in the Supreme Court's explication of the test, but it would hardly be cause for abandonment of the plain language of the Fifth Amendment.

tional or unjust.[59] Justice Scalia recently offered his version of this position in his concurring opinion in *Hubbard v. United States*.[60] In apparent contradiction of his concurring position in *Payne*,[61] Scalia asserted that the decision to set aside precedent must be supported by "reasons that go beyond mere demonstration that the overruled opinion was wrong."[62] "Otherwise," Scalia explained, "the doctrine would be no doctrine at all," and would accord an " 'arbitrary discretion in the courts.' "[63]

The above contradictions provide ample fodder for the cynical response to the Rehnquist Court's doctrine of stare decisis. In light of the above, common epithets thrown at the Court's overruling rhetoric are understandable, perhaps even understated. But the unexamined premise of many critics is that the current inconsistencies are a product of the modern era. This Article examines that premise with an initial focus on the extent to which the stare decisis principles of the founding era and early Supreme Court endorsed the correction of errors in precedent.

A. Evolution of the Doctrine at Common Law

Legal historians generally agree that the doctrine of stare decisis is of relatively recent origin. At least as late as the early eighteenth century, common law judges and commentators acknowledged that:

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59. *See Casey*, 505 U.S. at 863 (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (asserting that the view has been "repeated in our cases[] that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided"); *see also* Gerhardt, *supra* note 3, at 145 (asserting that the current Court has embraced two stare decisis standards, one that permits the overruling of precedents "deemed erroneously reasoned," another that "demand[s] something more than erroneous reasoning").

60. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring). *Hubbard* held that the federal false statements statute, 18 U.S.C. § 1001, applied only to statements made in the executive department. In so doing, the Court overruled *United States v. Bramblett*, 348 U.S. 503 (1955), which had extended § 1001 to statements made in legislative, executive, and judicial departments. *See Hubbard*, 514 U.S. at 715.

61. The "apparent" contradiction may be explained by the fact that *Payne* overruled constitutional precedent, while *Hubbard* was a statutory decision. This distinction is discussed in further detail *infra* Part IV.

62. *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring).

63. *Id.* (quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilten) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 78]). To Scalia, two reasons beyond the mere error of *Bramblett* sustained its abandonment: (a) the "potential for mischief federal judges have discovered in the mistaken reading of 18 U.S.C. § 1001"; and (b) the lack of any significant "reliance" interests in *Bramblett*. *Hubbard*, 514 U.S. at 716-17. For further discussion of this aspect of *Hubbard*, see the discussion *infra* accompanying notes 456-57.

> Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do).[64]

In other words, although judicial decisions were viewed as evidence of the law,[65] "the Year Books themselves . . . were not regarded as collections of authoritative or binding decisions."[66]

This attitude was the natural outgrowth of what is now referred to as the declaratory theory of the common law: The law had a "Platonic or ideal existence" before any decision by the court, and that any judicial declaration that was inconsistent with such ideal need not be formally overruled but could merely be replaced with a new decision as a "reconsidered declaration as law from the beginning."[67] In Lord Coke's metaphorical terms, the declaratory theory posited that, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."[68] This declaratory notion of common law decisions presupposes a relatively weak (if not non-existent) doctrine of stare decisis. Far from demanding adherence to case law, the classic declaratory theory left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it.

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64. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713); *see also* C.K. ALLEN, LAW IN THE MAKING 209-19 (7th ed. 1964); 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 146 (1991); HAROLD POTTER, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 275, 279 (A.K.R. Kiralfy ed., Sweet & Maxwell Ltd. 4th ed. 1958) ("In this period the judges did not regard themselves as absolutely bound by earlier decisions, and this attitude of mind lastod well into the fifteenth century, and in a modified form down to the nineteenth century. . . . During the latter half of the seventeenth and during the eighteenth centuries we find cases constantly followed in practice but a tendency to assert that they were not binding in theory.").

65. *See* HALE, *supra* note 64, at 45; *see also* 2 EDWARD COKE, COKE UPON LITTLETON 254(a) (First American ed. 1853) (noting that reported decisions are "the best proofes [of] what the law is").

66. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 346 (5th ed. 1956).

67. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932) (rejecting due process challenge to Montana court's refusal to give retroactive effect to its decision overruling a past decision).

68. 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (London, E&R Brooke 1797) (1642).

1. Blackstone's *Commentaries* and the Law of Precedent

There is no consensus as to precisely when the notion of case law precedent gained currency in English common law.[69] But most legal historians have agreed that the eighteenth and early nineteenth centuries marked an important point of transition.[70] During this period, the English courts began to speak of a qualified obligation to abide by past decisions. Under this view, the fiction of the declaratory theory was retained, but common law judges were perceived to have a duty to articulate some justification for setting aside the evidence of the law found in prior decisions.

Although the precise timing of this step in the transition is a subject of some debate among legal historians, William Blackstone's influential *Commentaries* apparently was one of the early authorities to speak of "the rule of precedent as one of general obligation."[71] Blackstone first stated the general principle in seemingly strict terms: "For it is an established rule to abide by former precedents, where the same points come again in litigation . . . ."[72] In support of this rule, Blackstone offered policies that are consistent with those announced by the modern Court. On one hand, adherence to precedent preserves the intogrity of the court; it is designed "to keep the scale of justice even and steady, and not liable to waver with every new judge's opin-

69. *See* DANIEL H. CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 5 (1885) ("Precisely when [the doctrine of stare decisis] became a distinctly established doctrine of English law is not easy to determine.").

70. *See* ALLEN, *supra* note 64, at 209 (noting that at least until the mid-eighteenth century "the whole theory and practice of precedent was in a highly fluctuating condition"); HOLDSWORTH, *supra* note 64, at 151-57 (noting that the modern doctrine of precedent was accepted by the latter part of the eighteenth century, subject to "reservations," such as the "power to disregard cases which are plainly absurd or contrary to principle"); PLUCKNETT, *supra* note 66, at 350 ("It is to the nineteenth century that we must look for the final stages . . . of the present system."); POTTER, *supra* note 64, at 279 (noting that during the eighteenth century "[o]pinions differ as to the force of individual precedents"); Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, *in* PRECEDENT IN LAW 35 n.1 (Laurence Goldstein ed., 1987) (noting changes in the British House of Lords' treatment of its own precedent during the nineteenth century).

71. MAX RADIN, STABILITY IN LAW 18 (1944). Blackstone's significant influence on the Framers' understanding of the law has been widely acknowledged. *See* Schick v. United States, 195 U.S. 65, 69 (1904) (asserting that the *Commentaries* are "the most satisfactory exposition of the common law of England," and that "undoubtedly the framers of the Constitution were familiar with it"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 10 (1969) (suggesting that "[t]he great appeal for Americans of Blackstone's *Commentaries* stemmed not so much from its particular exposition of English law . . . but from its great effort to extract general principles from the English common law and make of it, as James Iredell said, 'a science' ").

72. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

ion."[73] Similarly, the doctrine is aimed at assuring stability in the law:

> [B]ecause the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his own private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[74]

On the other hand, Blackstone acknowledged that countervailing policies counsel against blind adherence to precedent in every case. The *"law"* and the *"opinion of the judge,"* noted Blackstone, "are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law."[75]

Blackstone's venerable statements on the law of precedent (which coincide with the period in which the United States Constitution was framed) seem to chart a compromise course between the classic adoption of the declaratory theory and a strict notion of stare decisis. According to Blackstone, the rule of adherence to precedent was subject to one relatively straightforward (if potentially rule-swallowing) exception: "Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law."[76] Blackstone proceeded to explain this exception in terms of the declaratory theory:

> But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.[77]

2. Early American Commentary on the Law of Precedent

The Framers' expectation that the federal courts would be subject to some notion of binding precedent is evident in Alexander Hamilton's argument in *Federalist No. 78* in favor of strong job security for federal judges. Hamilton first suggested that "a voluminous

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73. *Id.*
74. *Id.*
75. *Id.* at *71.
76. *Id.* at *69-70.
77. *Id.* at *70.

code of laws is one of the inconveniences necessarily connected with the advantages of a free government."[78] "To avoid an arbitrary discretion in the courts," Hamilton continued, "it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[79] Because such "precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them," Hamilton argued that "there can be but few men in [] society who will have sufficient skill in the laws to qualify them for the stations of judges," and thus that "permanency of the judicial office[]" was necessary to lure such men to federal judgeships.[80]

Viewed in isolation, Hamilton's side-bar on precedent might be construed to conceive of a strict rule demanding adherence to precedent under all circumstances. Hamilton wrote of a binding notion of stare decisis under which precedents would define and point out the duty of the court in every case. In Hamilton's view, the policies of certainty and judicial integrity supported this doctrine: adherence to "strict rules and precedents" is necessary "[t]o avoid an arbitrary discretion in the courts."[81] Earlier in *Federalist No. 78*, Hamilton implicitly embraced the similar ideal of a court securing the "inflexible and uniform adherence to the rights of the Constitution."[82]

But *Federalist No. 78* was hardly conceived as a comprehensive exposition of the doctrine of stare decisis, and Hamilton's statement of a prima facie rule of adherence to precedent should not be construed to exclude the existence of exceptions or countervailing considerations. Hamilten's conception of a judge's duty was to follow not only precedent, but "strict rules," which seems to be a reference to the

78. FEDERALIST NO. 78, *supra* note 63, at 471.

79. *Id.* Anti-Federalist commentary also made oblique reference to the notion of stare decisis. The Federal Farmer was concerned, for example, that it was a "very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate." Letters from The Federal Farmer No. 3 (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed., 1981) [hereinafter COMPLETE ANTI-FEDERALIST]. The danger, in the Federal Farmer's view, was compounded by the fact that the federal courts had "no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." *Id.* For a detailed discussion of the Federalist/Anti-Federalist interchange on this and relatod issues, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1385-91 (1997), and John C. Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1155-57 (1996).

80. FEDERALIST NO. 78, *supra* note 63, at 471.

81. *Id.*

82. *Id.* at 470-71.

lamentable "voluminous code of laws . . . necessarily connected with the advantages of a free government."[83] In combination, strict rules and precedents may define the court's duty, but a suggestion that *every* case would be predetermined by the authority of case law alone would have been specious. Nor is it clear that Hamilton was discussing the question of whether the Supreme Court would have the power to overrule its own decisions; *Federalist No. 78* may simply have been addressing a rule of vertical stare decisis requiring lower federal courts to follow case law from a superior tribunal.[84]

Moreover, other founding-era commentators acknowledged that the rule of stare decisis was subject to certain exceptions. William Cranch, the second reporter of Supreme Court decisions, offered some indication of his understanding of the role of reported opinions in the preface to his first report.[85] While echoing Hamilton's view that reported opinions would "limit . . . discretion" and act as a "check upon" judges, Cranch also maintained that the judge retained the power to "decide a similar case differently," at least where he "make[s] public [his] strong reasons for doing so."[86]

Like Blackstone and Cranch, James Madison conceived of a rule of stare decisis that was tempered by countervailing policies and exceptions.[87] His views on this issue were expressed in letters justifying his assent as President to the Bank of the United States, despite the fact that he had questioned its constitutionality in 1791.[88] In justifying his change of heart, Madison relied principally on judicial precedents upholding congressional power in this area.[89] Such

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83. *Id.* at 471.

84. *Cf.* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-78, at 257-59 (Boston, Charles C. Little & James Brown, 2d ed. 1851). Story first posited a "rule" similar to that espoused in FEDERALIST NO. 78 that "judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws which are brought into controversy before it," and that "the principles of the decision are held, as precedents and authority, to bind future cases of the same nature." *Id.* § 377, at 258. But Story's treatment of stare decisis addressed the question of adherence of lower courts to Supreme Court decisions (stare decisis on a "vertical" plane), and not whether the Court had the power to overrule itself (stare decisis on a "horizontal" plane). *See id.* § 378, at 258-59 (asserting that "this conclusive effect of judicial adjudications," which "was in the full view of the framers of the constitution," suggests that "the judgments of the courts of the United States" were "plainly supposed to be of paramount and absolute obligation throughout all the statos").

85. Cranch's Preface, 5 U.S. (1 Cranch) iii (1804).

86. *Id.* at iii-iv.

87. *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 391 (Marvin Meyers ed., revised ed. 1981) [hereinafter MIND OF THE FOUNDER].

88. *See id.* at 390.

89. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the constitutionality of the national bank).

"precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions," were in Madison's view "regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law."[90] Madison offered two policy justifications in favor of the binding or authoritative force of precedent:

> 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it.... 2. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.[91]

Madison's discussion of this issue probed deeper than Hamilton's treatment in *Federalist No. 78*. In addition to espousing the general rule, Madison also acknowledged a limitation on the general principle: "That cases may occur which transcend all authority of precedents must be admitted, but they form exceptions which will speak for themselves and must justify themselves."[92] Unfortunately, Madison stopped short of offering a comprehensive discussion of his understanding of the applicable exceptions to the rule. But his treatment of the extent of the precedential effect of a decision acknowledged that at some point a decision that completely disregards the underlying provision of law should not be followed:

> There has been a fallacy... in confounding a question whether precedents could expound a Constitution, with a question whether they could alter a Coust. [sic] This distinction is too obvious to need elucidation. None will deny that precedents of a certain description fix the interpretation of a law. Yet who will pretend that they can repeal or alter a law?[93]

Thus, in Madison's view, a precedent that is thought to expound or interpret the law or the Constitution is worthy of deference, but once

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90. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391.

91. *Id.*

92. Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 443 (Gaillard Hunt ed., 1910) [hereinafter 9 WRITINGS OF JAMES MADISON].

93. Letter from Madison to N.P. Trist (Dec. 1831), *reprinted in* 9 WRITINGS OF JAMES MADISON, *supra* note 92, at 477.

the precedent ventures into the realm of altering or repealing the law, it should be rejected.

James Kent's influential *Commentaries on American Law* set forth a similar approach. Kent followed Blackstone in conceiving of precedent in terms of the declaratory theory. "A solemn decision upon a point of law, arising in any given case," said Kent, "becomes an authority in a like case, because it is the *highest evidence* which we can have of the law applicable to the subject."[94] But also like Blackstone, Kent tempered the declaratory theory with a conditional duty to adhere to precedent, subject to an exception that recognized a power of error correction:

> [T]he judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.[95]

B. Stare Decisis in the Marshall Court: Binding Precedent or Mere Evidence of the Law?

The founding-era doctrine of precedent thus was in an uneasy state of internal conflict. On one hand, the framing generation perceived the importance of stability and certainty in the law, and thus embraced a rule of following past decisions. On the other hand, a declaratory understanding of the common law gave rise to an exception permitting some form of reexamination of the merits of a prior decision. The unresolved tension involves the interplay between these two propositions. A strong rule threatens permanently to enshrine the errors of the past with no hope for internal correction, while a pure declaratory exception swallows the rule and its aim of stability.

The history of the Supreme Court's treatment of precedent may be understood as an evolution of its various attempts to balance these competing concerns. That history begins in the Marshall Court,[96] whose decisions indicate an unresolved tension between a

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94. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475 (O.W. Holmes, Jr. ed., 14th ed., Boston, Little, Brown, & Co. 1896) (emphasis added).

95. *Id.* at *475-76.

96. No decisions prior to Chief Justice Marshall's tenure overruled precedent, *see* Banks, *supra* noto 9, at 263 note to tbl.1 ("[T]here were no overturns for the Jay (1789 to 1795), Rutledge (1795 to 1795) or Ellsworth (1796 te 1800) tonures . . . ."); or offered any substantive discussion of its importance.

rule of stare decisis and an exception born of the founding-era declaratory theory.

1. The Marshall Court and the Declaratory Theory

An argument could be made that Chief Justice Marshall's opinions indicate that he attached little significance to precedent. Marshall often engaged in lengthy doctrinal expositions on settled issues that today would be disposed of with a simple citation. As David Currie has indicated, "precedent, while not wholly foreign to Marshall's opinions, was seldom prominent there."[97] Currie offers several illustrations of his view that Marshall had a "general disdain for reliance on authority," and that "[i]t was typical of Marshall not to cite even his own opinions although they squarely supported him."[98]

Cohens v. Virginia[99] is one example of this approach. The Cohens had been convicted in state court in Virginia of selling lottery tickets in Virginia. In its attempt to convince the Court that it lacked jurisdiction over this appeal, the State argued, among other things, that the Court's appellate jurisdiction extended only to cases decided in the lower federal courts. The issue had been conclusively resolved to the contrary just five years earlier in *Martin v. Hunter's Lessee*,[100] but Marshall's opinion for the Court embarked on a lengthy analytical discussion before rejecting the argument.[101]

Marshall's approach in *McCulloch v. Maryland*[102] was similar. In concluding that formation of a national bank was a necessary and proper exercise of powers expressly given to Congress, Marshall rejected the argument that this clause was not limited to "those single means, without which the end would be entirely unattainable."[103] Marshall himself had reached the same conclusion fourteen years

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97. David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 680 (1982).

98. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 98, 163 (1985). Currie notes: "Rare is the judge teday who would disdain such support and rely wholly upon the force of his own argument, hut his later opinions were to show that Marshall often paid little heed to precedents even when they squarely supported him." *Id.* at 70.

99. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 440 (1821).

100. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816).

101. *See Cohens*, 19 U.S. (6 Wheat.) at 378-447; *see also* CURRIE, *supra* note 98, at 98 (suggesting that *Cohens* was indicative of Marshall's "general disdain for reliance on authority").

102. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 318 (1819).

103. *Id.* at 414.

earlier in *United States v. Fisher*.[104] But Marshall's opinion in *McCulloch* made no mention of *Fisher*; instead he addressed the issue as if it were one of first impression.

It would be a mistake, however, to attach too much significance to Marshall's approach. As a general matter, the best explanation for his failure to rely on precedent is probably the lack of a reliable digest system during the early part of the nineteenth century. In *McCulloch*, for example, counsel failed to call attention to *Fisher*, and Marshall's colleagues "stood by while he threw away his trump card."[105] In many cases, it may simply have been easier for Marshall to have rehearsed his own evaluation of the merits of an issue than to have located any appropriato case law authority.[106]

On the other hand, the lack of research resources cannot fully explain Marshall's approach. In *Cohens*, after all, Marshall eventually got around to citing *Martin* as an afterthought to his own analysis.[107] Thus, it is tempting to conclude that Marshall's apparent disregard for precedent was, to some extent, a natural outgrowth of the declaratory theory and a concomitantly weak doctrine of stare decisis. State court decisions of the founding era often adopted declaratory views of precedent,[108] expressly stating that "a decision" is

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104. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (rejecting the argument, in the context of upholding Congress's power te give priority to the federal government's claims in bankruptcy proceedings, that "[w]here various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means").

105. CURRIE, *supra* note 98, at 163. Schwartz notes that in contrast to Story, who "reveled in legal research," "Marshall disliked the labor of investigating legal authorities to support his decisions." SCHWARTZ, *supra* note 12, at 60; *see also* GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 91 (1970) (attributing to Marshall the comment that "Brother Stery, here . . . can give us the cases from the Twelve Tables down to the latest reports"); G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 203 (1988) (noting that "[a]dvocacy before the Marshall Court was an essentially oral medium," that "[w]ritten briefs were rare," and that "written treatises were neither numerous nor widely available").

106. Indeed, in contrast to his approach in the above cases, Marshall sometimes resolved the question presented to the Court with little more than a citation of precedent. In *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 234 (1818), for example, the Court faced the question whether a plea of "*nil debet* could be a good bar" to plaintiff's action in debt. Marshall's opinion for the Court included no independent analysis; it simply asserted that:

> This is precisely the same case as that of *Mills v. Duryee*; the court cannot distinguish the two cases. The doctrine there held was . . . that whatever pleas would be good te a suit thereon [if the action had been brought in state court], and none others, could be pleaded in any other court in the United Statos.

Id. at 235.

107. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 423 (1821).

108. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 33, 36 (1959) (asserting that in the colonial period "decided cases were believed to contain evidence of the law," but that by the mid-nineteenth century "the theory that cases were merely evidence of the law was under heavy attack by the theoricians").

not law, but only prima facie evidence of the what the law is,[109] and that "[a] court is not bound to give the like judgment, which had been given by a former court, unless they are of the opinion that the first judgment was according to law."[110]

Familiarity with such an approach would naturally have led Marshall and his colleagues to accord relatively little significance to a prior decision. Justice Johnson championed this approach in a dissenting opinion in *Ex parte Bollman*.[111] *Bollman* presented the question of the Supreme Court's statutory and constitutional jurisdiction to issue a writ of habeas corpus. Chief Justice Marshall's opinion for the Court upheld the Court's jurisdiction and relied, among other things, on two prior cases in which the Court had issued the Great Writ under similar circumstances.[112] Although in the cited cases the jurisdictional issue was neither raised by counsel nor addressed by the Court,[113] Marshall concluded that "the question is considered as long since decided."[114] Johnson's dissent took a classic declaratory approach:

> Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not *law*, and in a thousand instances have such cases been declared so by courts of justice.[115]

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109. Henry v. Bank of Salina, 5 Hill 523, 535 (N.Y. 1843).

110. Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786).

111. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Johnson, J., dissenting).

112. *See id.* (citing *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806), and United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795)). Erich Bollman had been placed under military arrest as an alleged accomplice of Aaron Burr in connection with Burr's purportedly treasonous expedition to set up a separate government in the western statos, and the *Bollman* Court was presented with the question of its power to issue a habeas writ if it found the evidence of treason insufficient. Public furor rose to the level of proposals in Congress to suspend the writ of habeas corpus and to limit the Supreme Court's power to issue the writ. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 305 (1926). The Court ultimately issued the writ in light of its conclusion that the evidence of treason was insufficient. *See id.* at 307.

113. *See* CURRIE, *supra* note 98, at 81.

