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The Limited Path Dependency of Precedent

Michael J. Gerhardt

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ARTICLES

THE LIMITED PATH DEPENDENCY OF PRECEDENT

*Michael J. Gerhardt**

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INTRODUCTION

An enormous divide separates the two dominant views of precedent in the scholarly literature on the United States Supreme Court. One view, especially popular among social scientists, conceives of precedent—understood as prior judgments or rulings of the Supreme Court as sources of authority for its decisions—as having very weak influence, if any at all, in constitutional adjudication. It holds that precedent, for the most part, does not constrain the Court. A contrasting view, widely shared among legal scholars, conceives of precedent as having sufficient force to constrain the Supreme Court. Legal scholars presume that the Court's constitutional decisions make a difference in, and to, constitutional law. They believe, in other words, that precedent imposes on constitutional law, meaningful path dependency—the phenomenon of past decisions or events impeding, compelling, or foreclosing subsequent choices or actions.¹ Most social scientists reject altogether the possibility of the path dependency of precedent in constitutional law. They produce extensive empirical studies, largely ignored by legal scholars, which purportedly show that Supreme Court Justices base their constitutional decisions not on precedent (or the law in any form, for that matter), but rather on exogenous factors, such as their personal policy preferences or strategic objectives.²

This Article attempts to bridge the enormous gap separating these two different views of precedent. Both are mistaken. The scholars who advance these views overstate things, perhaps idealize them; and, this Article suggests that a more realistic and careful appraisal of the role of precedent in constitutional law is possible. It posits that precedent exerts more path dependency in constitutional law than social scientists acknowledge, but less path dependency than legal scholars presume. It identifies a number of factors that ensure that precedent generally has a limited, rather than a completely absent or robust, degree of path dependency in constitutional adjudication. Moreover, this Article maintains that social scientists generally have

¹ The notion of path dependency employed in this Article derives from social science, especially economic theory. It describes a specific phenomenon of past events or decisions within economic and social systems as foreclosing certain choices. See DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 99 (1990) (describing the notion of path dependency). See also Paul A. David, *Historical Economics in the Long Run: Some Implications of Path Dependence*, in HISTORICAL ANALYSIS IN ECONOMICS 29, 29 (Graeme Donald Stokes ed. 1993) (describing path dependency as the inability “to shake off the effects of past events”) (footnotes omitted).

² Social scientists generally operate from one of two different analytical perspectives in studying the role of Supreme Court precedent in constitutional law. Part I addresses these perspectives in detail.

ignored the numerous functions performed by precedent in constitutional law that go beyond merely constraining subsequent adjudication. Because conventional legal scholarship on precedent and the dominant social science models of the Court do not explain, much less predict, the limited path dependency of Supreme Court precedent or the multiple functions of precedent, a new model of constitutional adjudication is in order. The moderate view of precedent, advanced in this Article, synthesizes legal analysis with the insights and techniques of each of the social science models of the Court, including the relatively new one commonly known as post-positivism or historical institutionalism.³ This proposed model provides a useful framework for better understanding the rather extensive unacknowledged (if not unrecognized) common ground shared by legal scholars and social scientists who study the Supreme Court. This model also illuminates connections between seemingly disparate, or disconnected, constitutional doctrines across a wide range of areas. A centerpiece of this model is the limited path dependency of precedent.

Part I examines the two dominant social science models of the Court, each of which forcefully advances a relatively "weak" view of precedent.⁴ It first describes the empirical findings of both models indicating that Supreme Court precedent generally does not impose any path dependency in constitutional law and thus does not preclude the Justices from directly voting their policy preferences or manipulating precedent to secure their preferred strategic objectives. Second, Part I sets forth a number of criticisms of each model. While I suggest many of these criticisms are apt, none fully refutes all of the findings, particularly the most recent ones, made by the social scientists who claim precedent does not constrain the Court. Nor do these criticisms dispel the nagging suspicion of many experts that personal ideologies and strategic maneuvering do play a significant role in constitutional adjudication.

Part II shows how structural and doctrinal analysis, which are basic to legal reasoning, support, rather than refute, social scientists' findings that the path dependency of precedent is absent in constitutional adjudication. First, a close inspection of constitutional doctrine—the Court's collective decisions in particular areas of

³ For a basic introduction to post-positivism or historical institutionalism, see SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 75 (Cornell W. Clayton & Howard Gillman eds., 1999).

⁴ While a statutory precedent—or one in which the Court resolves a question about the meaning of a statute—has path dependency, the Court has long distinguished between constitutional and statutory precedents. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426 (1988) (discussing the Court's disparate treatment of constitutional and statutory precedents). The Court has given greater deference to statutory precedents because of the greater ease with which Congress may overrule them.

constitutional law⁵—indicates that path dependency requires that constitutional precedents must have at least five essential properties: permanence, sequentialism, predictability, consistency, and compulsion. Although constitutional precedents generally need all these properties to generate meaningful path dependency, many if not most constitutional precedents lack one or more of the properties. Second, the nature of the process of constitutional adjudication restricts the path dependency of precedent. Several factors endogenous to the process of constitutional adjudication explain why some precedents impose more path dependency than others and particularly why some, but not other areas of constitutional law are amenable to judicial closure. These factors include the ways in which constitutional adjudication differs from common law judging; how the Supreme Court frames its judgments (specifically, as rules or as standards); changes in the Court's composition; cycling and other phenomena that render the Court's decisions unpredictable and inconsistent; the different ways in which constitutional law is entrenched (including institutional practices such as judicial review, doctrine that provides a basis for further judicial review of specific areas of constitutional law, and particular decisions); political and other forces intensifying the political salience of some issues; and the absence of rules for guiding the Justices' interpretation or manipulation of precedent.

Part III demonstrates how precedent does more work in constitutional adjudication than social scientists say it does. Social scientists discount precedent because they ask too much of it. They demand that it must force Justices to routinely forego choices they would pre-

⁵ On the critical relationship between precedent and doctrine, see CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 1–12 (2004). While constitutional doctrine generally consists of the “rules and principles that emerge from all . . . sources” of law, including judicial precedent, Fried explains that, “because the Supreme Court in deciding constitutional cases has acted like a common law court developing the law according to its precedents, those five hundred-odd volumes of Supreme Court Reports are the principal source of constitutional law, of constitutional doctrine.” *Id.* at 1, 4. The Court is not free to reconsider its doctrine anew in each case that comes before it:

No merely human judge would have the time or the intellect to think every case out afresh. Doctrine not only mediates between first principles and particular results along the timeless dimension of inference, but it in fact—if not in logical necessity—provides continuity between a particular decision and those that have gone before. It is respect for precedent that makes for continuity in doctrine. Such continuity gives Supreme Court decisions the regularity and predictability they must have to make the Court's exercise of power both be and seem to be lawlike and acceptable.

Id. at 5. Furthermore, Fried explains, “[u]nless doctrine persists, unless doctrine itself is prolonged, it cannot sufficiently order social action. The Constitution promises that kind of persistence, and it can only deliver if its commands are instantiated in doctrines that persist.” *Id.* at 7–8. Likewise, the successful implementation and adherence to laws “requires persistence of doctrine over time and extension over cases and topics. Coherence requires consistency both diachronically and synchronically.” *Id.* at 10.

fer not to make, and then the social scientists denounce precedent as a failure when it cannot be shown to have exerted such power. By focusing on whether Supreme Court precedent fulfills the very narrow purpose they have assigned to it, social scientists miss all that precedent otherwise accomplishes. Judicial precedent performs multiple functions in constitutional law, besides merely constraining some choices. These functions include: (1) serving as a modality and conceptual framework