114. *See Bollman,* 8 U.S. (4 Cranch) at 100. Marshall's argument directly contradicted his earlier indication in *United States v. More*, 7 U.S. (3 Cranch) 159 (1805), that a mere silent premise of an opinion, without express argument and analysis, was entitled to no deference. *See* discussion *infra* accompanying notes 118-22.

115. *Bollman,* 8 U.S. (4 Cranch) at 103-04 (Johnson, J., dissenting); *cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (suggesting that it is the Court's "prerogative" and "duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly

Under Johnson's declaratory approach to case law, an examination of the correctness or consistency of the Court's earlier decisions was more than a matter of the Court's right; it was a matter of necessity. Such a reexamination of the merits flowed naturally from the declaratory theory that "[a] case that cannot be tested by principle is not law."[116]

2. Binding Precedent and the Marshall Court

Despite Marshall's penchant for reinventing the legal wheel when settled issues reappeared, his own discussion of precedent often contradicted the pure declaratory approach offered by Johnson.[117] The earliest Marshall Court discussion of precedent may be found in a series of jurisdictional cases. The first was *United States v. More*, which arose out of the appointment of Benjamin More to a five-year term as justice of the peace in the District of Columbia.[118] Although More initially was entitled to a fee for his services, Congress repealed the fee provision in 1802. More was prosecuted for continuing to accept a fee, and he demurred on the ground that the 1802 statute contravened Article III's guarantee that federal judges' compensation would not be "diminished during their continuance in office."[119] The *More* Court avoided the merits of this question by concluding that it lacked jurisdiction to review criminal cases under the Judiciary Act.[120] In response to counsel's argument that the Court had exercised such jurisdiction in an earlier case, Chief Justice Marshall responded that the jurisdictional issue had not been raised, and thus that the earlier cases had no precedential value: "It passed *sub silentio*, and the court does not consider itself as bound by that case."[121]

Although the declaratory theory was alive and well in Marshall's day, his statement in *More* suggests that he conceived of prior decisions as more than evidence of the law to be easily cast aside

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called into question"); 1 KENT, *supra* note 94, at *477 (suggesting that "there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application").

116. *Bollman*, 8 U.S. (4 Cranch) at 104 (Johnson, J., dissenting).

117. A further contradiction may be found in Marshall's rejection of "the custom of the delivery of opinions by the Justices *seriatim*," in favor of the new practice of "announcing, himself, the views of that tribunal." 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL, 1800-1815, at 16 (1919). Marshall's innovation was aimed at gaining "conclusiveness and fixity" for the new Court's decisions, SCHWARTZ, *supra* note 12, at 39, a goal that seems inconsistent with a "declaratery" duty of reexamination of the "reason" of precedent in every case.

118. United States v. More, 7 U.S. (3 Cranch) 159 (1805).

119. *See id* at 166 (quoting U.S. CONST. art. III).

120. *Id.* at 172-74.

121. *Id.* at 172.

in favor of a more enlightened view of the proper rule. Instead, a decision squarely confronting an issue apparently would have some binding effect on the Court in subsequent cases.[122]

Indeed, Marshall sought an even more expansive role for precedent when it suited the result he favored, as the above discussion of *Ex parte Bollman* indicates. In justifying the Court's jurisdiction to issue a habeas writ, Marshall cited two prior cases in which the Court had issued the writ. Although in the cited cases the jurisdictional issue was neither raised by counsel nor addressed by the Court, Marshall disregarded the distinction he had drawn in *More* in concluding that "the question is considered as long since decided."[123] In apparent recognition of the inconsistency with *Bollman*, Marshall acknowledged that "the question of jurisdiction was not made at the bar," but maintained that "the case was several days under advisement, and this question could not have escaped the attention of the court."[124]

Marshall made a further attempt to reconcile his discordant views on this issue in his majority opinion in *United States v. Deveaux*.[125] *Deveaux* was a trespass action brought by the President, Directors, and Company of the first National Bank against certain Georgia citizens who allegedly had taken silver from the Bank's Savannah branch to satisfy their stato tax obligations.[126] The lower court had dismissed for lack of jurisdiction; Justice Marshall's opinion for the Court reversed. Marshall first offered a sweeping dictum: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corpo-

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122. Marshall's opinion in *Cohens* included a statement of similar effect. In the context of distinguishing holding and dictum, Marshall asserted the following:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a suhsequent suit when the very point is presentod for decision.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821). The negative implication is siguificant. Marshall believed that specific conclusions that constitute the holding of the case would be given controlling significance.

123. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100 (1807).

124. *Id.*

125. United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), *overruled in part by* Louisville, Cincinnati, & Charleston R.R. v. Lotson, 43 U.S. (2 How.) 497 (1844).

126. *Id.* at 62.

rate name."[127] In other words, the National Bank could sue in diversity only if its members themselves were diverse from the defendants.

Despite Marshall's broad conclusion as to the jurisdictional status of a corporation, *Deveaux* did not turn on whether the Bank itself could qualify as a citizen for diversity purposes; "no one had argued that the Bank was a citizen of any state, and it would have been difficult to do so because it was a federal corporation."[128] And there was no dispute that the Bank's members were not citizens of Georgia, as were the defendants. Thus, the issue presented was "whether, by becoming members of the corporation, the individuals who compose it lose, in their corporate affairs, those privileges which as individuals they possessed before."[129] Marshall concluded that the answer was no: diversity jurisdiction was aimed at avoiding prejudice to outsiders, and outsiders "are not less susceptible of these apprehensions . . . because they are allowed to sue by a corporate name."[130]

On this point, Marshall noted that the Court repeatedly had exercised jurisdiction over "causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."[131] Apparently aware of his erratic track record on this issue (but without citation to *More* or *Bollman*), Marshall made the following attempt at reconciliation: "Those decisions are not cited as *authority*; for they were made without considering this particular point; but they have much *weight*, as they show that this point neither occurred to the bar or the bench."[132] By way of clarification, Marshall later added that "the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded."[133]

The Marshall Court's opinions on the issue of the constitutionality of state bankruptcy laws reveal a further solicitude for precedent. The bankruptcy issue arose initially in *Sturges v. Crowninshield*,[134] in which a New York bankruptcy statute was challenged as (1) inconsistent with Congress's express power under the

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127. *Id.* at 86.
128. CURRIE, *supra* note 98, at 88.
129. *Deveaux*, 9 U.S. (5 Cranch) at 79.
130. *Id.* at 87.
131. *Id.* at 88.
132. *Id.* (emphasis added).
133. *Id.* at 92. Marshall's point seems fair enough; an unspoken jurisdictional premise should not be accorded stare decisis effect as judicial *authority* on that point, but neither should it be disregarded altegether—it may be given some weight in showing that the Court and counsel failed to raise the issue. But it should be recognized that this approach retracts much of Marshall's conclusion in *Bollman* that a jurisdictional question may be "considered as long since decided" by the mere exercise of jurisdiction.
134. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

Constitution to establish bankruptcy laws; and (2) an impairment of the obligation of contracts. Marshall's opinion for the Court ruled that Congress's bankruptcy power was not exclusive, "provided there be no act of Congress in force to establish a uniform system of bankruptcy,"[135] but that the New York statute violated the Contracts Clause insofar as it applied retroactively to contracts in place prior to enactment of the New York law.[136] Eight years later, in *Ogden v. Saunders*,[137] the question of the constitutionality of *prospective* application of state bankruptcy provisions came before the Court. The seriatim opinions in *Ogden* upheld state authority to enact prospective bankruptcy statutes, offering competing theories on the substantive issues before the Court but a surprising consensus as to the precedential value of *Sturges*.

Justice Washington voted with the majority, based primarily on his conclusion that the Contracts Clause protected only the "obligation" of contracts, not the contracts themselves, and thus was offended only by retroactive legislation, which was "oppressive, unjust, and tyrannical."[138] Before reaching this question, however, Washington first paused to emphasize his deference to *Sturges*. Apparently, Justice Washington's initial inclination would have been to strike down the bankruptcy statute in *Ogden* on the broad ground that Congress's bankruptcy power was exclusive. But he expressly declined to take that route in light of the *Sturges* Court's rejection of that argument:

> To the decision of this Court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned Judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the State legislatures to pass bankrupt laws, by which I understand, those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to be-

135. *Id.* at 208.

136. *See id.* at 207-08.

137. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

138. *Id.* at 266 (Washington, J.). Although the *Ogden* Court generally upheld the states' power to pass prospective bankruptcy legislation, it did not relieve the debtor in question from his obligation, since the Court held that the states had no power to affect contracts made by citizens of other states. *Id.* at 359 (Johnson, J., concurring); *see also* 2 WARREN, *supra* noto 112, at 692 (suggesting that "the financial troubles which arose, during the next ten years, out of the over-speculation in public lands, canals and railroads, and out of disastrous banking methods, could have been alleviated by the exercise of Congressional power in the passage of a National Bankruptcy Act, when they could not be adequately dealt with by the insolvent laws of the separate States" under the ruling in *Ogden*).

> lieve that this opinion was, and is incorrect, since it stands condemned by the decision of a majority of this Court, solemnly pronounced.[139]

Justice Washington's apparent disagreement with *Sturges* on the exclusivity of Congress's bankruptcy power was insufficient to justify abandoning it. If forced to choose between his own view and that adopted by a majority of the Court, Washington opted for the latter, rejecting his own views as incorrect by definition even though he clearly had not changed his private views on the matter. Since *Sturges* had not resolved the question whether the Contracts Clause was offended by purely prospective application of a state bankruptcy law, however, Washington proceeded to analyze that issue unencumbered by any prior authority.

Chief Justice Marshall dissented,[140] concluding that the Contracts Clause was equally offended by prospective or retrospective bankruptcy legislation, but offered dicta that indicated his agreement as to the precedential value of *Sturges*. "In *Sturges v. Crowninshield*," Marshall explained, "it was determined, that an act which discharged the debter from a contract entered into previous to its passage, was repugnant to the constitution."[141] The Contracts Clause question before the Court in *Ogden* was different from that decided in *Sturges*,

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139. *Ogden*, 25 U.S. (12 Wheat.) at 263-64. Professor Currie lauds Washington's "admirable self-restraint" in "respecting the precedential effect of what was really only a dictum in *Sturges*," and in thus "cast[ing] the deciding vote to uphold a law he believed invalid." CURRIE, *supra* note 98, at 151. Professor White similarly notes Washington's "blend of stubbornness and deference to precedent," but also suggests that the Justices in *Ogden* "tacitly agreed not to give . . . any weight" te *Sturges*' companion case of *McMillan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819). WHITE, *supra* note 105, at 651-52. White's analysis assigns an overbroad holding to *McMillan*. As White asserts, *McMillan*'s rejection of the state bankruptcy law in that case included an assertion by the Chief Justice that it was immaterial whether the law had been "passed before the debt was contracted." *McMillan*, 17 U.S. (4 Wheat.) at 213. But this conclusion was pure dicta; the statute's application in *McMillan* was effectively retrospective in that the contract at issue had been "made in a different State, by persons residing in that State, and, consequently, without any view to" the bankruptcy law in question. *Ogden*, 25 U.S. (12 Wheat.) at 333 (Marshall, C.J., dissenting). Prior to *Ogden*, the Court had not directly addressed the constitutionality of a purely prospective application of a state insolvency law, and Marshall's rejection of the prospective/retrospective distinction in *McMillan* was dicta. As Marshall himself conceded in *Ogden*, *McMillan* was not controlling in view of the "general rule" that "the positive authority of a decision is co-extensive only with the facts on which it is made." *Id.* Thus, the Justices' conclusion in *Ogden* that the constitutionality of prospective bankruptcy legislation was "open for discussion" despite *McMillan* merely indicates their refusal to assign precedential weight to dicta, and does not support White's conclusion that the Marshall Court "tacitly agreed" to ignore the proper effect of a holding.

140. *See Ogden*, 25 U.S. (12 Wheat.) at 332 (Marshall, C.J., dissenting). Professor Currie notes that "*Ogden* was the only constitutional case in thirty-four years in which Marshall signed a dissent." CURRIE, *supra* note 98, at 151.

141. *Ogden*, 25 U.S. (12 Wheat.) at 333 (Marshall, C.J., dissenting).

however, and thus Marshall concluded that the issue was not controlled by *Sturges*:

> [I]t is a general rule, expressly recognized by the Court in *Sturges v. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made. In *Sturges v. Crowninshield*, the law acted on a contract which was made before its passage; in this case, the contract was entered into after the passage of the law.[142]

In the absence of any decision with positive authority on the point in question, Marshall agreed that it was "consequently, open for discussion."[143] Despite his disagreement with the result in *Ogden*, Marshall offered the converse of this point when the question arose again in *Boyle v. Zacharie*, resolving that the principles established by the majority in *Ogden* "are te be considered no longer open for controversy, but the settled law of the court."[144]

Taken together, the above cases evidence the view that an actual holding in an earlier case has "binding" effect and "controls the judgment" in a subsequent suit. The Marshall Court apparently had moved beyond the pure declaratory approach advocated by Johnson, which would invite de novo reexamination of the merits of a prior decision in every case.

3. Overruling Decisions and the Marshall Court

But Marshall's statements must be understood in context. General dicta about the importance of adherence to precedent—either in cases in which the Court abides by a former decision or where the Court has not directly confronted the issue at hand—may provide a jaundiced view of the actual state of the doctrine. Marshall's reliance on precedent in support of a certain result may merely have turned on a conclusion that the prior decision was correctly decided,[145] or on the view that "[i]t could subserve no useful purpose again to examine the

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142. *Id.*

143. *Id.*

144. Boyle v. Zacharie, 31 U.S. (6 Pet.) 348, 348 (1832). Marshall's deference to precedent even extended, to some degree, to English decisions. *See* Cathcart v. Robinson, 30 U.S. (5 Pet.) 264, 280 (1831) (concluding that English decisions under the "statute of Elizabeth," which had been adopted in the United States, could "properly be considered as accompanying the statutes themselves, and forming an integral part of them," where such decisions preceded the adoption of the statute in the United States, but that subsequent decisions were entitled only to "great respect," and were not "absolute authority").

145. *See* United States *ex rel.* Amy v. Mayor of Burlington, 154 U.S. 568, 569 (1870) (noting that the case is "substantially the same" as *Butz v. City of Muscatine*, 75 U.S. (8 Wall.) 575 (1869), and indicating that "[o]ur opinion is the same as in that case").

subject."[146] Moreover, even if Marshall's statements about deference to precedent are taken at face value, they leave unanswered the question of the *extent* of the binding effect of the earlier decision and the circumstances under which a subsequent court might avoid such an effect. The answer to this question may be found by turning to an examination of the cases in which the Marshall Court actually overruled its prior decisions.

Three Marshall Court decisions are generally identified in statistical studies as overruling past precedent:[147] *Hudson v. Guestier (Hudson II)*,[148] *Gordon v. Ogden*,[149] and *Green v. Neal's Lessee*.[150] The disputo in *Hudson II* involved competing claims to the cargo of the vessel *Sea Flower*, which had been captured by the French while the ship was trading, in violation of French ordinances, with certain parts of the island of Hispaniola that were in revolt.[151] The issue before the Court was whether a French tribunal had jurisdiction to issue a judgment of condemnation in favor of the captors of the vessel. This question turned on two distinct sub-issues: (1) whether the circumstances of the captors' seizure of the vessel deprived the French court of jurisdiction; and (2) whether the French court's jurisdiction required the presence of the vessel in a French port. When the jurisdictional issue in *Hudson II* had been previously presented to the Court with the companion case of *Rose v. Himely*,[152] Chief Justice Marshall's opinion focused on the first sub-issue, and concluded that the seizure had been made "on the high seas," or more than "two leagues from the coast"[153]—and that such an invalid seizure deprived the French court of jurisdiction.[154]

The Court's decision in *Hudson II* rejected Marshall's conclusion on this issue. Justice Livingston's opinion in *Hudeon II* (concurred in by all Justices but Marshall) held that it was not material whether the vessel was "taken on the high seas, or more than two

146. Wright v. Sill, 67 U.S. (2 Black) 544, 545 (1862).

147. *See* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2245-46 (1996); *see also* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 n.1 (1932) (Brandeis, J., dissenting); Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 159-60 (1958).

148. Hudson v. Guestier (*Hudson II*), 10 U.S. (6 Cranch) 281 (1810).

149. Gordon v. Ogden, 28 U.S. (3 Pet.) 33 (1830).

150. Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291 (1832).

151. After its capture, the *Sea Flower* was taken to the Spanish port of Baracoa. The French captors then sought and received a judgment of "condemnation" from "a French tribunal at Guadaloupe," and the cargo was sold for the benefit of the captors and purchased by Guestier. *Hudson II*, 10 U.S. (6 Cranch) at 281.

152. Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808).

153. *Id.* at 273-74.

154. *See id.* at 279.

leagues from the coast."[155] "By a seizure on the high seas," Livingston said, France had "interfered with the jurisdiction of no other nation, the authority of each being there concurrent."[156]

In this context, *Hudson II* is understandably characterized as overruling *Rose*. Marshall's opinion in *Rose* is styled by the reporter as "the opinion of the court,"[157] and his conclusion regarding the propriety of the seizure included his own assertion that "[t]o a majority of the court it seems to follow, that such a seizure is totally invalid," and "that such possession confers no jurisdiction on the court of the country to which the captor belongs."[158] Moreover, in *Hudson II* Marshall concluded his brief dissent with the assertion that "the principle of *that case* (Rose v. Himely) *is now overruled.*"[159] Beyond this acknowledgment, the Court in *Hudson II* offered no explanation for its apparent rejection of *Rose*. Understandably, the *Hudson II* Court's seemingly cavalier treatment of precedent has been thought to betray the Marshall Court's purported commitment to stare decisis.[160]

But the apparent betrayal is illusory. In fact, the holding in *Hudson II* addresses an issue that had been expressly reserved in *Rose*. Despite Marshall's characterization of his opinion in *Rose* as the majority, in *Hudson II* he admitted to an error in counting votes in *Rose*.[161]

Marshall's counting error is evident from an examination of the other opinions in *Rose*. Six Justices participated in the case, five of whose votes are accounted for in the report of the case. Justices Livingston, Cushing, and Chase concurred in the judgment, but they expressly declined to render "an opinion on the invalidity of a seizure on the high seas."[162] Livingston's concurrence sidestepped the validity of the seizure by concluding that the French court lacked jurisdiction

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155. *Hudson II,* 10 U.S. (6 Cranch) at 284.

156. *Id.*

157. *Rose,* 8 U.S. (4 Cranch) at 268.

158. *Id.* at 279.

159. *Hudson II,* 10 U.S. (6 Cranch) at 285 (emphasis added).

160. *See* Monaghan, *supra* note 2, at 757 & n.186 (citing *Guestier* for the proposition that "[t]he view that a judicial precedent is the equivalent of a legislative act has never existed in American law").

161. Marshall discusses his error in *Rose* in his brief dissent in *Hudson II*, which is reported in relevant part as follows:

> "Marshall, Ch. J. observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken." The opinion was concurred in by one judge. He was still of opinion that the construction then given was correct.

Hudson II, 10 U.S. (6 Cranch) at 285 (Marshall, C.J., dissenting) (citing *Rose,* 8 U.S. (4 Cranch) at 268 (Marshall, C.J., delivering opinion of the Court)).

162. *Rose,* 8 U.S. (4 Cranch) at 281 (Livingston, J., concurring).

"because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port."[163] Justice Johnson dissented and disagreed with Marshall's majority approach. In Johnson's view, the Court was "not at liberty" to inquire into the propriety of the seizure, and in any event the seizure arguably was consistent with the "law of nations."[164]

Thus, four Justices in *Rose* were on record as either declining to reach the propriety of the seizure or overtly disagreeing with Marshall's conclusions on that issue. Although his vote was not reported, Justice Washington apparently was the sole vote in support of Marshall's opinion. In this light, *Hudson II* cannot be read to overrule any proper holding of the Court, and the case should not be read as evidence of a permissive, declaratory approach to precedent. Marshall's conclusion that the principle of *Rose* had been overruled was perhaps his way of saving face over his counting error, but in fact the principle at issue was a minority view and not a holding.

Green v. Neal's Lessee[165] is similarly misplaced in lists of Marshall Court overruling decisions. To be sure, the *Neal's Lessee* Court did set aside *Patton's Lessee v. Easton*[166] and *Powell's Lessee v. Green*,[167] which had concluded that under Tennessee case law, a seven-year Tennessee statute of limitations required a claimant in adverse possession to establish that his possession was accompanied by "a connected title, either legal or equitable."[168] *Neal's Lessee* abandoned that requirement and held that a showing of connected title was not required.[169]

But the decision in *Neal's Lessee* did not raise the stare decisis question of the effect of a determination that *Patton's Lessee* and *Powell's Lessee* were incorrectly decided in the first instance. Instead, the issue in *Neal's Lessee* was the binding effect of subsequent developments in Tennessee case law. *Neal's Lessee* is not a stare decisis case; it merely held that the Court had the duty to adopt the evolving local law of Tennessee on this statute of limitations question.[170]

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163. *Id.*
164. *Id.* at 287-89 (Johnson, J., dissenting).
165. Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291 (1832).
166. Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476 (1816).
167. Powell's Lessee v. Green, 27 U.S. (2 Pet.) 241 (1829).
168. *Neal's Lessee*, 31 U.S. (6 Pet.) at 295.
169. *Id.*
170. *Id.* at 298 (noting that "where a question arises under local law," the decision by a state court of last resort "should be considered as final by this court").

Gordon v. Ogden, by contrast, was a true overruling decision, and its treatment of precedent provides an opportunity to examine the extent of the Marshall Court's commitment to a binding rule of stare decisis and of any exceptions to the rule. The issue in *Gordon* was whether the Supreme Court's jurisdiction over cases in which the matter in dispute exceeds $2000 should be measured by the amount claimed in the pleadings or by the actual amount of the judgment.[171] The Court's earlier decision in *Wilson v. Daniel*[172] had adopted the former measure: "To ascertain . . . the matter in dispute," *Wilson* had held that the Court "must recur to the foundation of the original controversy—to the matter in [dispute] when the action was instituted," and not to "the sum, or value, found by a verdict."[173] Chief Justice Marshall's opinion for the Court in *Gordon* expressly overruled the *Wilson* standard, but not without first indicating a reluctance to do so:

> Although that case was decided by a divided court, and although we think, that upon the true construction of the twenty-second section of the judicial act, the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in Wilson vs. Daniel, had not a contrary practice since prevailed.[174]

For Marshall, the mere conclusion that *Wilson* wrongly interpreted the statute was insufficient to justify overruling it. Marshall did not use the modern buzz words of "special justification," but his analysis was substantially in accord with the view that such a justification was necessary. In this instance, the Court's inclination to follow precedent despite its purported error was overcome by the contrary practice that had prevailed since that decision was announced.[175]

The contrary practice referred to by Marshall was evidenced by the Court's dismissal for lack of jurisdiction of *Wise & Lynn v. Columbian Turnpike Co.*[176] In that case, plaintiffs Wise & Lynn as-

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171. Gordon v. Ogden, 28 U.S. (3 Pet.) 33, 34 (1830).

172. Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798), *overruled by* Gordon v. Ogden, 28 U.S. (3 Pet.) 33 (1830).

173. *Id.* at 405.

174. *Gordon*, 28 U.S. (3 Pet.) at 34.

175. *See id.*

176. Wise & Lynn v. Columbian Turnpike Co., 11 U.S. (7 Cranch) 276, 276 (1812). Marshall also quoted a dictum from *Cooke v. Woodrow*, 9 U.S. (5 Cranch) 13, 14 (1809), that "[i]f the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute." *Gordon*, 28 U.S. (3 Pet.) at 35. But, as Marshall himself acknowledged, *Cooke* provided little support for a practice "contrary" to the standard announced in *Wilson* since the dictum "was said in a case in which the defendant below was a plaintiff in error, and in which the judgment was a sufficient sum to give jurisdiction." *Id.* In that context, a judgment in excess of

serted a claim against the defendant in the Circuit Court for the District of Columbia for a sum in excess of $100. The court entered a judgment in favor of Wise & Lynn in the amount of $45. Wise & Lynn sought a writ of error from the Supreme Court, whose jurisdiction over cases from the Circuit Court for the District of Columbia required that the amount in controversy exceed $100. Without any citation to *Wilson*, or any attempt to distinguish the $100 amount-in-controversy requirement from the $2000 requirement in *Wilson*, the *Wise & Lynn* Court dismissed the writ of error on grounds that conflicted directly with the line drawn in *Wilson*.[177]

Although most statistical studies designate only the above three overruling decisions in the Marshall era, there is at least one more case that should be added to the list. In *United States v. Percheman*,[178] Chief Justice Marshall authored an opinion for the Court that expressly set aside the interpretation given to a treaty with Spain just four years earlier in *Foster v. Neilson*.[179] In both *Foster* and *Percheman*, plaintiffs had asserted claims to certain parcels of land within the Louisiana territory under grants from the Spanish crown. Although the grants in question post-dated the treaty of St. Ildefonso, by which Spain had ceded the Louisiana territory to France, a subsequent treaty between the United States and Spain ratified those grants.[180] The primary question before the Court in *Foster* and *Percheman* was whether this language was self-executing, or whether it was contract language that would require a further legislative act of ratification.[181]

Chief Justice Marshall's opinion in *Foster* adopted the former view.[182] He relied principally on the common-sense meaning of the language, noting that the treaty "does not say that those grants are hereby confirmed," but that "those grants shall be ratified and confirmed to the persons in possession," which "seems to be the langnage of contract."[183] Four years later, Marshall's opinion in *Percheman*

$2000 could easily be said to satisfy the jurisdictional amount without implying the converse that a judgment for less than that amount would defeat jurisdiction.

177. The report of *Wise & Lynn* simply indicates as follows: "Upon the return of the rule, it appearing that the sum awarded was only 45 dollars, the Court, all the Judges being present, decided that they had no jurisdiction, although the sum claimed by *Wise & Lynn* . . . was more than 100 dollars." *Wise & Lynn*, 11 U.S. (7 Cranch) at 276.

178. United States v. Percheman, 32 U.S. (7 Pet.) 51, 52-53 (1833).

179. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 316 (1829), *overruled in part by Percheman*, 32 U.S. (7. Pet.) at 51.

180. *See Percheman*, 32 U.S. (7 Pet.) at 89.

181. *Foster*, 27 U.S. (2 Pet.) at 314-15.

182. *Id.*

183. *Id.*

reached the opposite conclusion and expressly disavowed *Foster* on this point. But Marshall's about-face did not turn merely on a changed view of the merits.

Instead, Marshall's *Percheman* decision turned on his conclusion that an important piece of the factual record was not before the Court in *Foster*. Specifically, Marshall noted that the treaty in question had been drafted in both Spanish and English, and that settled law required a construction of the treaty that allows both versions to agree.[184] The Spanish version of the treaty provided that the grants in question "shall remain ratified and confirmed to the persons in possession of them, to the same extent."[185] Although Marshall reaffirmed that the English version seemed to use the "words of contract," he also acknowledged that "they are not necessarily so," and that "[t]hey may import that they 'shall be ratified and confirmed,' by force of the instrument itself."[186] In setting aside *Foster*'s construction of the treaty, Marshall speculated that the result would have been the same if the Spanish version had been before the Court.[187]

Thus, the Marshall Court's true overruling decisions (*Gordon* and *Percheman*) recognized limited exceptions to the rule of binding precedent articulated in the Court's overruling rhetoric rehearsed above. *Gordon* found a justification for overturning a prior decision in the contrary practice that had developed in the Court's subsequent cases; *Percheman* relied on the conclusion that important facts were not before the Court in its earlier, erroneous decision.

C. Error Correction in Historical Perspective

As the above discussion demonstrates, the modern doctrinal tension over the stare decisis effect of a currently perceived error was also evident in the founding era. In one sense, the notion of analytical error as a special justification for overturning precedent has the deepest of historical roots. Blackstone's rule of stare decisis acknowledged

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184. *See Percheman*, 32 U.S. (7 Pet.) at 88.

185. *Id.*

186. *Id.* at 89.

187. *See id.* Marshall wrote:

> In the case of Foster v. Neilson, 2 Pet. 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought te our view, and we then supposed, that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article.

Id.

a single exception, one that permitted departure from precedent deemed clearly contrary to reason, and vestiges of the declaratory approach were evident in the Court's early treatment of precedent.[188]

But it would be a mistake to conclude that the founding generation embraced an open invitation to reexamine the merits of any prior decision. Blackstone's conception of stare decisis acknowledged the rule-swallowing effect of a merits-based exception and accordingly sought to circumscribe the scope of the exception. Blackstone himself noted the policy of assuring that the common law is not altered according to a subsequent judge's "private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land."[189] Uuless the reexamination of the reason and justice of the earlier decision is properly cabined, the result warned of by Blackstone would easily arise: The common law would depend on private sentiments and not on the "customs of tlie land."

The framing generation understood the danger inherent in the declaratory theory of case law. The notion that "nothing is law that is not reason," Sir William Jones noted, is:

> [I]n theory, excellent; but in practice, dangerous, as many rules, true in the abstract, are false in the concrete. For, since the reason of *Titius* may, and frequently does, differ from the reason of *Septimius*, no man, who is not a lawyer, would ever know how to act, and no man who is a lawyer, would in many instances know what to advise, unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.[190]

As Jones, Scalia, and even Blackstone would tell us, a coherent doctrine of precedent cannot invite a de novo reexamination of whether tlie legal analysis in a prior decision conforms to the current judge's view of tlie proper approacli to tlie problem. Such a doctrine "would be no doctrine at all" in the sense that it would accord exclusive significance to the policy of accuracy while completely ignoring the policies of stability and institutional integrity.

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188. *See* 1 BLACKSTONE, *supra* note 72, at *69.

189. *Id.*

190. WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 84 (Boston, Etheridge for West 1796); *see also* 1 CHARLES FEARNE, AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES 170 (London ed. 1844):

> If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decision of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature; I should be glad to know, what person would venture te purchase an estate, without first having the judgment of a court of justice, respecting the identical title under which he means te purchase?

Thus, the founding generation apparently rejected the permissive error-correction standards sometimes offered by the modern Court. The notion of a "duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question,"[191] though consistent with the declaratory theory and espoused in some founding-era opinions, likely would have been rejected as eviscerating the doctrine of stare decisis. But the founding generation also rejected the opposite extreme, which would have foreclosed error correction altogether as a basis for overruling precedent. Instead, the Blackstone standard of precedent charted a compromise course that attempted to avoid the rule-swallowing effect of a merits-based exception by narrowly limiting the availability of correction for error.

The founding-era compromise seems comparable to the modern notion that only an egregious error justifies abandoning precedent.[192] Blackstone conceded that the "particular reason of every rule in the law" cannot "at this distance of time be always precisely assigned."[193] But in Blackstone's view, even the lack of a currently perceived reason to support a decision was insufficient to justify rejecting it: "[I]t is sufficient that there be nothing in the rule *flatly contradictory to reason*, and then the law will *presume it to be well founded.*"[194] Thus, far from inviting a de novo reevaluation of the reason behind a particular common law decision, Blackstone placed a weighty thumb on the scale in favor of the previous decision, with any doubts being resolved in favor of staying the course.

Modern application of Blackstone's notion of error correction also requires an appreciation of the significant difference in the nature of the judicial work-product in the two eras. Today the business of the Supreme Court is largely "the interpretation of public enactments which are in themselves laws binding on all whom they concern," while the great proportion of the case law from Blackstone's era "does not profess to interpret any written law, whether original or derivative, but professes on the contrary to develop and apply principles that have never been committed to any authentic form of words."[195] In the common law context of divining the best applicable

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191. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring).

192. *See supra* note 44.

193. 1 BLACKSTONE, *supra* note 72, at *70.

194. *Id.* (emphasis added).

195. FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 239 (London, MacMillan & Co., 1896); *see also* Scalia, *supra* note 8, at 84-88 (contrasting the work of common-law judges, whose role it is to have "the intelligence to know what is the best rule of law to govern the case at hand," with that of modern federal appellate courts, which are involved exclusively in the "interpretation of text—the text of a regulation, or of a statute, or of the Constitution").

rule without any controlling legal text, Blackstone acknowledged that a judge could reject a former decision as "manifestly absurd or unjust" where the decision lacked any foundation in equity or fairness.[196] But that standard is not logically transferrable to the business of the modern Supreme Court. The "interpretation of public enactments which are in themselves laws binding on all whom they concern"[197] does not naturally lend itself to the substitution of a Justice's views of equity or fairness for the settled meaning of the controlling text. Thus, Justice Stevens' notion of a stare decisis standard that permits the modern Court to evaluate a precedent's consistency with the current sense of justice, the social welfare, or the mores of the day[198] finds some historical roots in the context of common law precedent; but it is not logically applicable to the predominant business of the modern Court of interpreting binding legal text.

Madison's conception of stare decisis is a more natural fit for the judicial business of the modern Court. He maintained that a decision arguably expounding or interpreting the law or the Constitution was worthy of deference, but believed that deference ended once the decision reached the level of altering or repealing the law.[199] Like Blackstone, Madison conceived of a strong presumption in favor of the merits of a judicial decision, so much so that any decision even arguably expounding or interpreting the text was worthy of deference.[200]

The Marshall Court's opinions reinforce this hesitation to overturn precedent on the basis of mere error. Its opinions repeatedly adverted to the binding or controlling effect of precedent, and its true overruling decisions appeared to conclude that something more than mere error was required to justify a change of course. The basis for error correction in those cases overlaps substantially with the notions often expressed by the modern Court that precedent may be susceptible to reversal if it is undermined (though not expressly overruled) by subsequent cases,[201] or if it is premised on an incomplete factual record.[202]

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196. 1 BLACKSTONE, *supra* note 72, at 70.

197. POLLOCK, *supra* note 195, at 239.

198. *See* Runyon v. McCrary, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring).

199. *See* Letter from James Madison te N.P. Trist (Dec. 1831), *reprinted in* 9 WRITINGS OF JAMES MADISON, *supra* note 92, at 477.

200. *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831) *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391.

201. *See* Agostini v. Felton, 521 U.S. 203, 235-38 (1997); *see also infra* text accompanying notes 374-79. The modern Court has also suggested that the precedential value of a decision diminishes when the decision is inconsistent with *prior* authority. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 231 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547

The Marshall Court's decisions also devoted substantial attention to the question recently before the Court in *Hohn v. United States* as to whether the Court's mere practice of exercising jurisdiction has any precedential significance.[203] In upholding the Court's jurisdiction to review denials of applications for certificates of appealability under its certiorari jurisdiction (and overruling *House v. Mayo*[204] on that point), the *Hohn* majority concluded that *House* had been undermined by the Court's subsequent practice of exercising certiorari jurisdiction under circumstances precluded by *House*.[205] Justice Scalia's dissent chided the majority for its attempt to stretch the notion of undermined authority. Scalia noted that the decisions cited by the majority "not only fail to mention *House*; they fail to mention the jurisdictional issue to which *House* pertains," and complained that the Court had "repeatedly held that the existence of unaddressed jurisdictional defects has *no precedential effect*."[206] In response, the *Hohn* majority apologetically cited Chief Justice Marshall's opinion in *More* on this point, conceding that "opinions passing on jurisdictional issues *sub*

(1990), principally on the ground that that case was inconsistent "with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"); Payne v. Tennessee, 501 U.S. 808, 835 (1991) (Scalia, J., concurring) (arguing that the precedential value of *Booth v. Maryland* and *South Carolina v. Gathers* was diminished because they had "announce[d] a novel rule, contrary to long and unchallenged practice"). Although this analysis is not evident in the Marshall Court's opinions, it does seem traceable to principles accepted by English courts and commentators of the founding era. *See* JOEL PRENTISS BISHOP, FIRST BOOK OF THE LAW § 98, at 77 (Boston, Little, Brown, & Co. 1868) (suggesting that a case may be overruled if it is not in accordance with "the principles which constitute the pre-existing law, or especially if it is in conflict with them"); 1 KENT, *supra* note 94, at *478 (noting that "[Lord Mansfield's] successor, Lord Kenyon . . . controlled or overruled several very important decisions of Lord Mansfield, as dangerous innovations, and on the ground that they had departed from the precedents of former times, and disturbed the landmarks of property, and had unauthorizedly superadded equity powers to a court of law").

202. *See* Planned Parenthood v. Casey, 505 U.S. 833, 863 (1990) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (suggesting that a reversal of course in precedent may be called for where the overruling decision "rest[s] on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions"); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410-11 (1932) (Brandeis, J., dissenting) (suggesting that stare decisis is weakened in cases where the decision "is dependent upon the determination of what in legal parlance is called a fact").

203. Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969, 1977 (1998) (holding that it is unnecessary to "invoke[ ] extraordinary jurisdiction in routine cases").

204. House v. Mayo, 324 U.S. 42, 44 (1945), *overruled by Hohn*, 118 S. Ct. at 1969.

205. *Hohn*, 118 S. Ct. at 1977-78. The *Hohn* majority nevertheless sought some refuge in the practice: "Once we have decided to reconsider a particular rule, however, we would be remiss if we did not consider the consistency with which it has been applied in practice." *Id.* at 1978.

206. *Id.* at 1982 (Scalia, J., dissenting) (quoting Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996)).

silentio" are not deemed to have "overruled an opinion addressing the issue directly."[207]

If it had probed deeper into Marshall's treatment of this issue, the *Hohn* majority might have found some response for Justice Scalia's criticism of its purportedly "new approach to unaddressed jurisdictional defects."[208] After all, like the majority in *Hohn*, Marshall had a difficult time completely ignoring the Court's assumptions of jurisdiction when it furthered the result he wished to reach. Despite his statement in *More*, Marshall's conclusion in *Ex parte Bollman* that the Court had jurisdiction to issue a writ of habeas corpus turned substantially on the fact that the Court had issued the writ in two prior cases. And in *United States v. Deveaux*,[209] Marshall sought to support his conclusion that individuals do not lose their right to sue in diversity by doing business as a corporation by noting that the Court repeatedly had exercised jurisdiction over "causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."[210]

Marshall wanted to have it both ways. He was stuck with his earlier statement that an unspoken jurisdictional premise should not be accorded stare decisis effect as judicial *authority* on that point. But where such a premise helped him, Marshall adopted the view that it could be given some *weight* in showing that the Court and counsel failed to raise the issue.[211] In this light, Justice Scalia's dissenting objection in *Hohn* as te the novelty of the majority's treatment of "unaddressed jurisdictional defects" argnably misses the mark. The *Hohn* Court's inconsistency may well have been logically untenable, but tlie contradiction was hardly novel.

Indeed, if one overarching conclusion is to be made about the doctrine of precedent in the founding era and the Marshall Court, it would be that the stare decisis principles of that day were plagned by tlie same doctrinal tensions and conflicts that are present in the Relinquist Court's opinions. Considerations of stability and institutional integrity place a high premium on consistency with past decisions, while a countervailing concern for accuracy calls for some mechanism for error correction. Blackstone's conception of stare

207. *Id.* at 1978.
208. *Id.* at 1982 (Scalia, J., dissenting).
209. United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).
210. *Id.* at 88.
211. *But see Hohn*, 118 S. Ct. at 1978 (acknowledging that "opinions passing on jurisdictional issues *sub silentio*" are not to be read as overruling an earlier holding, but insisting that "we would be remiss if we did not consider the consistency with which it has been applied in practice").

decisis sought to resolve this tension with a strong presumption in favor of precedent and a limited notion of error correction.[212] The Marshall Court's opinions generally reinforced that approach, and introduced a consideration that has often played a role in the modern Court: that precedent undermined by subsequent decisions may be peculiarly susceptible to reversal.[213]

IV. RULES OF PROPERTY AND RELIANCE INTERESTS

Chief Justice Rehnquist's opinion for the Court in *Payne v. Tennessee*[214] relied extensively on the notion of a sliding stare decisis scale on commercial reliance grounds. In abandoning the previously held view that the Eighth Amendment precluded victim-impact evidence in capital cases, Rehnquist asserted that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved."[215] Because the question in *Payne* "involv[ed] procedural and evidentiary rules," Rehnquist concluded that considerations in favor of stare decisis were at a minimum, and error correction was more freely available.[216]

Justice Marshall's dissent objected to the majority's approach, accusing the Chief of "[r]enouncing this Court's historical commitment to a conception of 'the judiciary as a source of impersonal and reasoned judgments.' "[217] In Marshall's view, a standard that limits "full protection of the doctrine of *stare decisis* to 'cases involving property and contract rights' . . . sends a clear signal that essentially *all* decisions unplementing the personal liberties protected by the Bill of

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212. *See supra* Part III.A.1.

213. As noted in detail in Part IV below, the doctrinal tension on the basic question of the Court's capacity for error correction continued in the Taney era. Taney Court opinions often equivocated about whether the perception of an error was a sufficient consideration to justify abandoning precedent. But in the Taney era, the Court also introduced an additional consideration that explains the apparent inconsistencies in its overruling rhetoric. *See infra* discussion at notes 235-94.

214. Payne v. Tennessee, 501 U.S. 808 (1991).

215. *Id.* at 828.

216. A similar approach carried the day in *United States v. Gaudin*, 515 U.S. 506, 521 (1995), in which the Court overruled *Sinclair v. United States*, 279 U.S. 263 (1929) in holding that the element of "materiality" was a matter of fact to be decided by the jury, and not a matter of law to be resolved by the court. The *Gaudin* Court held that the "role" of stare decisis was "somewhat reduced . . . in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior." *Gaudin*, 515 U.S. at 521.

217. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting) (quoting Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)).

Rights and the Fourteenth Amendment are open to reexamination."[218] Such an "impoverished conception of *stare decisis*," according to Marshall, "cannot possibly be reconciled with the values that inform the proper judicial function," since "*stare decisis* is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of 'the judiciary as a source of impersonal and reasoned judgments.' "[219]

At least one commentator has taken Justice Marshall's side in the above debate, attacking the reliance standard as a "modern methodology in the service of judicial legislation."[220] Under this view, "the common law method, as adopted by the Framers' generation and rooted in Article III," is seen as "emphasiz[ing] Blackstonian precedent in all cases, not primarily for commercial predictability, but as the principal bulwark against usurpation of the rule of law by judicial tyranny."[221]

A. Rules of Property in the Founding Era

History provides ample support for Chief Justice Rehnquist's side of the *Payne* debate. Blackstone's explication of error correction drew no express distinction between commercial cases and other decisions, but the distinction had already taken hold in the English courts. One early English statement appeared in *Morecock v. Dickins*, a 1768 case in the High Court of Chancery.[222] The issue in that case was whether Dickins, the holder of a legal mortgage on property, should be considered to have received constructive notice of a prior equitable mortgage held by Morecock, by virtue of Morecock's registration of the deed.[223] Counsel for Morecock argued that registration should serve as constructive notice.[224] Although Lord Camden indicated his inclination to agree with this argument on its merits, he refused to abandon settled precedent on the point:

> If this was a new point, it might admit of difficulty; but the determination in *Bedford v. Bacchus* seems to have settled it, and it would be mischievous to

218. *Id.* at 851 (quoting South Carolina v. Gathers, 490 U.S. 805, 828 (1989) (Scalia, J., dissenting)).

219. *Id.* at 852 (quoting *Moragne*, 398 U.S. at 403).

220. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 18 (1994).

221. *Id.*

222. Morecock v. Dickins, 27 Eng. Rep. 440 (Ch. 1768).

223. *See id.* at 440.

224. *See id.* at 441.

> disturb it.... Much property has been settled, and conveyances have proceeded upon the ground of that determination.... A thousand neglects to search have been occasioned by that determination, and therefore I cannot take upon me to alter it. If this was a new case, I should have my doubts; but the point is closed by that determination, which has been acquiesced in ever since.[225]

The commercial reliance interests in *Morecock* were unmistakable. "A thousand neglects to search" the registries had been premised on the proposition that registration of an equitable mortgage was not constructive notice to a legal mortgagee, and thus Lord Camden preserved the precedent despite his doubts about its merits.[226]

The converse position was also recognized in the English courts of the founding era. In *Robinson v. Bland*, the court determined, among other things, to abandon the general rule limiting a prevailing plaintiff in a breach of contract suit to interest accruing to "the day that the writ is sued out."[227] The general rule was abandoned as certainly unreasonable, and replaced with a new standard awarding interest accruing "down to the time of the last act done by the Court, to liquidate the demand."[228] Judge Wilmot's opinion offered a reliance-based justification for the court's correction of this error:

> Where an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the Judges, till the Legislature thinks proper to alter it: lest the new determination should have a retrospect, and shake many questions already settled: but the reforming erroneous points

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225. *Id.*

226. *Id.* Similarly, in *Hodgson v. Ambrose*, 99 Eng. Rep. 216, 219 (K.B. 1780), Mansfield stated:

> With regard to the question, whether the interposition of trustees to preserve contingent remainders, shall vary the rule of law ... whatever our opinion might be upon principle and authorities, if the point were new, we all think, that, since this is literally the same case with *Coulson v. Coulson*, and that has stood as law for so many years, it ought not now to be litigated again. It would answer no good purpose, and might produce mischief. The great object, in questions of property, is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned.

Id.; see also Doe v. Manning, 103 Eng. Rep. 495, 500 (K.B. 1807):

> Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the Stat. 27th of Eliz: and it is no new thing for the Court to hold itself concluded in matters respecting real property by former decisions upen questions, in respect of which, if it were *res integra*, they probably would have come to very different conclusions.

227. Robinson v. Bland, 96 Eng. Rop. 141, 142 (K.B. 1760).

228. *Id.* at 144.

> of practice can have no such bad consequences; and therefore they may be altered at pleasure, when found to be absurd or inconvenient.[229]

Thus, Judge Wilmot conceived of a bifurcated stare decisis standard that is reminiscent of that offered by Chief Justice Rehnquist in *Payne*. A decision establishing "any rule of property" must be retained, Wilmot says, even when in error. But error in "points of practice" is a different matter. A change of course on such issues does not affect reliance interests, and thus the courts may abandon precedents of this nature with fewer misgivings.[230]

James Kent's conception of stare decisis similarly recognized the increased importance of stability as to rules of property. As compared to Blackstone, Kent conceived of a relatively aggressive notion of error correction. Kent's perception was that "the records of many of the courts in this country are replete with hasty and crude decisions," and he openly suggested that "such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[231]

But Kent's conception of error correction was tempered by an important limitation. He recognized that the policy of stability and certainty was more important in certain areas of the law than in others. When decisions "create a practical rule of property," Kent explained, they should be adhered to even when subsequent judges "may feel the hardship, or not perceive the reasonableness, of the rule."[232]

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229. *Id.*

230. As with decisions of the modern Supreme Court, the English courts of the founding era occasionally contradicted themselves on this point, suggesting that error correction might be appropriate even in cases establishing rules of property. *See, e.g.*, Williams v. Germaine, 108 Eng. Rep. 797, 800-01 (K.B. 1827) (Lord Tenterden, C.J.) ("It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established and continued to be acted upon for many years should not be changed unless it appears clearly to have been founded upon wrong principles.").

231. 1 KENT, *supra* note 94, at *477.

232. *Id.* at 478. Thomas Cooley's early American edition of Blackstone's *Commentaries* also conceived of a bifurcated error-correction standard. 1 THOMAS M. COOLEY, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 70 n.1 (4th ed. 1899). According to Cooley's Blackstone:

> A precedent flatly unreasonable and unjust may be followed if it has been for a long period acquiesced in, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by overruling it. In such a case it will be proper to leave the correction of the error to the legislature, which can so shape its action as to make it prospective only, and thus prevent the injurious consequences that must follow from judicially declaring the previous decision unfounded.

Id.

B. Rules of Property in the Supreme Court

Although the dominant stare decisis question addressed by the Marshall Court was the extent of the Court's power to abandon precedent on the basis of its correctness, several Marshall Court decisions acknowledged the notion of enhanced deference to property rules in the context of yielding to purportedly erroneons decisions of the state courts.[233] In addition, the Marshall Court adverted to a similar approach in the context of suggesting that some deference was owed to a legislative construction of the Constitution, especially where property rights were implicated.[234] Otherwise, the application and development of the rule of property standard in the Supreme Court occurred in the Taney era.

Indeed, the Taney Court's principal contribution to the stare decisis dialogue was to consider whether the Court's power of error correction varied depending on the extent of property and contract rights at stake. Four overruling decisions are generally attributed to the Taney Court:[235] *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*,[236] *The Propeller Genesee Chief v. Fitzhugh*,[237] *Gazzam v. Phillip's Lessee*,[238] and *Suydam v. Williamson*.[239] These and other decisions in the Taney era offer historical context for the debate between Chief Justice Rehnquist and Justice Marshall in *Payne*—whether arguments for adhering to stare decisis are stronger in cases involving

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233. *See* Jackson v. Chew, 25 U.S. (12 Wheat.) 153, 163 (1827) (adopting New York's standards for the construction of a will on the ground that such decisions establisbed "a rule of landed property," and indicating the Court's obligation to follow such decisions even if in "error," since "it is an error which has been so repeatedly sanctioned hy all the Courts of that State, for the last twenty years, that it has ripened into a settled rule of law"); M'Keen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22, 32-33 (1809) (doubting the Pennsylvania courts' construction of a state statute regarding the prerequisites for validity of a deed, but following that construction because "infinite mischief would ensue, should this court observe a different rule from that which has long been established in the stato" on an issue on which "many titles probably depend").

234. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) (upholding the constitutionality of the national bank, based in part on the conclusion that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not te be lightly disregarded").

235. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 n.1 (1932) (Brandeis, J., dissenting); CONGRESSIONAL RESEARCH SERVICE, *supra* note 147, at 2245-46; Blaustein & Field, *supra* noto 147, at 159-60.

236. Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844). For background on *Letson*, see CURRIE, *supra* note 98, at 260-61, and CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 461-66 (1974).

237. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852), *superseded by* 28 U.S.C. § 1333(1).

238. Gazzam v. Phillip's Lessee, 61 U.S. (20 How.) 372 (1858).

239. Suydam v. Williamson, 65 U.S. (24 How.) 427 (1861).

property and contract rights than in cases involving procedural and evidentiary rules.[240]

The Taney Court's first discussion of stare decisis appeared in Justice Wayne's opinion for the Court in *Letson*. At issue in *Letson* was whether the federal courts had diversity jurisdiction over an action brought by Thomas W. Letson, a New York citizen, against the Louisville, Cincinnati, and Charleston Railroad Company ("LC&C"), a South Carolina corporation. As noted above, Chief Justice Marshall's broad dictum in *Deveaux* had asserted that a corporation itself was not a citizen, and that its citizenship for diversity purposes was to be based on the citizenship of its members.[241] Since some of LC&C's stockholders arguably were New York citizens, counsel for LC&C argued that the federal courts lacked jurisdiction over Letson's claim under *Deveaux* and its progeny. In response, Letson's counsel attacked *Deveaux* and urged its reversal.[242]

Wayne accepted the invitation to abandon *Deveaux*, and authored an opinion holding that a corporation under state law should be treated as a citizen of that state.[243] Wayne first seized upon the error he saw in *Deveaux*, noting that its conception of diversity jurisdiction was not consistent with the Constitution or with sound legal reasoning.[244] Wayne seemingly embraced the role of error correction, expressly "yielding to decided cases every thing that can be claimed for them on the score of authority except the surrender of conscience."[245] But he went on to imply that the Court's capacity to correct the error in *Deveaux* depended on the fact that a broader conception of corporate citizenship for diversity jurisdiction did not upset any commercial reliance interests.[246] If it had, the implication was that the error would be preserved.

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240. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

241. United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809).

242. *See* Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 515-23 (1844).

243. *See id.* at 558.

244. *See id.* at 555-56.

245. *Id.* at 555.

246. *See id.* at 556 ("Fortunately a departure from [*Deveaux* and its progeny] involves no change in a rule of property."). Wayne's approach was superficially similar to that of Justice Johnson in dissent in *Ex parte Bollman*. Johnson had embraced a reexamination of the "correctness or consistency" of the Court's earlier decisions. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 104 (1807) (Johnson, J., dissenting). Wayne looked to the "true principles of interpretation" of the Constitution and laws to evaluate the "correctness" of a prior ruling. *Letson*, 43 U.S. (2 How.) at 555. But the difference in methodology is significant. Whereas Johnson's notion of a "duty" of reexamination seemed to flow from his view that an unprincipled decision "is not law," *Bollman*, 8 U.S. (4 Cranch) at 104 (Johnson, J., dissenting), Wayne's merits-based approach

Two Taney Court decisions in 1850 made this point. In *Townsend v. Jemison*,[247] the plaintiff filed a breach of contract action in federal court in Alabama on a contract entered into with the defendant in Mississippi. Defendant opposed the action under a three-year Mississippi statute of limitations.[248] The question before the Supreme Court was whether the Mississippi statute applied on the theory that it formed a part of the contract (which was entered into in Mississippi), or whether the longer Alabama statute of limitations applied on the theory that the statute of limitations merely affected the remedy.[249] The *Townsend* Court reinforced the Court's previous adoption of the latter view.[250]

Justice Wayne's opinion for the Court volunteered that differences in opinion on the issue were beside the point, as the issue had been resolved " 'by authorities the court is bound to respect.' "[251] In Wayne's view, "[t]he error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority."[252] Error correction, in other words, was outside the Court's conception of the judicial power. The rule at issue was unalterable except by the "superior authority" of "legislative enactment."[253]

Justice Grier's opinion for the Court in *Barnard v. Adams*[254] set down a similarly rigid rule in demanding adherence to decisions on the contribution principle of general average in admiralty law. The rule of general average required contribution by cargo owners toward compensation for the loss of a ship sacrificed to save the cargo.[255] In *Barnard*, the question was whether the principle applied when the ship's destruction was inevitable.[256] Grier's majority opinion held that the Court's previous decisions required the conclusion that it did.[257] Even conceding that the Court's precedents have been subject to criticism and their correctness may be in doubt, Grier denied that cor-

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depended on a different consideration: that rejection of *Deveaux* "involve[d] no change in a rule of property," *Letson*, 43 U.S. (2 How.) at 556.

247. Townsend v. Jemison, 50 U.S. (9 How.) 407 (1850).

248. *See id.* at 408.

249. *See id.* at 413.

250. *Id.* at 420.

251. *Id.* at 413-14 (quoting Leroy v. Crowninshield, 15 F. Cas. 362, 371 (C.C.D. Mass. 1820) (No. 8269)).

252. *Id.* at 414.

253. *Id.* at 414-15.

254. Barnard v. Adams, 51 U.S. (10 How.) 270 (1850).

255. *See id.* at 303.

256. *Id.* at 301-02.

257. *See id.* at 304-05, 307.

rection of such errors was appropriate: "In questions involving so much doubt and difficulty, it is of more importance to the mercantile community that the law be settled, and litigation ended, than how it is settled."[258]

The Court's reluctance to overturn purportedly erroneous precedents in *Townsend* and *Barnard* is easily explainable in commercial reliance terms. In *Townsend*, the settled rule permitted the owner of a contract claim to rely on the statute of limitations of the forum state without fear of an intervening time-bar from the state where the contract was formed.[259] A decision overruling precedent would upset vested interests in contract claims. In *Barnard*, the mercantile community had come to rely on the availability of contribution in general average even in cases of inevitable destruction.[260] In either case, overruling precedent would have upset settled expectations in the commercial context, and error correction was thus improper.[261]

Chief Justice Taney continued the rule of property theme in his opinion for the Court in *The Propeller Genesee Chief v. Fitzhugh*.[262] *The Genesee Chief* presented the question whether the federal courts' admiralty jurisdiction extended to a suit arising out of a collision on Lake Ontario.[263] Presumably, the federal courts would have lacked jurisdiction under the Court's earlier pronouncement as to the scope of Article III's Admiralty Clause in *The Steam-Boat Thomas*

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258. *Id.* at 302. Although the preference for stability over accuracy is often attributed to Justice Brandeis, *see* Agostini v. Felton, 521 U.S. 203, 235 (1997), Grier and his nineteenth-century contemporaries were quite familiar with this notion, at least in the context of a case involving a "rule of property."

As in the modern Court, however, the preference for stability was not always consistent. Justice Field's majority opinion in *Barden v. Northern Pacific Railroad Co.*, 154 U.S. 288 (1894), sought to justify rejection of the established rule that rules vesting title in government land to railroads upon construction of tracks and telegraph lines with the conclusion that accuracy is paramount: "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Id.* at 322. Field's analysis harkened back to Johnson's declaratory approach, arguing that "[t]hose doctrines only will eventually stand which bear the strictest examination, and the test of experience." *Id.* The *Barden* dissent's response was more in line with the then-dominant approach. "If ever there was a case in which the rule *stare decisis* should prevail," it is on an issue that would "unsettle[] the question of title to . . . lands." *Id.* at 349 (Brewer, J., dissenting).

259. Townsend v. Jemison, 50 U.S. (9 How.) 407, 413 (1850).

260. *Barnard*, 51 U.S. (10 How.) at 303.

261. *Cf.* Peralta v. United States, 70 U.S. (3 Wall.) 434, 439 (1865) (noting, in rejecting plaintiff's argument that the Court should abandon certain rules of evidence applicable to proving the validity of title to Mexican land in California, that "[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions").

262. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852).

263. *Id.* at 451.

Jefferson.[264] Justice Story's opinion for the Court in *The Thomas Jefferson* had held that admiralty under Article III extended only to cases where the voyage at issue "was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide."[265] Because the Missouri River voyage in *The Thomas Jefferson* "not only in its commencement and termination, but in all its intermediate progress, was several hundreds of miles above the ebb and flow of the tide," Story's opinion held that any exercise of admiralty jurisdiction in the case was beyond that authorized by Article III.[266]

Chief Justice Taney's opinion in *The Genesee Chief* candidly overruled *The Thomas Jefferson* and adopted a new test for admiralty jurisdiction. Taney argued that the *Thomas Jefferson* test would undermine the goal of "a perfect equality in the rights and the privileges of the citizens of the different states," in that the benefits of "safety and convenience of commerce, and the speedy decision of controversies" presented by the admiralty courts would be reserved only for "states bordering on the Atlantic."[267] Moreover, Taney asserted that the "ebb and flow" test was "arbitrary, without any foundation in reason" in that "there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit."[268] Thus, even though the ebb and flow test concededly was the prevailing standard in England at the time of the framing of the Constitution, Chief Justice Taney rejected it as "purely artificial and arbitrary as well as unjust."[269] Accordingly, Taney concluded that the admiralty jurisdiction properly turned on whether the waters at issue are navigable, and not on whether they are within the ebb and flow of the tide.[270]

Despite the conviction of Taney's disdain for the rationale and correctness of *The Thomas Jefferson*, he expressly admitted to a certain degree of angst in overruling the case: "It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is

264. The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat) 428 (1825).
265. *Id.* at 429.
266. *Id.*
267. *The Genesee Chief*, 53 U.S. (12 How.) at 454.
268. *Id.*
269. *Id.* at 457.
270. *See id.*

entitled."[271] Having noted the general importance of adherence to precedent, however, Taney emphasized that "[t]he case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined."[272] Taney explained that if *The Thomas Jefferson* had established a rule of property, stare decisis would have demanded adherence to that decision:

> If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, stare decisis is the safe and established rule of judicial policy and should always be adhered to. . . . But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturh no rights of property nor interfere with any contracts heretofore made. . . . And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.[273]

Like Wayne and Grier, Taney suggested that the Court had the power to correct clear errors in precedent only if the decision in question did not affect a rule concerning property rights.[274]

The Taney Court's remaining discussions of stare decisis are somewhat more puzzling and difficult to reconcile with the above. Two terms after *The Genesee Chief*, in *Marshall v. Baltimore & Ohio Railroad Co.*,[275] the Court seemingly contradicted Taney's conclusion that decisions concerning jurisdiction are particularly vulnerable to reversal. Justice Grier's majority opinion in *Marshall* reaffirmed the substance of *Letson* in holding that corporations are, for purposes of diversity jurisdiction, to be treated as citizens of the state in which they reside.[276] In so holding, Grier went out of his way to affirm the importance of adherence to precedent in that case. In apparent

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271. *Id.* at 456.
272. *Id.* at 458.
273. *Id.* at 458-59. David Currie has suggested that *The Genesee Chief* was "the Court's most comprehensive treatment of stare decisis in constitutional cases" to date, and that it was "only the second time the Court had overruled a constitutional decision" (the first being *Letson*). CURRIE, *supra* note 98, at 258. Elsewhere, Taney's opinion in *The Genesee Chief* has been described as illustrating "the manner in which the law changes to meet changed external conditions." SCHWARTZ, *supra* note 12, at 103. But as the above demonstrates, Taney's willingness to overturn *The Thomas Jefferson* turned on much more than a perception of changed conditions.
274. *The Genesee Chief*, 53 U.S. (12 How.) at 458.
275. Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314 (1853).
276. *Id.* at 328.

contradiction of *The Genesee Chief*, Grier went so far as to suggest that "[t]here are no cases, where an adherence to the maxim of '*stare decisis*' is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts."[277]

Gazzam v. Phillip's Lessee provided another puzzle. The opposing parties in *Gazzam* asserted competing claims to a parcel of public land[278] subdivided and purchased under "[a]n Act making further provision for the sale of the public lands" (the "Act").[279] It was undisputed that the parcel in question had been included in the property described in the patent and certificate of purchase issued to Gazzam's predecessor in interest (William D. Stone), and had not been included in the property described in the patent and certificate of purchase issued to Phillip's lessee's predecessor (James Etheridge).[280] But Phillip's lessee nevertheless claimed title to the parcel on the ground that the Act required that the parcel in question be included in the property described in the patent and certificate of purchase.[281] Specifically, Phillip's lessee asserted that the Act required the United States Surveyor General to subdivide fractional sections of the public lands into half-quarter sections, and that the lands surveyed and conveyed to Etheridge had fallen short of an entire half-quarter section, while the lands surveyed and conveyed to Stone had included a parcel that would have made Etheridge's half-quarter section completo.[282] Accordingly, Phillip's lessee claimed that Gazzam's interest (through Stone) should be restrained by the parcel in question and that Phillip's lessee had a right (through Etheridge) te the land necessary to complete his half-quarter section.[283]

Twelve years earlier, the Court had accepted the identical argument (in connection with the identical parcel of land) in *Brown's Lessee v. Clements*.[284] The Court in *Brown's Lessee* had held that "the patent granted to Stone [was] void" and that Etheridge was entitled to the land necessary to complete his half-quarter section, despite the

277. *Id.* at 325. Professor Currie notes that Grier's dictum "was precisely the opposite of what the Court had said two terms earlier in *The Genesee Chief*," and that his "point also seemed especially inappropriate because *Letson*, the very decision he now pronounced immutable, had itself unceremoniously discarded another jurisdictional precedent." CURRIE, *supra* note 98, at 261.

278. Gazzam v. Phillip's Lessee, 61 U.S. (20 How.) 372 (1857).

279. Brown's Lessee v. Clements, 44 U.S. (3 How.) 650, 653 (1845).

280. *See Gazzam*, 61 U.S. (20 How.) at 375-76.

281. *See id.* at 374.

282. *See id.* at 374-75.

283. *See id.* at 375.

284. *Brown's Lessee*, 44 U.S. (3 How.) at 650.

conceded fact "that as Etheridge only paid for the quantity of land mentioned in his patent, that he can have no right to land paid for by Stone, and included in his patent."[285] *Gazzam* soundly rejected *Brown's Lessee* on that point, concluding that it was inconsistent with the language of the Act in question.[286] The Act provided " 'that fractional sections containing one hundred and sixty acres or upwards shall, in like manner, *as nearly as practicable*, be subdivided into half-quarter sections,' "[287] thus preserving "some latitude of discretion" in the Surveyor General to subdivide public lands into less than half-quarter sections, and obviating any basis for disregarding the clear language of the patents in question.[288] In so holding, the *Gazzam* Court conceded that "some rights may be disturbed by refusing to follow the opinion expressed in [*Brown's Lessee*]," but nevertheless rejected that precedent as irreconcilable with the language of the Act.[289]

Finally, in *Suydam v. Williamson*, the Taney Court set aside another precedent despite its concession that property had been bought and sold in reliance on a prior opinion.[290] The issues in *Suydam* concerned the validity under New York law of a conveyance of property from Thomas B. Clarke to Peter McIntyre and the adequacy of consideration to support that conveyance.[291] When the propriety of the same conveyance had previously arisen in *Williamson v. Berry* and companion cases, the Court (over dissents from Chief Justice Taney and Justices Catron and Nelson) had upheld it based on its understanding of New York case law.[292] Justice Campbell's opinion for the Court in *Suydam* expressly overruled *Williamson* in light of more recent New York authority, while acknowledging the irregularity of self-reversal under the circumstances.[293] But despite the obvious commercial property interests at stake, the Court in *Suydam* overruled *Williamson* in favor of its more recent understanding of New York law.[294]

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285. *Id.* at 667-68.
286. *Gazzam*, 61 U.S. (20 How.) at 376.
287. *Id.* at 376 (quoting Act of April 24, 1820 (3 U.S. St., at 566) (emphasis added)).
288. *Id.* at 377.
289. *Id.* at 378.
290. Suydam v. Williamson, 65 U.S. (24 How.) 427, 431 (1860).
291. *Id.*
292. Williamson v. Berry, 49 U.S. (8 How.) 495, 549 (1850), *cited in* Suydam v. Williamson, 65 U.S. (24 How.) 427, 427 (1860) (stating that "[t]he facts of the case are stated in the opinion of the court, and also in the report of the cases in 8 Howard. . . . The points of law involved in the case are fully stated in the reports in 8 Howard").
293. *Suydam*, 65 U.S. (24 How.) at 431, 435. "Every principle by which our law of precedents is justified, tends against the reopening of the case in this court." *Id.* at 431.
294. *Id.* at 435.

C. Rules of Property and Reliance Interests: A Comparative Analysis

By the founding era, English courts and American commentators had embraced the notion of an enhanced rule of stare decisis in cases involving rules of property. That principle also dominated the Court's treatment of precedent during the Taney era. Indeed, on closer scrutiny even the apparent anomalies noted above disappear. The extent of the Taney Court's willingness to correct apparently erroneous precedent turned entirely on whether a change of course would "disturb . . . rights of property . . . or interfere with any contracts heretofore made."[295]

Letson abandoned *Deveaux*'s restrictive conception of corporate citizenship in diversity jurisdiction as inconsistent with the Constitution.[296] *Townsend* and *Barnard* preserved the Court's precedents despite doubting their correctness and expressing concerns that they were in error. The difference in attitude toward error correction is easily explainable in commercial reliance terms. A more expansive conception of diversity jurisdiction for corporations obviously disturbed no property rights and interfered with no existing contracts. *Townsend* and *Barnard*, by contrast, clearly involved such commercial reliance interests.

The rule of property standard also explains the apparent contradiction between the *The Genesee Chief*, which had suggested that error correction was particularly appropriate as to questions of jurisdiction,[297] and *Marshall*, which had asserted that there were no cases where stare decisis was so necessary as those affecting jurisdiction.[298] In *The Genesee Chief*, the Court decided to discard what it viewed as an unduly restrictive jurisdictional test. Because a decision to expand federal admiralty jurisdiction did not disturb rights of property or interfere with any contracts, the Court embraced a duty to correct a decision "without any foundation in reason."[299]

In *Marshall*, by contrast, the Court was being asked to discard what the parties viewed as an overly-expansive jurisdictional test. Because a decision to restrict federal diversity jurisdiction plainly would have interfered with vested rights of the parties who had rea-

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295. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459 (1852), *superseded by* 28 U.S.C. § 1333(1) (1994).

296. Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 555-56 (1844).

297. *The Genesee Chief*, 53 U.S. (12 How.) at 458.

298. Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 325 (1853).

299. *The Genesee Chief*, 53 U.S. (12 How.) at 454, 458-59.

sonably relied on the finality of the federal court's decision, the *Marshall* Court disclaimed any ability to adopt a more restrictive jurisdictional test. In light of the then-prevailing rules liberally permitting collateral attack based on lack of jurisdiction,[300] a decision retracting the standards for federal diversity jurisdiction would have upset the settled rights of parties that had received federal judgments under the *Letson* standard. Justice Grier's opinion in *Marshall* failed to put the point precisely in the language of commercial reliance, but he clearly appreciated the general point:

> [*Letson*] has, for the space of ten years, been received by the bar as a final settlement of the questions which have so frequently arisen under this clause of the Constitution; and the practice and forms of pleading in the courts of the United States have been conformed te it. Confiding in its stability, numerous controversies involving property and interests to a large amount, have been heard and decided by the circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments te have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community.[301]

Taney's concurrence in Grier's opinion is hardly puzzling in this light. Despite the facial contradiction between Taney's and Grier's statements regarding the precedential value of jurisdictional decisions, Taney's general approach in *The Genesee Chief* supported Grier's conclusions in *Marshall*: "For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts [or seek a judgment of a federal court in diversity], upon the faith that rights thus acquired would not be disturbed."[302]

Respect for vested property rights also explains the apparent anomalies in the Taney Court's rhetoric in *Gazzam* and *Suydam*. The *Gazzam* Court conceded that rejection of *Brown's Lessee* would disturb certain interests in property that had been built around that decision, but the Court's opinion reveals that *retention* of *Brown's Lessee* would have done even more violence to vested property rights.[303] For decades, conveyances of public lands had logically relied on the proposition that the land conveyed would naturally correspond with

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300. *See* CURRIE, *supra* note 98, at 261 n.190 (noting that "nineteenth-century doctrine seems to have freely allowed collateral attack on judgments for want of jurisdiction," and citing *Thompson v. Whitman*, 85 U.S. (8 Wall.) 457 (1873), in support).

301. *Marshall*, 57 U.S. (16 How.) at 325.

302. *The Genesee Chief*, 53 U.S. (12 How.) at 458.

303. Gazzam v. Philip's Lessee, 61 U.S. (20 How.) 372, 377-78 (1857).

the property described in the patents and certificates of purchase.[304] Continued retention of *Brown's Lessee* would interfere with the "vast tracts of the public domain surveyed and sold" in reliance on the foregoing proposition, and the *Gazzam* Court simply concluded that less disruption would result from a decision overruling *Brown's Lessee* than a decision "adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years."[305]

Suydam's rhetoric is explainable on similar grounds. Its rejection of *Williamson*'s decision to uphold the conveyance in question was based on an intervening development in New York law, which was controlling.[306] Thus, the *Suydam* decision could easily be understood te turn on subsequent developments in case law that undermined the decision in *Williamson*. But *Suydam* is also explainable in "rules of property" terms. Justice Campbell's concession—that overruling precedent undermines common law principles[307]—ignored a crucial policy behind an enhanced standard of deference to rules of property. Certainty in rules of property is important not only to protect vested reliance interests, but also to enable future transactions to move forward in reliance on settled legal principles. If the *Suydam* Court had retained the *Williamson* rule of property in competition with the more recently considered New York standard, the harm from the resulting chaos and confusion would far outweigh the minimal disturbance to the specific reliance interests in question.[308] As in

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304. *See id.* at 376-78.

305. *Id.* at 372, 378.

306. Suydam v. Williamson, 65 U.S. (24 How.) 427, 433 (1860).

307. *See id.* at 431.

308. Indeed, Campbell might have cited Chief Justice Marshall in support of this conclusion. In a similar case, Marshall had explained the virtues of overruling a previous decision on a matter of property in deference to a recent change in state law:

> [I]n construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has long been established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.... On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles probably depend.

M'Keen v. Delancy's Lessee, 9 U.S. (5 Cranch) 22, 32-33 (1809); *cf.* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381-82 (1977) (dealing with a question of state sovereignty rather than substantive property law and finding stare decisis principles less compelling). In *Corvallis Sand*, 429 U.S. at 382, the Court overruled *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which had held that federal common law controlled the ownership of lands that had re-emerged from the bed of a navigable stream. *Bonelli Cattle Co.*, 414 U.S. at 324-25. The *Corvallis Sand* court returned to the rule that had prevailed prior to *Bonelli*, that new

Gazzam, less disruption resulted from a rejection of *Williamson* than a retention of that decision would have produced.

By the Taney era, then, the Court had settled on a bifurcated stare decisis standard comparable to that advocated by Chief Justice Rehnquist in *Payne*. *Townsend*, *Barnard*, and *Marshall* made clear that "[c]onsiderations in favor of *stare decisis* [were] at their acme in cases involving property and contract rights,"[309] so much so that the Court disclaimed any power to correct erroneous precedents in such cases. *Letson* and *The Genesee Chief* established the converse point, that the opposite was true in cases involving procedural and evidentiary rules.[310]

The founding generation had not, however, addressed the difficulty presented by cases falling in neither of the above categories. Thus, the principal doctrinal development of the modern era on the issue of reliance has been the extension of this principle to interests beyond the commercial context. The primary extension offered in moderu opinions is the notion that in some instances, *governmental* action predicated on judicial precedent should be protected by an enhanced standard of stare decisis.[311] Such an extension of the rule of property formulation apparently had not taken hold in the founding era or the early decisions of the Supreme Court. As a general matter, however, the extension is difficult to quarrel with as a natural application of founding-era principles. If private investment in contract and property interests is sufficient to demand adherence to arguably erroneous precedent, public investment in governmental structures should produce a similar effect. Indeed, even the most ardent critics of stare decisis concede the need to retain precedents around which vast governmental structures are built, such as the modern adminis-

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states admitted into the Union have the same rights as the original states in lands under their navigable waters, and that, other than passage of title at the time of statehood, ownership of such lands is controlled by state law. *Corvallis Sand*, 429 U.S. at 378, 381. In so doing, the Court noted that the "concern for unsettling titles would lead us to overrule *Bonelli*, rather than to retain it." *Id.* at 382. "Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years," the Court concluded that "a return to the former would more closely conform to the expectations of property owners than would adherence to the latter." *Id.*

309. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

310. *See, e.g.*, *id.* (noting the dichotomy between rules of property, on one hand, and procedural and evidentiary rules, on the other).

311. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that *Hans v. Louisiana*, 134 U.S. 1 (1890), should not be overruled because it "has had a pervasive effect upon statutory law, autematically assuring that private damages actions creatod by Federal law do not extend against the states" and noting that "[f]orty-nine Congresses since *Hans* have legislated under that assurance").

trative state.[312] The Rehnquist Court has understandably struggled in its attempts to identify the logical end of this extension,[313] but at a general level the extension is a natural outgrowth of principles with a long historical pedigree.[314]

V. STARE DECISIS AND THE CONSTITUTIONAL OR STATUTORY NATURE OF THE DECISION

Amidst all the contradictions and retractions in the modern Court's doctrine of precedent, one point has achieved an unusual degree of consensus: that stare decisis has "great weight . . . in the area

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312. *See* Cooper, *supra* note 3, at 410 ("Surely a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss"); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155-59 (1990) (arguing that substantial institutional reliance on precedent can protect it from overruling even if it deviated from original understanding); Easterbrook, *supra* note 1, at 431 (noting that "constitutional rules establish governmental structures" which are "the framework for all political interactions," and have widespread effects on governmental planning); Monaghan, *supra* note 2, at 749-50 (asserting that "stare decisis operates to promote systemwide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society," and that "[s]uch norms include the freedom from racial discrimination by the government, the general reach of the commerce clause, and even the legality of paper money").

313. Reliance in the form of legislative creation of governmental structures seems closely analogous to the commercial reliance recognized in the founding era. *See* United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. . . . Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."); Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 200, 202-03 (1991) (refusing to overrule *Parden v. Terminal Railway*, 377 U.S. 184 (1964), which held that FELA creates a cause of action against a state-owned railroad enforceable in state court, and noting that "[w]orkers' compensation laws in many States specifically exclude railroad workers from their coverage because of the assumption that FELA provides adequate protection for those workers"). But more difficult questions arise when the analogy is stretched to executive reliance on precedent. *See* Hubbard v. United States, 514 U.S. 695, 714 (1995) (Stevens, J., plurality opinion); *id.* at 723 (Rehnquist, C.J., dissenting). And the analogy is stretched to the breaking point when it is extended to reliance by individuals who may "have organized intimate relationships and made choices that define their views of themselves and their places in society" on the assumption of the validity of a certain decision. Planned Parenthood v. Casey, 505 U.S. 833, 855-56 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (recognizing that "the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context," but nevertheless attempting to lay claim to the foregoing notion of reliance); *id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part) (chiding the plurality for its "unconventional—and unconvincing—notion of reliance").

314. The implications of this extension should not be overlooked, however. A principle of stare decisis that insulates precedent from further review on the basis of what might be termed "structural" governmental reliance interests creates an inherent bias in favor of expansion of governmental power. Judicial decisions expanding governmental power are entitled to a strong presumption of deference on the basis of governmental reliance interests, but decisions restricting governmental power are more freely open to review in light of the absence of any such reliance.

of statutory construction"[315] but "is at its weakest" in constitutional cases.[316] Two principal jnstifications have been offered for a diminished standard of deference to constitutional decisions. The first seeks the moral high ground of the judicial oath to uphold the Constitution. Justice Scalia set forth his view of this argument in his dissent in *South Carolina v. Gathers*:[317]

> I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our systom of government that return is no longer possible (a description that surely does not apply to *Booth*), I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors have put on it."[318]

The second justification emphasizes the unique difficulty of overturning constitutional decisions outside the judicial process. In the Rehnquist Court, this argument is often made by reference to Justice Brandeis' dissent in *Burnet v. Coronado Oil & Gas Co.*, whose memorable prose has since become a mandatory part of the burial rite for any constitutional precedent:

> *Stare decisis* is not, like the rule of *res judicata*, a universal inexorable command. . . . *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that

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315. Neal v. United States, 516 U.S. 284, 295 (1996).

316. Agostini v. Felton, 521 U.S. 203, 235-38 (1997).

317. South Carolina v. Gathers, 490 U.S. 805, 824-25 (1989) (Scalia, J., dissenting). The majority in *Gathers* adhered te its holding in *Booth v. Maryland*, 482 U.S. 496, 504 (1987), that the Eighth Amendment bars admission of victim-impact evidence during the penalty phase of a capital trial. *Gathers*, 490 U.S. at 810-11. As noted above, the *Gathers* majority position was short-lived; it took only two years (and the appointment of Justice Souter to the Court) for the *Gathers* dissenters to garner a fifth vote for their inclination to overrule *Booth*'s construction of the Eighth Amendment. *See* Payne v. Tennessee, 501 U.S. 808, 830 (1991).

318. *Gathers*, 490 U.S. at 824-25 (Scalia, J., dissenting) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)); *see also* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (asserting that the only correct rule of decision is "the constitution itself and not what we have said about it"); Lawson, *supra* note 16; Michael Stekes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 319 n.349 (1994) ("The Constitution and federal statutes are written law (not common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others.").

> the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[319]

Brandeis' argument seeks to distinguish constitutional precedent from other decisions by isolating the principal policy weighing against stare decisis—that of correcting judicial error—and by emphasizing the comparative difficulty of extra-judicial error correction in the constitutional realm.[320]

The notion of enhanced deference to statutory decisions hinges on a corollary of this second argument. Because "Congress, not th[e] Court, has the responsibility for revising its statutes," the Rehnquist Court has often expressed a heightened reluctance to overturn statutory precedent.[321] The nature of the inference from congressional inaction has varied over the years, from the bold presumption that silence constitutes tacit approval of the precedent in question,[322] to the more modest assertion that inaction "may be probative to varying degrees" even if it "cannot be regarded as acquiescence under all circumstances."[323]

Members of the modern Court have expressed occasional qualms about the soundness of the constitutional/statutory dichotomy. Justice Thurgood Marshall argued that the policy of judicial in-

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319. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-08 (1932) (Brandeis, J., dissenting) (citations omitted). *Burnet* upheld Coronado Oil & Gas Company's exemption from federal income taxes, on the theory that Coronado was an "instrumentality" of state government since it produced its oil under a lease of state school lands. *Id.* at 400-01. The majority opinion in *Burnet* found this conclusion to follow necessarily from *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), and thus "adhere[d] te the rule there approved." *Burnet*, 285 U.S. at 398. For a related argument for the notion of a weak standard of constitutional stare decisis, see *New York v. United States*, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting) (asserting that "it is a wise policy which largely restricts [stare decisis] to those areas of the law where correction can be had by legislation," since "[o]therwise the Constitution loses the flexibility necessary if it is to serve the needs of successive generations").

320. For a discussion of the economic considerations behind this and related arguments, see Thomas R. Lee, Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent sec. VI (Mar. 12, 1999) (unpublished mannscript, on file with author).

321. Neal v. United States, 516 U.S. 284, 296 (1996). *But see* State Oil Co. v. Khan, 522 U.S. 3 (1997). In *Khan*, the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145, 151-53 (1968), which had held that vertical maximum price fixing is a per se violation of Section 1 of the Sherman Act. *Khan*, 522 U.S. at 22. In so doing, the Court asserted that "the general presumption that legislative changes should be left te Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" *Id.* at 20-21 (quoting National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978)).

322. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940) (refusing to rescind the application of the Sherman Act to labor unions, since Congress was aware of the issue and did not legislate).

323. Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987).

tegrity "is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements."[324]

Justice Scalia has questioned the statutory corollary. In his view, the notion that congressional inaction spells approval is based on "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant," and requires suspension of "rudimentary principles of political science."[325]

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324. Payne v. Tennessee, 501 U.S. 808, 852-53 (1991) (Marshall, J., dissenting). Marshall noted that:

> Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public nnderstands the Court to be inplementing 'principles . . . founded in the law rather than in the proclivities of individuals.'

Id. at 853 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)). Academic critics have offered parallel arguments. *See* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976) (noting that frequent overrulings "undermine the belief that judges are not unrestrainedly asserting their individual or collective wills, but following a law which binds them as well as the litigants"); Maltz, *supra* note 4, at 484 (stating that "[t]he Court's continued ability to function effectively . . . depends on the willingness of the public to accept the Court . . . this acceptance in turn depends upon the public perception that in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes."). Others question the logical extent of the Brandeis argument, noting that the Court's "nonactivist" decisions (those declining to extend individual constitutional rights) are in fact subject te "correction" by the legislative process. *Id.* at 471; *see also* Monaghan, *supra* note 2, at 742 (noting that in decisions rejecting autonomy or equality claims "the results (if not the decisions) can be 'overruled' by statute"). *But see* City of Boerne v. Flores, 521 U.S. 507, 534-36 (1997) (holding that Congress exceeded its constitutional powers in attempting to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990), by the Religious Freedom Resteration Act); *City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting) (suggesting that stare decisis should be particularly weak in constitutional cases, since, "as this case so plainly illustrates—'correction through legislative action is practically impossible' " in such cases (quoting Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996))). Another critic attacks the Brandeis argument at its foundation, asserting that the "hard" process of amendment under Article V was according to the Framers' design and that the "[r]eady overruling of constitutional cases interferes with" the two objectives behind that process: ensuring the stability of governmental structure and assuring super-majoritarian support for any constitutional rule. Easterbrook, *supra* note 1, at 430-31 (arguing that in addition to reducing the "stability of governmental institutions," a relaxed stare decisis standard in constitutional cases "saps the drive for change in the constitutional text," thns undermining the goal of ensuring supormajoritarian support for constitutional rules).

325. *Johnson*, 480 U.S. at 671-72 (Scalia, J., dissenting). Specifically, Scalia has argued that it is:

> impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id. at 672; *see also Khan*, 522 U.S. at 19-22 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), which had held that vertical maximum price fixing is a per se violation of Section 1 of the Sherman Act, and stating that the Court "infer[red] little meaning from the fact that Congress has not reacted legislatively to *Albrecht*").

The modern Court has vaguely sought to trace its differential standard of deference to a long-established practice.[326] But the Court has had a difficult time attributing this approach beyond decisions from the twentieth century. A commonly cited source for the Court's approach is Justice Brandeis' dissent in *Burnet*.[327] Despite the sweeping rhetoric quoted above, however, Brandeis offered little support for any historic practice in support of his view. With a few exceptions noted below, the voluminous cases cited in Brandeis' lengthy footnotes simply exemplified instances in which the Court had overruled previous decisions, without consciously adopting a different standard based on the constitutional or statutory nature of the decisions.[328]

A few commentators have vaguely speculated that it was not until this century that "the Court explicitly articulate[d] a rationale for the proposition that precedents should carry less weight in constitutional adjudication than in cases of statutory construction."[329] But

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For the most part, commentators agree with Scalia's rejection of the "retrospective theory of congressional acquiescence," on the ground that it "fails to reflect the realities of the legislative process and is inconsistent with the estahlished goals of statutery interpretation." Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 182-83 (1989); *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (criticizing the "super-strong presumption of correctness" for statutory precedents). *But see* Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 12-13 (1988) (arguing that "enacting legislators would prefer that courts give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal"). Even so, at least one commentator has called for an "absolute" rule of deference to statutory precedent, on a separation of powers theory that a looser standard presents "countormajoritarian difficulties" by involving the courts in "the development of statutory law." Marshall, *supra*, at 183; *see also* Easterbrook, *supra* note 1, at 430-31 (arguing that constitutional precedents are entitled to more deference than statutory ones in light of the intentionally hard process of constitutional amendment).

326. *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) ("We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents . . . ."); New York v. Unıted States, 326 U.S. 572, 590-91 (1946) (Douglas, J., dissenting) ("[T]hroughout the history of the Court *stare decisis* has had only a limitod application in the field of constitutional law."); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its histery has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued te this day.").

327. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-12 (1932) (Brandeis, J., dissenting).

328. Brandeis did cite two dissents and one majority opinion from the nineteenth century that purportedly adoptod his approach. *See id.* at 408 n.3 (citing Barden v. Northern Pac. R.R. Co., 154 U.S. 288, 322 (1894) (discussed *supra* note 258); Washington Univ. v. Rouse, 75 U.S. (8 Wall.) 439, 444 (1869) (Miller, J., dissenting) (discussed *infra* note 383); The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting) (discussed *infra* notes 364-76 and accompanying text)).

329. James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 349-50 (1986); *see also* Eskridge, *supra* note 325, at 1364-65 (1988) (asserting that it was not "until the twentieth cen-

neither the Court nor its critics have bothered to trace the Court's historical treatment of this issue in any detail.

A. *Constitutional and Statutory Precedent in the Founding Era*

Founding-era commentary was decidedly agnostic as to the stare decisis significance of the constitutional or statutory nature of a precedent. The notion of an enhanced standard of deference to statutory decisions apparently had not occurred to the founding generation—treatises and other commentary are silent on the issue. And while some commentators considered the notion of diminished deference to constitutional decisions, they generally rejected it.[330]

James Madison addressed the deference owing to constitutional precedent in the context of his attempts to justify his change of heart as to the constitutionality of a national bank.[331] In apparent response to the charge that Madison had contradicted his earlier views on the merits of this issue, he responded that although his "abstract opinion of the text of the Constitution" had not changed, he had given in to "a course of authoritative expositions" by the courts as "evidence of the public will necessarily overruling individual opinions."[332] As noted above, Madison contemplated two policy bases for adhering to precedent. The first is based on the familiar goals of certainty and stability: "that the good of society requires that the rules of conduct of its members should be certain and known."[333]

Madison's second argument is more complex: A judicial decision that is "publicly made" and "repeatedly confirmed by the constituted authority" creates an inference of "sanction" or consent by the people.[334] Madison stopped short of explaining the precise basis for the inference, but his comments suggest that it arises out of the fact that the people retain the ultimate authority both to "ma[k]e the law through their legislative organ" and to "determine[] its meaning through their judiciary organ."[335] With this background, one might have expected Madison to join Justice Brandeis in suggesting a dimin-

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tury" that the notion of a "hierarchy in which constitutional precedents would be treated with less deference than statutory precedents . . . mature[d] into widely cited doctrine").

330. *See infra* notes 326-43, 399-401, 420-21 and accompanying text.

331. *See* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391.

332. Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* 9 WRITINGS OF JAMES MADISON, *supra* noto 92, at 442-43.

333. Letter from James Madison te Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391.

334. *Id.*

335. *Id.*

ished standard of deference to constitutional precedent. If the basis for adherence to precedent is the constructive consent of the people, the fiction of consent seems less appropriate on issues of constitutional law, where correction by the people through the legislature is much more cumbersome.

In fact, however, Madison soundly rejected that conclusion, arguing instead that stare decisis applied with equal force to constitutional decisions:

> Can it be of less consequence that the meaning of a Constitution should be fixed and known, than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation unless the Constitution be so? On the contrary, if a particular Legislature, differing in the construction of the Constitution from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the Constitution, but in the laws themselves; inasmuch as all laws preceding the new construction and inconsistent with it are not only annulled for the future, but virtually pronounced nullities from the beginning.[336]

By focusing on his first policy argument for stare decisis (and largely ignoring the second), Madison concluded that the doctrine applied with equal (or greater) force in constitutional cases.[337] Madison failed te address the implications of his second policy argument, which arguably could have led him to a different conclusion. Instead, he simply asserted that "[i]t cannot be less necessary that the meaning of a Constitution should be freed from uncertainty, than that the law should be so."[338]

In reaching this conclusion, Madison did address the judicial oath argument adverted to above. If a judge is under an oath to support the law, Madison explained, it might be argued that the judge

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336. *Id.*

337. *See id.*

338. Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* 9 WRITINGS OF JAMES MADISON, *supra* note 92, at 443. Anti-Federalist sentiment at the time of the founding was of similar effect. Brutus indirectly indicated a parallel understanding of the value of constitutional precedent in the course of lamenting the federal courts' anticipated accretions on state power:

> Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquaimted; one adjudication will form a precedent to the next, and this to a following one.

Essays of Brutus XV (Mar. 20, 1788), *reprinted in* 2 COMPLETE ANTI-FEDERALIST, *supra* note 79, at 441.

would be constrained to follow his "own construction of it" and to reject a contrary interpretation adopted by precedent.[339] As soon as he stated this argument, however, Madison quickly rejected it:

> Yet, has it ever been supposed that he [the judge] was required or at liberty to disregard all precedents, however solemnly repeated and regularly observed, and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community? . . . There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law, and there is a like necessity of considering it a constitutional rule of interpreting a Constitution.[340]

Madison's rejection of the judicial oath argument is two-pronged. First, and most fundamentally, Madison seems to imply that the judicial oath is no basis for distinguishing the Constitution from other laws. The judge's oath extends, at least by implication under the Supremacy Clause,[341] to federal statutes and treaties made under its provisions. Thus, if the judge's oath implies a duty to support his own interpretation of the Constitution, "however different from that put on it by his predecessors," the same obligation logically applies to questions of statutory interpretation.[342] The logical end of the oath argument, then, is not a reduced standard of deference to

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339. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391-92.

340. *Id.* at 392.

341. *See* Paulsen, *supra* note 318, at 260 (suggesting that the judicial oath under Article VI of the Constitution "requires faithful interpretation of the Constitution (and, by virtue of the Supremacy Clause of the Constitution, of treaties and laws made in pursuance of the Constitution)"). The text of the oath administered to Supreme Court Justices reinforces this argument by failing to draw any express distinction between the Constitution and other laws of the United States. The oath administered by Chief Justice Rehnquist to new Associate Justices is as follows:

> I, _____, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States under the Constitution and Laws of the United States, so help me God.

Oath of the Associate Justices of the Supreme Court (on file with the author); *see also* Kneeland v. Milwaukee, 15 Wis. 497, 524 (1862). The *Kneeland* court stated that:

> But it is said, that if all other grounds fail, our oaths to support the constitution imperatively require us to detormine every constitutional question according to our own views of the true construction of the instrument without regard to previous decisions. The effect of the argument urged upon this point would be to take decisions upon constitutional questions entirely out of the maxim *stare decisis*. Yet I can see no reason for confining it to constitutional questions only. Our oaths faithfully te discharge the duties of our office, as much bind us to sustain the law, as our oaths te support the constitution require us to enforce that.

342. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391.

constitutional questions, but a wholesale abandonment of stare decisis.[343]

Second, Madison contends that the judge's oath to uphold the law extends by implication to the "legal rule of interpreting a law," including the rule that directs the judge to give due regard to precedents.[344] The Constitution and statutes, in other words, must be interpreted in light of settled rules of interpretation. Unless the legal rule of stare decisis is arbitrarily omitted from the laws the judge has sworn to uphold, the judicial oath provides no basis for adoption of the judge's individual understanding of a constitutional provision at the expense of precedent.

As noted above, Madison acknowledged that there were exceptions to the rule of stare decisis. Whatever the extent of Madison's exceptions to the rule of stare decisis, however, he clearly believed that they applied across the board to constitutional and other precedents:

> That there may be extraordinary and peculiar circumstances controlling the rule in both cases, may be admitted; but with such exceptions the rule will force itself on the practical judgment of the most ardent theorist. He will find it impossible to adhere, and act officially upon, his solitary opinions as to the

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343. *See* Paulsen, *supra* note 318, at 260 (asserting that a proper understanding of the judicial oath "calls into question the validity of the doctrine of stare decisis (at least in its strongest form)"). Paulsen attacks Madison's "explanation for his shift of positions on the bank" as "quite problematic," in that it "would require subsequent generations of officeholders to treat the constitutional interpretations of earlier generations as effectively amending the Constitution." *Id.* In Paulsen's view, "[i]t is difficult to square that view with an oath to support the Constitution, which sets forth the amendment process in detail in Article V." *Id.* Paulsen's argument is vulnerable on two counts. First, it overstates Madison's premise. Madison did not purport to require the retention of constitutional precedent at all costs and in all circumstances, thus "effectively amending the Constitution." *Id.* Instead, Madison merely rejected the assertion that constitutional precedent should be categorically undervalued; he left room for the rejection of all precedent in proper circumstances. Second, Paulsen's argument ignores the second aspect of Madison's justification set forth below: that an oath to uphold the Constitution and laws of the United States includes, by implication, established rules of interpreting those laws, including standards of stare decisis.

344. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 391-92; *see also Kneeland*, 15 Wis. at 522. The court stated that:

> [I]n giving due effect to the maxim of *stare decisis*, though its own views would be different, it disregards neither the constitution nor the law, for both intended that this maxim should have due effect in the judicial system which they established. The question is, did the constitution itself intend that each judge should for all time decide upon [his] own interpretation according to his own views, as though no decision had ever been made, or did it intend that such decisions once made and acted on by the people so that change would overthrow all the transactions of the past, should be followed by succeeding judges? Obviously the latter.

> meaning of the law or Constitution, in opposition to a construction reduced to practice during a reasonable period of time.[345]

Madison's approach was reflective of the treatment of the doctrine by most other commentators of the nineteenth century. As noted above, James Kent's *Commentaries on American Law* added one important nuance to Blackstone's exception for error correction. Kent recognized that the policy of stability and certainty was more important in certain areas of the law (such as property rights) than in others.[346] Kent thus conceived of a sliding standard of deference for decisions creating a rule of property, but no sliding scale was offered on the constitutional, statutory, or other basis of the underlying law.[347]

B. Constitutional and Statutory Precedent in the Marshall and Taney Courts

The Marshall Court apparently perceived no stare decisis significance in the constitutional or statutory nature of a precedent. As the above summary of the Marshall Court's treatment of precedent indicates, the Court during Marshall's tenure never suggested that the nature of a decision would affect its precedential value. Its decisions rarely had any opportunity to comment on the precedential value of constitutional decisions, since most of its discussion of precedent appeared in non-constitutional cases. When the treatment of

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345. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* MIND OF THE FOUNDER, *supra* note 87, at 392. Andrew Jackson expressed a contrary view in vetoing an 1832 bill re-chartering the national bank. Jackson asserted that "[m]ere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled." Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144-45 (James D. Richardson, III ed., 2d ed. 1912). Jackson was more impressed with the judicial oath argument than was Madison. In his view, "[e]ach public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." But Jackson's opposition to precedent swept more broadly than that; Jackson objected not only to the notion of deference to constitutional precedent, but to deference to *any* precedent and to the very idea of judicial review. *See* 2 SAMUEL D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 582 (1896) (asserting that "the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both").

346. *See* 1 KENT, *supra* note 94, at *477-78.

347. *See* J.C. WELLS, RES ADJUDICATA AND STARE DECISIS 562-63 (Des Moines, Iowa Mills & Co. 1879) (concluding that the "maxim" of stare decisis was "fit and necessary to be applied te questions which should arise in regard to" the meaning of the Constitution, that its application in the constitutional and statutory realm should be "in the same manner it is applied to other subjects," and that the differential standards of deference flowed not from the nature of the underlying law being interpreted by the Court, but from the degree to which "titles and contracts" were built around the decision).

constitutional precedent arose, the Court made no mention of a diminished standard of deference, implicitly placing constitutional precedent on at least an even plane with other decisions. In *Ogden v. Saunders*, for example, Justice Washington's dictum suggested that the Court's earlier interpretation of Congress's bankruptcy power had controlling significance despite his continuing view that *Sturges* wrongly interpreted that provision of Article I.[348] Far from adopting a diminished standard of deference to constitutional precedent, Washington conceived of a standard that led him to set aside his own view as "condemned by the decision of a majority of this Court, solemnly pronounced."[349]

As discussed in detail above, the Taney Court's willingness to overturn erroneous precedent turned entirely on its perception of whether a change of course would affect property or contract rights.[350] Despite numerous opportunities in decisions considering the value of statutory precedents, the Taney Court never mentioned the underlying statutory nature of a decision as a basis for an enhanced standard of deference. Thus, when the Court in *Townsend v. Jemison* alluded to a previous statutory construction as "too strongly engrafted into the law to be removed without the interposition of some superior authority,"[351] its conclusion was based on the presence of vested commercial reliance interests, and not on the statutory nature of the decision. And *Marshall v. Baltimore & Ohio Railroad Co.* claimed that adherence to stare decisis was uniquely necessary under the circumstances of that case, but again the assertion turned not on the statutory flavor of the issue but on the "great and irreparable evil" that would be inflicted on property interests in the event of reversal.[352]

As to constitutional decisions, Professor Currie has suggested that "the Court in Taney's own time would demonstrate that constitutional precedents enjoyed no immunity from being overruled."[353] Professor Eskridge has drawn a similar conclusion.[354] In fact, how-

348. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 263-64 (1827).

349. *Id.*

350. *See* discussion *supra* notes 235-94 and accompanying text.

351. Townsend v. Jemison, 50 U.S. (9 How.) 407, 414 (1850); *see also* discussion *supra* notes 247-53 and accompanying text.

352. Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 325 (1853); *see also* discussion *supra* notes 300-02 and accompanying text.

353. CURRIE, *supra* note 98, at 226.

354. *See* Eskridge, *supra* note 325, at 1365 n.15. Eskridge's attribution to Taney of the notion of diminished deference te constitutional authority is based on Taney's dissent in *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849). Taney's dissenting position in *The Passenger Cases*, and his later retraction of that approach, are discussed in detail *infra* notes 370-78 and accompanying text.

ever, except in a few isolated opinions of single Justices, the constitutional dimension of a precedent was not considered relevant to the stare decisis question in the Taney era.

The first opinion to suggest otherwise was Justice Daniel's concurrence in the *License Cases*.[355] The *License Cases* unanimously upheld state prohibitions on selling imported liquor without a state license, but there was no opinion for the Court and no consistent line of analysis in any of the six seriatim opinions that were reported.[356] The issue of deference to precedent arose with regard to the Court's earlier decision in *Brown v. Maryland*, which had precluded Maryland from collecting a license tax on imported goods so long as they "remain[ed] the property of the importer, in his warehouse, in the original form or package in which it was imported."[357] Chief Justice Taney urged the resolution of two of the consolidated cases under this original package doctrine, on the ground that the state regulations in those two cases applied to liquor in broken packages.[358] As for the third consolidated case, in which the regulation applied to liquor in its original package, Taney concluded that the state retained concurrent power to regulate interstate commerce.[359] Although the confusing and lengthy opinions make difficult the task of divining a consistent line of analysis, this latter point seems to have garnered majority support. Justices Woodbury, Nelson, and Catron seemed to agree with Taney that the commerce power was not exclusive.[360]

Justice Daniel concurred in the result urged by Taney, but thought that the entire case should have been disposed of on the ground that the interstate transaction ended once the liquor entered the state, and that the states thus retained the power to regulate the sale as a matter of local commerce.[361] Daniel also went out of his way

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355. The License Cases, 46 U.S. (5 How.) 504, 611-18 (1847) (Daniel, J., concurring).

356. *See* SWISHER, *supra* note 236, at 372-73 (asserting that "if there had been a carry-over from the Marshall period of the tradition of seeking unanimity among the Justices and speaking through one voice, that ideal had now, by 1847, been largely abandoned with respect to critical constitutional issues"). For further background on the *License Cases*, see CURRIE, *supra* note 98, at 225-26; SCHWARTZ, *supra* noto 12, at 79-81.

357. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 442 (1827).

358. *See The License Cases*, 46 U.S. (5 How.) at 574-75.

359. *See id.* at 579-80.

360. *See id.* at 601-08 (Catron, J., concurring); *id.* at 618-24 (Woodbury, J., concurring). Nelson joined both Taney's and Catron's opinions. *See id.* at 618; *see also* CURRIE, *supra* noto 98, at 226 (concluding that "four of the seven Justices who voted flatly and persuasively declared that the commerce clause did not limit state power").

361. *See The License Cases*, 46 U.S. (5 How.) at 614-16 (Daniel, J., concurring). As to the exclusivity of the commerce power, Daniel seemed to agree with Taney, Woodbury, Nelson, and Catron, at least where the state's exercise of power did not conflict "with some regulation actually established by Congress in virtue of that power." *Id.* at 615.

to offer his disagreement with the original package doctrine of *Brown v. Maryland* and to volunteer his groundbreaking view "that in matters involving the meaning and integrity of the constitution," he would "never . . . consent that the text of that instrument shall be overlaid and smothered by the glosses of essay-writers, lecturers, and commentators," or by judges whose decisions contravened his own understanding as to the meaning of the Constitution.[362] Daniel's justification was the argument that Madison had considered and rejected: that he had "been sworn to observe and maintain the constitution," and could not "put [his] conscience" as to its meaning "into commission."[363]

Two years later, Chief Justice Taney expressed a similar view in the *Passenger Cases*.[364] These consolidated cases presented the issue of the constitutionality of New York and Massachusetts statutes charging ship captains per capita fees for passengers brought into the respective states.[365] Two principal questions were at stake: (1) whether the express grant of power to Congress under the Commerce Clause was exclusive of any parallel power in the States; and (2) even assuming exclusivity of power under the Commerce Clause, whether the States retained police powers encompassing the authority to levy the fees at issue.[366] By a bare five to four margin, the Court invalidated the per capita fees.[367] The Court was again fractured, however, with eight Justices authoring extensive opinions. Justice Wayne's opinion argued (in contradiction to the apparent majority position in the *License Cases*) that Congress's commerce power was exclusive, and claimed the support of all five members of the majority.[368] But Catron and Grier, who voted to invalidate the fees, did so without even discussing the Commerce Clause; their opinions were based on the conclusion that the state statutes conflicted with certain congressional statutes regulating commerce with Great Britain.[369]

Chief Justice Taney dissented. He cited the *License Cases* for the proposition that the Commerce Clause was not an exclusive grant

362. *Id.* at 612.
363. *Id.*
364. The Passenger Cases, 48 U.S. (7 How.) 283 (1849).
365. *See id.* at 392-93, 409-10.
366. *See id.* at 393.
367. *See id.*
368. *See id.* at 410-15 (Wayne, J., concurring).
369. *See id.* at 437-52 (Catron, J., concurring); *id.* at 455-64 (Grier, J., concurring).

of power.[370] Under Taney's view of the official report of the *License Cases*:

> [F]ive of the justices of this court, being a majority of the whole bench, held that the grant of the power to Congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbours, for the convenience of trade or the security of health . . . .[371]

Notwithstanding his reading of the *License Cases*, Taney suggested that the holding there should be subject to reexamination on the merits:

> After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.[372]

Taney's opinion offered no citation to Justice Daniel's dissent in the *License Cases*, and he would have been hard-pressed to find any other support for his view. Arguments from counsel in the *Passenger Cases* reflected the then-prevailing view. David B. Ogden,[373] counsel for one of the ship captains who objected to the imposition of the per capita fees, argued that doubtful questions should be decided based on precedent, and that "adjudged cases upon points of doubtful construction of the Constitution" are "*peculiarly within the good sense and principle of the rule.*"[374] Opposing counsel made no effort to contradict Ogden's view.

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370. *See id.* at 470 (Taney, C.J., dissenting).

371. *Id.*

372. *Id.*

373. Ogden reportedly "argued more important cases before [the Marshall Court] than any other American lawyer" except Daniel Webster and William Wirt, and Marshall is said to have commented that "when [Ogden] bad stated his case, it was already argued." CHARLES E. WARREN, HISTORY OF THE AMERICAN BAR 303-04 (1911).

374. *The Passenger Cases*, 48 U.S. at 292 (reporting Ogden's oral argument) (emphasis added). Ogden reiterated the point as follows:

> If, in ordinary questions, it is the interest of the public that there should be an end of litigation as to what the law is, is it not emphatically the interest of the public that their great organic law should be fixed and settled?—that, in points upon which the construction of the Constitution is doubtful, (and it could only be when that construction is doubtful that the case could come before this court,) the construction given by adjudged cases should be adhered to? . . . If in ordinary cases between man and man it is important that the law should be settled, it seems to me that it is *infinitely more important to the community that the construction of the Constitution should be settled.*

Even Taney's dissent seemed cognizant of the novelty of his position. When Taney took the detour in his opinion to diminish the binding effect of the *License Cases*, he self-consciously offered a *new* standard of deference in constitutional cases. Taney proposed that,

> it be regarded *hereafter* as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should *hereafter* depend altogether on the force of the reasoning by which it is supported.[375]

When placed in historical context, the "hereafter" phrasing is significant. Taney understood that until that time constitutional precedent was on the same stare decisis plane as other decisions; "hereafter" he proposed a different rule.

The majority opinions in the *Passenger Cases* did not speak to the proper treatment of precedent generally or to the *License Cases* in particular, and it would be a mistake to infer that the Justices in the majority subscribed to Taney's novel standard. The better reading of the majority's treatment of the *License Cases* is simply that there was no majority holding on the exclusivity of the commerce power.[376] As noted above, Justices Catron and Grier relied on statutory arguments, and not on any conclusion as to the exclusivity of Congress's power under the Commerce Clause. At this point, Daniel's and Taney's views regarding constitutional precedent were likely viewed as dicta in isolated opinions, not as a new standard to be taken seriously by the Court.

Indeed, Taney himself provided support for this conclusion in his majority opinion in *The Genesee Chief*, announced just two years after the *Passenger Cases*. The Court's decision to overrule *The Thomas Jefferson*'s interpretation of the Admiralty Clause provided a prime opportunity for Taney to adopt for the Court what he had proposed as the rule "hereafter" in his dissent in the *Passenger Cases*. If the majority had agreed that *The Thomas Jefferson*'s construction of the Admiralty Clause was "always open to discussion" because of its perceived error, and that its authority depended solely "on the force of

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Id. (emphasis added).

375. *Id.* at 470 (Taney, C.J., dissenting) (emphasis added).

376. *See* CURRIE, *supra* note 98, at 227 (suggesting that "there is room for doubt" as to whether Grier and Catron agreed with the other majority Justices' conclusion that the commerce power was exclusive); SWISHER, *supra* note 236, at 389 (asserting that "the question of exclusiveness was not pertinent" te the analysis of Justices Wayne, Grier, and Catron, since they concluded that "the stato statutes conflicted with Acts of Congress regulating commerce and with treaties with Great Britain").

the reasoning by which it [was] supported," surely Taney would have said so. But instead of a categorical rule that constitutional decisions are always open to discussion, Taney's opinion in *The Genesee Chief* suggested that the level of deference owing to a precedent should turn on whether reversal would "disturb" any "rights of property" or "interfere with any contracts heretofore made."[377] If it would, Taney concluded that the prior decision (whether constitutional, statutory, or otherwise) must be adhered to "notwithstanding" the Court's conviction that it was "purely artificial and arbitrary as well as unjust."[378]

The opposing opinions in *Marshall* reinforce this understanding. As noted above, Justice Grier's majority opinion claimed adherence to the Court's previous decision in *Letson* in holding that persons who use the corporate form are presumptively treated as citizens of the state in which they are located.[379] In so doing, Grier noted that a narrower conception of diversity jurisdiction would be disruptive of existing reliance interests.[380] Daniel dissented and stood alone in suggesting that adherence to a constitutionally suspect decision would be a violation of the duty to uphold the Constitution.[381] Taney's experiment with that idea apparently had ended.

Daniel's *Marshall* dissent is significant not only in demonstrating that his position was still an outlying minority view. It was also the first articulation of the argument that has since carried the day in justifying a diminished standard of deference to constitutional precedent: that application of stare decisis to constitutional decisions "does indeed cut off all hope of redress, of escape, or of redemption, unless one may be looked for, however remote, in a single remedy—that sharp remedy to be applied by the true original sovereignty abiding with the States of this Union, namely, a reorganization of existing institutions."[382]

C. Constitutional Precedent in Historical Perspective

Thus, the notion of a diminished standard of deference to constitutional precedent was generally rejected by founding-era commentators, and drew only isolated support in opinions in the Taney era. Under the prevailing view in the founding era and through the

377. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458-59 (1851).
378. *Id.* at 457.
379. *See* Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328 (1853).
380. *See id.* at 325.
381. *See id.* at 344 (Daniel, J., dissenting).
382. *Id.* at 347.

Marshall and Taney years, exceptions to the rule of stare decisis might condone the rejection of constitutional precedent, but any exceptions applied across the board irrespective of the constitutional nature of the decision.

The first majority opinion to suggest otherwise appears to be Justice Strong's opinion for the Court in the *Legal Tender Cases*.[383] In *Hepburn v. Griswold*,[384] the Court had initially invalidated a congressional statute that authorized the issuance of paper money and declared it legal tender.[385] Chief Justice Chase penned the majority opinion, which turned on the conclusion that the issuance of paper money was not an appropriate means of carrying out any of Congress's enumerated powers under Article I.[386] Chase was joined by Justices Nelson, Clifford, and Field. Justice Miller dissented, joined by Justices Swayne and Davis.[387] Chase claimed to have Justice Grier's support in the majority opinion, but Grier resigned prior to the Court's announcement of its decision.[388]

Hepburn was met with wide predictions of the dire consequences that were anticipated to flow from the decision,[389] and two new appointments to the Court followed quickly on its heels. One appointment filled the vacancy left by Grier's retirement; the other filled a new position created by a statute that expanded the number of Associate Justices to eight.[390] The opinions in *Hepburn* were handed down on February 7, 1870; Justice Strong was appointed on February

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383. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553-54 (1871). Two years earlier, another dissent had hinted at such an approach. *See* Washington Univ. v. Rouse, 75 U.S. (8 Wall.) 439, 444 (1869) (Miller, J., dissenting). In the *Washington University* case, Justice Miller dissented from the majority's holding, in reliance on earlier decisions under the Contracts Clause, that the Missouri legislature had granted an enforceable, permanent exemption from taxation to the University. *Id.* at 440-41. Miller opined that the legislature had no power to grant such a permanent exemption and added "that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court." *Id.* at 444.

384. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), *overruled in part by The Legal Tender Cases*, 79 U.S. (12 Wall.) at 457.

385. *See id.* at 625-26; *see also* The Legal Tender Act, ch. 33, 12 Stat. 345, 345 (1862) (current version codified at 31 U.S.C. § 5103 (1994)).

386. *See Hepburn*, 75 U.S. (8 Wall.) at 617.

387. *See id.* at 626-39 (Miller, J., dissenting).

388. *See id.* at 626 (suggesting that Grier agreed that the statute was unconstitutional as applied to debts incurred before it was passed); 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 716-19 (1971) (noting that Grier resigned under pressure from his colleagues before the decision was announced from the bench).

389. *See* SCHWARTZ, *supra* note 12, at 156-57 (suggesting also that *Hepburn* was "categorically correct in terms of original intention" of the framers); *see also* CURRIE, *supra* note 98, at 329 (suggesting that *Hepburn* "was an aberration in a history of generally sympathetic interpretation of the affirmative grants of congressional power").

390. *See The Legal Tender Cases*, 79 U.S. (12 Wall.) at 528 & n.81.

18, 1870; and Justice Bradley was appointed on March 21, 1870.[391] The newly constituted Court ordered argument in the *Legal Tender Cases* and handed down its decision on May 1, 1871.[392]

This time, Justices Strong and Bradley joined the *Hepburn* dissenters in upholding Congress's power, with Strong authoring the majority opinion. Strong's opinion for the Court overtly overruled *Hepburn*, and held "the acts of Congress constitutional as applied to contracts made either before or after their passage."[393] Strong made no effort to tie congressional power to any specific provision of Article I, but vaguely suggested that the power could be inferred from Article I.[394]

Strong's justification for rejecting *Hepburn* was twofold. First, he questioned the adequacy of the *Hepburn* majority, in light of Grier's resignation and the impending expansion of the number of Associate Justices on the Court.[395] Second, Strong suggested that on important constitutional questions, a different standard of stare decisis applied:

> We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort . . . to overrule decisions previously made. We agree this should not be done inconsideratoly, but in the case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.[396]

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391. *See id.*

392. *Id.*

393. *Id.* at 553. For a discussion of the public criticism that came in the wake of the Court's self-reversal in the *Legal Tender Cases*, see SCHWARTZ, *supra* note 12, at 158.

394. *See The Legal Tender Cases*, 79 U.S. (12 Wall.) at 534.

395. *See id.* at 553-54 ("That case was decided by a divided court, and by a court having a less number of judges that the law then in existence provided this court shall have."). This argument was challenged in several dissenting opinions. *See id.* at 571-72 (Chase, C.J., dissenting) (insisting that at the time *Hepburn* was decided, "[t]he court was . . . full," and that the *Hepburn* majority was a "majority of the court as then constituted, five judges out of eight"); *id.* at 604 (Clifford, J., dissenting) (noting that "[b]y law the Supreme Court at that time consisted of the Chief Justice and seven associate justices, the act of Congress having provided that no vacancy in the office of associate justice should be filled until the number should be reduced to six," and that "[f]ive of the number, including the Chief Justice, concurred in the opinion in that case, and the judgment of the State court was affirmed, three of the associate justices dissenting").

396. *Id.* at 554. Justice Bradley's concurrence echoed these same sentiments. *See id.* at 569-70 (Bradley, J., concurring) (suggesting that "[o]n a question relating to the power of the government, where I am perfectly satisfied that it has the power, I can never consent to abide

Strong's justification for overruling *Hepburn* thus attempted te lay claim to the Court's supposed habit of treating constitutional cases differently from those involving private rights.[397] But Strong's reference to the Court's habit is misleading in this context. His sole citation for the Court's habit was *Briscoe v. Bank of Kentucky*.[398] *Briscoe*, however, is hardly support for the notion of a relaxed standard of stare decisis in constitutional cases. Chief Justice Marshall's opinion for the Court in *Briscoe* consistod of a single paragraph, which simply noted the Court's practice of not rendering a decision in constitutional cases unless a majority of the justices concurred in the judgment.[399]

Thus, *Briscoe* literally supports the habit adverted to by Strong of treating constitutional cases differently, but the difference in treatment had nothing to do with stare decisis.[400] By citing *Briscoe* out of context, Strong created the illusion of a settled practice of as-

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by a decision denying it, unless made with reasonable unanimity and acquiesced in by the country," and that *Hepburn* was vulnerable because it was "recent" and "only made by a bare majority").

397. *See id.* at 554.

398. *See id.* (citing Briscoe v. Bank of Ky., 33 U.S. (8 Pet.) 118 (1834)).

399. *See Briscoe*, 33 U.S. (8 Pet.) at 122. The court stated that:

> The practice of this court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct [sic] these cases to be reargued at the next torm, under the expectation that a larger number of the judges may then be present.

400. *See The Legal Tender Cases*, 79 U.S. (12 Wall.) at 554. The various opinions in *The Legal Tender Cases* disagreed as to whether the actual principle of *Briscoe* had been disregarded in *Hepburn*. *See supra* note 395. The correct resolution of this issue turns, in part, on whether Justice Grier's phantom vote for the majority opinion is credited. Without his voto, the *Hepburn* majority was only four, less than a majority of the eight Justices then authorized to sit on the bench. Chief Justice Chase understandably attempted to include Grier's concurrence in his tally, *Hepburn*, 75 U.S. (8 Wall.) at 626, as did contomporaneous law review commentary, which argued that "[u]nder the rule of practice . . . of Briscoe *v.* Bank, this decision [in *Hepburn*] was all, in point of regularity and authority, that the decision of any constitutional question or case could be." D.H. Chamberlain, *The Doctrine of Stare Decisis As Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 129 (1889). On the other hand, legal historians have expressed some doubt about whether Grier actually agreed with the majority, *see* 6 FAIRMAN, *supra* note 388, at 716-19, and Strong was probably on solid ground in asserting that Grier's vote was technically irrelevant in light of his resiguation before the formal announcement of the decision in *Hepburn*.

Even so, *Briscoe* itself expressly left the matter of proceeding on a constitutional case with less than a full majority of the "whole court" to the discretion of the Justices; it simply noted the "practice" of the Court and left open the possibility of disregarding that practice "in cases of absolute necessity." *Briscoe*, 33 U.S. (8 Pet.) at 122. Moreover, the "whole court" after Justice Grier's resiguation arguably consisted (until confirmation of the new appointments) of only seven members. If so, even a four-Justice majority constituted a "majority of tlie wliole court" under *Briscoe*.

signing diminished precedential value to constitutional questions, but that illusion did not become a reality until the twentieth century.

The novelty of Strong's approach is evident from an examination of contemporaneous legal commentary on the Court's decision. A prominent response appeared in an article by D.H. Chamberlain in the *Harvard Law Review*.[401] After rejecting various other bases offered by Strong in support of the Court's decision to overrule *Hepburn*,[402] Chamberlain proceeded to express his outrage at the novel suggestion that constitutional decisions were somehow of diminished precedential value:

> What is there to soften the rigor or abate the force of this rule as applied to the decisions of constitutional questions coming before courts? It will hardly be claimed that convenience does not call for certainty in constitutional law as loudly as in other matters or kinds of law. Judges Strong and Bradley dwell on the far-reaching public consequences of the decision of constitutional questions, especially of "questions of constitutional power." No one questions it; but it might seem that this consideration was one chief reason for holding steadily by such a decision made upon full argument, and careful consideration by a full court. We would admit all the considerations, all the qualifications, urged by these most accomplished and upright judges,—though we do not see how they applied to the legal-tender decisions of 1870,—but we cannot feel their force in constitutional questions so much even as in matters of privato right.[403]

With this background, Chamberlain stated the view that prevailed through most of the nineteenth century—that the doctrine of stare decisis applied at least as strongly to questions of constitutional law:

> Whether, however, it was right and wise to reverse the first legal tender decision or not, or whether that case was a fair exception to the rule or not, it would at first view appear to be more inconvenient for the whole people to be in doubt as to matters of constitutional construction, than for a comparatively few to be in doubt as to some point of commercial law, for example. A rule of

401. *See* Chamberlain, *supra* note 400. Chamberlain's article has been described as "the first law review essay on stare decisis in constitutional law." Monaghan, *supra* note 2, at 744 n.128.

402. Chamberlain argued, for example, that "[t]he allusion made by Judge Strong, to the court then consisting of less than the members provided by law, is inaccurate," Chamberlain, *supra* note 400, at 128; that "[f]ive members of the court [in *Hepburn*] joined in the decision," so that "[u]nder the rule of practice . . . of Briscoe v. Bank, this decision was all, in point of regularity and authority, that the decision of any constitutional question or case could be," *id.* at 129; and that the "bare" majority in *Hepburn* was actually a greater majority "in ratio" than the majority in the *Legal Tender Cases* that overruled *Hepburn*, *id.* at 129-30.

403. *Id.* at 130-31.

> constitutional construction can hardly be changed with less inconvenience or disadvantage to the public than one of private concern only.[404]

Chamberlain concluded by emphasizing the novelty of Strong's suggestion of a weaker rule of stare decisis in constitutional cases. To his knowledge, there were no authorities that would support Strong's approach; at that time, it was not even "regarded in the forum of the profession or of jurists and judicious law-writers as an open question."[405]

In light of the discussion above, Chamberlain obviously overplayed his hand in shutting out the possibility of *any* authority for Strong's approach. Justices Daniel and Taney had introduced the concept of a lesser standard of deference to constitutional precedent in their dissents in the *License Cases* and the *Passenger Cases*, respectively. And a small minority of nineteenth-century commentators had put constitutional precedent in a category of its own.[406] But hyperbole aside, Chamberlain's article does indicate that Strong's approach to stare decisis in the *Legal Tender Cases* was still viewed as an aberration.

Significantly, Strong's opinion itself made no effort to offer any substantive argument for diminished deference to constitutional precedent. Instead, Strong turned to the conclusion that whether the case involves constitutional power or merely a private right, the Court should correct its error if it is "thoroughly convinced" that it "made a mistake."[407] Bradley's concurrence is of similar effect. Instead of arguing for a diminished standard of deference to all constitutional

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404. *Id.* at 131.

405. *Id.* Not surprisingly, Chamberlain's position was criticized by some commentators. *See* EVERETT V. ABBOT, JUSTICE AND THE MODERN LAW 77-78 (1913). Abbot wrote:

> Any citizen, therefore, whose liberty or property is at stake, has an absolute constitutional right to appear before the court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. In other words, he has a constitutional right to assert before the court itself that its decisions are themselves unconstitutional, and if he can establish his assertion, the court is under a sworn duty to reverse itself, because it is under a sworn duty to uphold the Constitution rather than its own opinions.

Id.; *see also* Louis B. Boudin, *The Problem of* Stare Decisis *In Our Constitutional Theory*, 8 N.Y.U. L.Q. REV. 589, 598-99 (1931) (quoting Abbot and adopting the same view). But even Chamberlain's critics acknowledged the novelty of their position, suggesting that it had "perhaps never been openly advanced," ABBOT, *supra*, at 76-77, and that "the practice of the courts and the almost unanimous opinion of the profession" was to the contrary, Boudin, *supra*, at 598 (emphasis omitted).

406. *See, e.g.*, 2 WARREN, *supra* note 112, at 749 (citing 4 WORKS OF GEORGE BANCROFT 549 (1852)) ("To the decision of an underlying question of constitutional law no . . . finality attaches. To endure, it must be right.").

407. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 554 (1871).

precedent, Bradley simply concluded that the Court was entitled to overrule a decision on a question of government power when there is "public excitement on the subject" and the Court is "fully convinced" that its former decision "was erroneous."[408] Thus, Strong's and Bradley's opinions provided a weak foundation for establishing a future practice of diminished deference to constitutional precedent.

Indeed, the weakness of this foundation was evident the next time the Court explicitly addressed the value of constitutional precedent—in its income tax decisions in *Pollock v. Farmers' Loan & Trust Co.*[409] *Pollock* presented what has since been characterized as "the most contentious and emotion-laden" issue of the era:[410] whether an 1894 income tax (or, more precisely, a tax on the income from property) was unconstitutional as a direct tax that had not been apportioned. The apportionment requirement is found in Article I, Sections 2 and 9, which provide that "direct Taxes shall be apportioned among the several States . . . according to their respective Numbers," and that "no Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[411]

The threshold issue in *Pollock* was whether the 1894 tax qualified as a direct tax as that term is used in Article I.[412] The 1894 tax obviously had not been apportioned according to the population of the various States, so the tax could survive only if it was deemed indirect. *Hylton v. United States* arguably had held that only capitation and real estate taxes qualified as direct taxes subject to the apportionment requirement,[413] and that understanding had prevailed for

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408. *Id.* at 569-70 (Bradley, J., concurring).

409. Pollock v. Farmers' Loan & Trust Co. (*Pollock I*), 157 U.S. 429 (1895), *overruled by* Pollock v. Farmers' Loan & Trust Co. (*Pollock II*), 158 U.S. 601 (1895).

410. JOHN STEELE GORDON, HAMILTON'S BLESSING: THE EXTRAORDINARY LIFE AND TIMES OF OUR NATIONAL DEBT 86-87 (1997). For further discussion of the emotional attacks on the income tax, including summary of arguments from counsel that it was "communistic," see SCHWARTZ, *supra* note 12, at 184.

411. U.S. CONST. art. I, § 2, cl. 3; *id.* § 9, cl. 4.

412. *Pollock I*, 157 U.S. at 558; *see also Pollock II*, 158 U.S. at 617-18.

413. Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796). In *Hylton*, the Court considered the constitutionality of "[a]n Act to lay *duties* upon carriages for the conveyance of persons." *Id.* at 172 (Chase, J.). The seriatim opinions in *Hylton* unanimously upheld the carriage tax in the face of a challenge under the Direct Tax Clause. Four Justices participated, three of whom authored opinions. All three suggested that only "capitation" and real estate taxes qualified as "direct" taxes subject to the requirement of apportionment, but all three expressly equivocated on that point. Chase opined that the direct taxes "contemplatod by the Constitution are only *two*, to wit, a *capitation*, or *poll* tax . . . and a tax on LAND," but he went out of his way to suggest that he was not giving a "judicial opinion" on that point. *Id.* at 175. Iredell agreed with Chase, but also expressed some doubt on the issue. *See id.* at 183. Paterson

nearly a century.[414] Counsel for Pollock (who brought the suit against a corporation in which he held stock to prevent compliance with the tax) recognized that limiting direct taxes to capitation and real estate taxes would undermine a constitutional challenge to the income tax, and thus counsel's arguments before the Court included an open invitation to overrule a "century of error" regarding the meaning of "direct taxes."[415]

After initial arguments in *Pollock*, the Court (by a 6-2 vote, Justice Jackson not participating because of an illness) struck down the tax as applied to income from real estate, but left open (on a 4-4 vote) the validity of the tax as applied to income from personal property.[416] Chief Justice Fuller's opinion in *Pollock I* superficially retained *Hylton*, and Fuller claimed that the Court's decision not to *extend* any decision upon a constitutional question properly preserved the principle of stare decisis.[417]

In light of the 4-4 vote in *Pollock I* on the constitutionality of the income tax as applied to personal property, the Court reheard the case, this time with all nine Justices participating. On rehearing, Chief Justice Fuller garnered a fifth vote in favor of invalidating the 1894 income tax in its entirety.[418] In contrast to his opinion in *Pollock I*, which superficially preserved the direct tax standard in *Hylton*, Fuller's opinion in *Pollock II* clearly rejected the view that direct taxes are limited to real estate and capitation taxes.[419] Fuller

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concluded that capitation and real estate taxes were the "principal" examples of direct taxes, but he was unwilling te conclude that no other taxes could qualify. *See id.* at 177.

414. *See, e.g.*, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 546 (1869); Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433, 444-45 (1869).

415. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 140-41 (1960).

416. *See Pollock I*, 157 U.S. at 586.

417. *Id.* at 579-80. Chief Justice Fuller's opinion for the Court in *Pollock I* concluded that even accepting the *Hylton* conclusion that a tax on real estate is a direct tax, a tax on real estate and a tax on income from real estate are constitutionally indistinguishable. *Id.* at 580-81. Because both taxes diminish the value of property, *Pollock I* held that the apportionment requirement applies to both. *Id.* at 579-80.

418. Justice Jackson dissented, so one Justice apparently switched sides and joined Fuller in *Pollock II*. Most historical commentators have concluded that Justice Shiras was the one who changed his mind. *See* 2 WARREN, *supra* note 112, at 700; Note, *The Income Tax Decision*, 29 AM. L. REV. 589, 589 (1895). *But see* SCHWARTZ, *supra* note 12, at 185 (stating that later commentators have questioned whether it was Justice Shiras who changed his mind "or even whether there was any switch at all" (citation omitted)).

419. Pollock v. Farmers' Loan & Trust Co. (*Pollock II*), 158 U.S. 601, 618 (1895):

> We are now permitted to broaden the field of inquiry, and te determine te which of the two great classes [direct or indirect] a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the

protested that there was "nothing in the *Hylton* case in conflict with the foregoing,"[420] but his disclaimer was hardly credible. *Hylton* confined direct taxes to two narrow categories; *Pollock II* held that direct taxes included any "general unapportioned tax, imposed upon all property owners as a body for or in respect of their property," whether aimed at the property itself or at "the income therefrom."[421]

If the *Pollock* majority had thought it could lay claim to a diminished standard of deference in constitutional cases under the *Legal Tender Cases*, surely it would have done so. Instead, it remained quiet while the dissent protested that stare decisis was of particular importance under the circumstances:

> If there be any weight at all to be given to the doctrine of *stare decisis*, it surely ought to apply to a theory of constitutional construction, which has received the deliberate sanction of this court in five cases, and upon the faith of which Congress has enacted two income taxes at times when, in its judgment, extraordinary sources of revenue were necessary to be made available.[422]

Justice White's dissent in *Pollock II* is consistent with the prevailing treatment of the issue by contemporaneous commentators. Instead of adopting a categorical standard of deference for all constitutional cases, White believed that the deference due to *Hylton* depended on the extent of private property or contract rights built around that decision.[423]

Despite Strong's majority opinion in the *Legal Tender Cases*, early twentieth-century commentators generally adhered to the view that constitutional decisions were at least as entitled to deference as other decisions. Henry Campbell Black's *Handbook on the Law of Judicial Precedents*, a self-proclaimed first offering of "a systematic and comprehensive treatise on the law of judicial precedents,"[424] broadly asserted that "[t]he principle of stare decisis applies with special force to the construction of constitutions, and an interpreta-

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manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.

420. *Id.* at 626.

421. *Id.* at 627.

422. *Id.* at 689 (Brown, J., dissenting).

423. *See id.* at 689-90:

I have always entertained the view that, in cases turning upon questions of jurisdiction, or involving only the rights of private parties, courts should feel at liberty to settle principles of law according to the opinions of their existing members, neither regardless of, nor implicitly bound by, prior decisions, subject only to the condition that they do not require the disturbance of settled rules of property.

424. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW, at v (1912).

tion once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons."[425]

Black's treatment of this issue does not include a citation to the *Legal Tender Cases*.[426] Black may have viewed Strong's analysis—in light of *Pollock* and subsequent cases—as such a "sport" that it could be ignored even in a comprehensive treatise. Or he may have interpreted Strong's approach simply to carve out a narrow exception for constitutional decisions concurred in by a shaky majority of the Court. Either way, that Black's comprehensive treatise conclusively rejected any rule of diminished deference to constitutional decisions, without even a citation to the *Legal Tender Cases*, provides further support for the conclusion that the notion had not yet taken hold even by the early twentieth century.[427]

Thus, the prevailing doctrine of stare decisis at the time of the framing and throughout the nineteenth century generally rejected the notion of a diminished standard of deference to constitutional precedent. When Justice Brandeis (dissenting in *Burnet*) sought to lay claim to a purportedly longstanding position of the Court that constitutional cases should readily be corrected where they are found inconsistent with reason,[428] the Court's actual position on that point had been to treat constitutional precedent in the same way it treated other decisions.

Despite its questionable historical pedigree, Brandeis' approach has been unquestioningly adopted by the modern Court. A key turning point was *Smith v. Allwright*,[429] which appears to be the first majority opinion of the twentieth century to adopt the Brandeis vision of diminished deference to constitutional precedent.[430] Justice Reed's

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425. *Id.* at 222.

426. Black's only citation to United States Supreme Court authority is to *Pollock I*, which he cites for the proposition that the Court "is not required, under the rule of stare decisis, to extend the scope of any decision upon a constitutional question, if it is convinced that error in principle might supervene." *Id.* at 226.

427. Black acknowledged that constitutional decisions that establish a "rule of property" might qualify for enhanced deference, but refused to accept a standard that would accord deference solely on the basis of the constitutional dimension of a decision. *See id.* at 225. A contrary view had been advocated, however, in contomporaneous academic commentary. *See* Charles Wallace Collins, *Stare Decisis and the Fourteenth Amendment*, 12 COLUM. L. REV. 603, 603 (1912) ("[T]he doctrine of *stare decisis* is much weaker in the realm of constitutional law .... Constitutional law is organic. It grows. It is an expression of the life of the social organism.").

428. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting).

429. Smith v. Allwright, 321 U.S. 649 (1944).

430. *See id.* at 664-65. The *Smith* Court overruled *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled in part by Smith v. Allwright*, 321 U.S. 649 (1944), in holding that a political party's

majority opinion in *Smith* offered the following commentary on constitutional precedent:

> In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day.[431]

Reed's position likely was unsurprising to those who were familiar with the views he had expressed as Franklin D. Roosevelt's Solicitor General. In that capacity, Reed had opined that a flexible notion of stare decisis "should be most liberally applied" in the "constitutional field," because "the court must test its conclusions by the organic document, rather than precedent," and because "legislation is often powerless to overcome questionable constitutional decisions."[432] But Reed's sweeping claims to an accepted practice throughout the Court's history were certainly questionable. Reed offered no historical evidence for such an approach, relying exclusively on Brandeis' *Burnet* dissent for his historical argument.[433]

Since *Smith*, however, the notion of an accepted practice of a diminished standard of deference to constitutional precedent has become a reality. The modern Court rarely considers the precedential value of a constitutional decision without adverting to the Brandeis position in *Burnet*. Thus, at least in this respect, the modern Court's overruling rhetoric appears to more liberally sanction the rejection of precedent than did the doctrine of the early nineteenth century. If the Rehnquist Court is bent on abandoning a constitutional decision, it may do so with little more than a citation to Brandeis and Reed and their self-fulfilling notion of an accepted practice. Such an approach had not garnered majority support in the founding era.

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denial of membership on the basis of race could constitute state action in violation of the fifteenth amendment where party membership is a prerequisite to participation in a primary election. *Id.*

431. *Id.* at 665 (footnotes omitted).

432. Stanley Reed, *Stare Decisis and Constitutional Law*, 35 PA. B. ASS'N Q. 131, 134 (1938).

433. *Burnet*, 321 U.S. at 665 n.9. Indeed, the only nineteenth-century opinion cited by Reed is *Pollock I*, which is ironically offered as support for the "desirability of continuity of decision in constitutional questions." *Id.* at 665 n.8 (citing Pollock v. Farmers' Loan & Tr. Co. (*Pollock I*), 157 U.S. 429, 652 (1895)). Justice Roberts' dissenting opinion in *Smith v. Allwright*, 321 U.S. 649 (1944), raised the familiar theme of institutional integrity, complaining that the Court's decisions on constitutional questions would thereafter be perceived as "a restricted railroad ticket, good for this day and train only." *Id.* at 669 (Roberts, J., dissenting).

One may question, however, whether the current practice produces significantly different results than would be achieved under the methodology of the founding era. In many cases, constitutional precedent that is abandoned by the Court would prove vulnerable even on grounds well accepted by the founding generation, such as the existence of subsequent undermining authority or the absence of any cognizable reliance interests. Theoretically, then, the doctrinal change inaugurated by the modern Court's adoption of the Brandeis/Reed position could make a difference in only a narrow category of cases, where a constitutional decision remains unscathed by subsequent decisions and supports arguably significant reliance interests.

But as a practical matter, it seems doubtful that the current Court would be anxious to overrule itself under such circumstances. In fact, the Rehnquist Court's practice to date suggests that the constitutional nature of a decision has been insufficient by itself to justify a reversal of precedent. Whenever the Rehnquist Court has overruled constitutional precedent, significant reliance interests have been notably absent[434] or other authority has undermined the decision in question.[435] In each instance, the Court easily conld have abandoned

434. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 520-21 (1995) (overruling *Sinclair v. United States*, 279 U.S. 263 (1929), in holding that the element of "materiality" was a matter of fact to be decided by the jury, and not a matter of law to be resolved by the court, and noting that *Sinclair*'s precedential value is minimal because it established a "procedural rule . . . which does not serve as a guide to lawful behavior"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233-34 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), holding that all race-based governmental classifications must be analyzed under a strict scrutiny standard, and noting that "reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case [*Metro Broadcasting*] is unlikely to affect primary conduct in any event"); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (suggesting that the Court's prior decisions precluding victim-impact evidence in capital cases under the Eighth Amendment were ripe for rejection because cases "involving procedural and evidentiary rules" do not sustain significant reliance interests).

435. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) (suggesting that the Court's prior decisions holding that the Establishment Clause precluded federal funding were ripe for reversal since there had been a "significant change in or subsequent development of our constitutional law"); Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality had upheld Congress's power to abrogate a State's Eleventh Amendment immunity by unequivocally expressing its intont to do so, and noting that *Union Gas* was a "solitary departure from established law" and was of "questionable precedential value, largely because a majority of the [*Union Gas*] Court expressly disagreed with the rationale of the plurality"); *Gaudin*, 515 U.S. at 520-21 (overruling *Sinclair v. United States* in holding that the element of "matoriality" was a matter of fact to be decided by the jury, and not a matter of law to be resolved by the court, and noting that *Sinclair*'s "underpinnings" had been "eroded . . . by subsequent decisions of this Court"); United States v. Dixon, 509 U.S. 688, 704, 709-11 (1993) (abandoning the *Grady v. Corbin*, 495 U.S. 508 (1990), "same conduct" test under the Double Jeopardy Clause and asserting that *Grady* was "wholly inconsistont with earlier Supreme Court precedent," and that *Grady*'s foundations were undermined by *United*

earlier constitutional authority without the modern crutch of diminished deference to constitutional decisions.

Agostini v. Felton illustrates the point.[436] Justice O'Connor's majority opinion in *Agostini* overruled *Aguilar v. Felton*[437] and *School District of Grand Rapids v. Ball*,[438] which had held that the Establishment Clause prohibited federal funding of a program providing remedial education to sectarian schools on a neutral basis with other schools.[439] In so doing, O'Connor dutifully recited the Brandeis position that although " 'in most matters it is more important that the applicable rule of law be settled than that it be settled right,' " stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."[440]

But the Brandeis crutch was hardly necessary. O'Connor persuasively argued that since *Ball* and *Aguilar*, more recent Establishment Clause jurisprudence had altered "the criteria used to assess whether aid to religion has an impermissible effect."[441] And O'Connor easily could have argued that precedent precluding governmental support for remedial education in parochial schools could hardly sustain any significant reliance interests.[442] The Court's rhetoric on constitutional precedent may have broadened since the founding era, but its practice is explainable under standards with a long historical pedigree.

D. Statutory Precedent in Historical Perspective

The notion of an enhanced standard of deference to statutory precedent apparently had not occurred to founding-era commentators,

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States v. Felix, 503 U.S. 378 (1992), which "recognize[d] a large exception" that "avoid[ed] a 'literal' (i.e., faithful) reading of *Grady*").

436. *Agostini*, 521 U.S. at 203.

437. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. at 203.

438. School Dist. v. Ball, 473 U.S. 373, 400 (1985), *overruled by Agostini*, 521 U.S. at 203.

439. *Ball*, 473 U.S. at 397.

440. *Agostini*, 521 U.S. at 235 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

441. *Id.* at 223. *But see id.* at 253 (Souter, J., dissenting) (quarreling with O'Connor's reading of subsequent authority and arguing that no subsequent case "has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine").

442. As I explain in further detail in a forthcoming article, a decision *proscribing* the provision of Title I services within parochial schools could not be expected to sustain the same sort of institutional investment that would be built around a decision *authorizing* governmental action. And although there undoubtedly had been some investment in facilities for providing such services off the premises of the schools, the existence of such sunk costs is not an argument for imposing further such costs. *See* Lee, *supra* note 320, sec. VI.

or to the Supreme Court in the Marshall and Taney years. In the founding generation, the only sliding standard of deference depended on the extent of commercial reliance interests, not on the statutory or constitutional character of the underlying issue. Thus, although the Court in the nineteenth century had recognized that judicial construction of a statute might be thought to "become[ ] . . . as much a part of the statute as the text itself," that conclusion generally applied only "so far as contract rights acquired under it [the statute] are concerned."[443]

Seeds of the modern theory of tacit congressional approval were sown in Justice Brown's opinion for the Court in *Sessions v. Romadka*.[444] In that case, defendants responded to a charge of patent infringement by asserting that plaintiff's patent "was invalid by reason of the joinder of distinct inventions in the same patent."[445] Plaintiff countered by entering a disclaimer of unrelated inventions included in the patent under a federal statute permitting a patentee to disclaim unwanted portions of a patent.[446] Despite language in the statute stating that a disclaimer shall not affect pending actions,[447] the Court had previously held that a plaintiff could preserve the right to prevail on the merits by entering a disclaimer after filing the suit, and that the only effect of filing a disclaimer after the commencement of the suit was to prevent the plaintiff from recovering costs from the defendant.[448] The *Sessions* Court stood by the Court's statutory precedent, and expressly relied on Congress's failure to reject the Court's construction when it reenacted the statute: "Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment."[449]

The modern approach to statutory precedent crystallized in a series of opinions in the Hughes Court. Justice Stone initially led the

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443. Douglass v. County of Pike, 101 U.S. 677, 687 (1879). The statute at issue in *Douglass* was a Missouri law regarding the issuance of municipal bonds. *Id.* at 678. Plaintiff Douglass had purchased certain bonds at a time when prevailing judicial authority construed the statute to authorize their issuance. *See id.* It was in this context that the Supreme Court rejected the government's challenge to those decisions. *See id.* at 687. Douglass had clearly relied on prevailing judicial authority in acquiring the bonds, and accordingly the former judicial construction had become "as much a part of the statute as the text itself." *Id.*; *see also* BLACK, *supra* note 424.

444. Sessions v. Romadka, 145 U.S. 29 (1892).

445. *Id.* at 40.

446. *See id.* (quoting Section 4917 of the Revised Statute).

447. *See id.* at 41.

446. *See id.* at 42.

449. *Id.*

charge. Taking a cue from *Sessions*, Stone and his colleagues held that when Congress reenacts a statute without changing the language previously construed in the Court's precedents, it "must be considered to have adopted the consistent interpretation of the latter,"[450] and sometimes even that congressional inaction in the face of statutory precedent indicates that "the interpretation of the Act . . . has legislative approval."[451] Although the Hughes Court sometimes equivocated on this latter point,[452] the Court's occasional mistrust of congressional silence has gradually given way to the notion that statutory precedent is per se entitled to great weight.[453]

This approach is another departure from founding-era principles. But again, one may question whether it actually affects outcomes. The question is not easily answered. When the Court expressly declines to overrule a statutory decision, the precise role of a rule of *enhanced* deference may be difficult to isolate from any of a number of other factors that may point in the same direction. Regardless of the statutory dimension of the precedent, the Court may conclude that the error in the decision is insufficiently clear to justify undermining the policies of stability and institutional integrity,[454] or

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450. United States v. Ryan, 284 U.S. 167, 175 (1931) (citing *Sessions*, 145 U.S. at 29); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940) (stating that the "long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive of legislative recognition that the judicial construction is the correct one," especially where the issue has "brought forth sharply conflicting views both on the Court and in Congress"); Missouri v. Ross, 299 U.S. 72, 75 (1936) (citing *Sessions*, 145 U.S. at 29) (asserting that congressional inaction is "persuasive evidence of the adoption by that body of the judicial construction," at least where Congress has amended the statute in question "in other particulars" and has not changed the language at issue). For further discussion of Justice Stone's views on statutory precedent, see Eskridge, *supra* note 325, at 1365-66.

451. United States v. Elgin, Joliet & E. Ry. Co., 298 U.S. 492, 500 (1936).

452. *See* Girouard v. United States, 328 U.S. 61, 69 (1946) (suggesting that "congressional silence" is insufficient to suggest "adoption of a controlling rule of law" in a previous decision); Helvering v. Hallock, 309 U.S. 106, 119-21 (1940) (concluding that "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines," and that mere inaction cannot be "tantamount to an estoppel barring reexamination by this Court of distinctions which it had drawn").

453. *See* Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987) ("The fact that inaction may not always provide crystalline revelation . . . should not obscure the fact that it may be probative to varying degrees."); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam).

454. *See, e.g.*, Neal v. United States, 516 U.S. 284, 285 (1996). At issue in *Neal* was the decision in *Chapman v. United States*, 500 U.S. 453, 468 (1991), which bad held that a sentencing court is required to take into account the weight of "blotter paper" with its absorbed LSD in determining whether the weight of the drug justifies the mandatory minimum sentence. In preserving *Chapman*, the *Neal* Court repeatedly referred te the Court's "reluctance to overturn [statutory] precedents," to the notion that the Court "give[s] great weight te *stare decisis* in the area of statutory construction," and to the rationale "that 'Congress is free to change this Court's interpretation of its legislation.'" *Id.* at 295 (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)). But despite this rhetoric, it is not at all clear that the statutory dimen-

that significant reliance interests counsel against reversal.[455] And despite the super-strong presumption in favor of statutory precedent,[456] the Court has overruled a significant number of statutory decisions under a familiar body of exceptions to the rule of adherence to statutory precedent.[457] Thus, although the super-strong presumption may discourage the Court from reexamining statutory decisions that it would otherwise scrutinize more closely, its impact is difficult te separate from other longstanding strands of the doctrine of stare decisis.

VI. CONCLUSION

Rumors of the recent demise of the Supreme Court's doctrine of precedent are greatly exaggerated.[458] For the most part, the inter-

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sion of *Chapman* had anything to do with the result in *Neal*. Kennedy's first-line argument was that *Chapman* was correct on the merits, and his lofty commentary on stare decisis came only after he first assumed away his conclusion on the merits "for argument's sake." *Id.* at 294.

455. *See, e.g.*, Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197 (1991). The *Hilton* Court refused to overrule *Parden v. Terminal Railway*, 377 U.S. 184 (1964), which held that FELA creates a cause of action against a state-owned railroad enforceable in state court. Although the Court emphasized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," *Hilton*, 502 U.S. at 202, it might have easily preserved *Parden* solely on its alternative justification that "overruling the decision would dislodge settled rights and expectations." *Id.* (noting that "[w]orkers' compensation laws in many States specifically exclude railroad workers from their coverage because of the assumption that FELA provides adequato protection"); *see also* Allied-Brnce Terminix Co. v. Dobson, 513 U.S. 265, 272 (1995) (refusing to overrule *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and its extension of the Federal Arbitration Act to the state courts and noting that since that decision, "privato parties have likely written contracts relying upen *Southland* as authority").

456. William Eskridge coined this label for the presumption. *See* Eskridge, *supra* note 325, at 1362.

457. *See id.* at 1369 (asserting that "[t]he willingness of the Supreme Court te reconsider statutory precedents depends upon: (1) the thoroughness of the Court's consideration of the issue in the precedent; (2) the degree to which Congress has left development of the statutory scheme to the courts; and (3) the degree to which the precedent has generated public and privato reliance"). The Rehnquist Court's statutory overrulings generally follow the pattern described by Eskridge. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 118 S. Ct. 1969, 1977-78 (1998) (overruling *House v. Mayo*, 324 U.S. 42 (1945), and its construction of the Court's certiorari jurisdiction because it was "rendered without full briefing or argument"); State Oil Co. v. Khan, 522 U.S. 3, 22 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and its construction of Section 1 of the Sherman Act and asserting that "the general presumption that legislative changes should be left te Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" (quoting National Soc'y of Prof. Eng'rs v. United Statos, 435 U.S. 679, 688 (1978)); Hubbard v. United States, 514 U.S. 695, 714 (1995) (overruling *United States v. Bramblett*, 348 U.S. 503 (1955), and its interpretation of 18 U.S.C. § 1001 and concluding that "the reliance interests at stake in adhering to *Bramblett* are notably modest").

458. Several minor strands of the Rehnquist Court's overruling rhetoric beyond those treatod in detail herein also seem to trace their roots deep in history. *Compare* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 571-72 (1993) (superseded by statuto)

nal inconsistencies and contradictions in the Rehnquist Court's overruling rhetoric are the product of an inherent tension in the countervailing policies at stake, not of a recent deterioration of historically stringent standards of stare decisis.[459]

In the founding era as in the Rehnquist Court, the primary tension concerned the extent of the Court's power to overrule decisions now deemed erroneous. The solution conceived by Blackstone and his contemporaries was to recognize a single exception to the rule of stare decisis, an exception that charted a compromise course between the extreme positions advocated in the Rehnquist Court's opinions in acknowledging a limited capacity for correction of precedents deemed clearly contrary to reason. The Marshall Court's decisions generally reinforce the limited nature of this exception; they also provide evidence of the historical roots of some of the Rehnquist Court's overruling rhetoric, principally the notion of diminished deference to precedent undermined by subsequent authority. History also supports the Rehnquist Court's notion that the rule of stare decisis is strongest in cases involving commercial reliance interests, but that error correction is freely available where no such interests are at stake. That approach gained acceptance in English cases and

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(Souter, J., concurring in the judgment) (suggesting that *Employment Division v. Smith*, 494 U.S. 872 (1990) (superseded by statute), could be "reexamined consistently with principles of *stare decisis*" since the narrow Free Exercise Clause rule announced there "was not subject to 'full-dress argument' prior to its announcement" (quoting Mapp v. Ohio, 367 U.S. 643, 676-77 (1961) (Harlan, J., dissenting)), *and* Girard v. Taggart, 5 Serg. & Rawle 19, 35 (Pa. 1818) (overruling *Willing v. Rowland*, 4 Dall. 106 (Pa. 1791), and noting that *Willing* was not "a solemn determination of the Supreme Court on debate," but "was given in the hurry of a jury-trial, on a point not made by the counsel, on which there had been no argument"), *and* 1 KENT, *supra* note 94, at *475-76 ("If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness."), *with* South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991), *and* JAMES RAM, THE SCIENCE OF LEGAL JUDGMENT 201 (New York, Baker, Voorhis, & Co. 1871) ("A circumstance that strengthens the authoritative force of a decision is, that it has stood as law for a length of time, as 'for forty years together, or nearly forty years, or nearly thirty-four years.' " (citing founding-era English cases)).

459. Frustration at confusion and inconsistency in the doctrine of stare decisis is hardly unique to the modern era. *See* CHAMBERLAIN, *supra* note 69, at 26 ("The doctrine of *stare decisis* may be said to be a much abused doctrine. It has pointed many a sneer, feathered many a shaft hurled at the law, as well as its professors and practitioners. Essayists, in other fields, have satirized it as a barren and illogical dogma."); EUGENE WAMBAUGH, THE STUDY OF CASES § 95, at 106-07 (Boston, Little, Brown, & Co., 2d ed. 1894) (noting the internal conflict in the policies underlying the doctrine of stare decisis and complaining that "the courts attempt to conceal this conflict, although they state each of the principles in emphatic language and follow now one of them and now the other," and "usually pretend to follow [the principle of stare decisis] even when they are going in precisely the opposite direction").

American commentary in the founding era, and it was the primary standard applied throughout the Taney era.

At least one strand of the Rehnquist Court's doctrine of precedent appears to be a product of the twentieth century. The notion that the constitutional or statutory nature of a precedent affects its susceptibility to reversal was largely rejectod in the founding era and did not gain majority support until well into the twentieth century. Even here, however, the results in the Rehnquist Court are largely explainable under longstanding stare decisis principles.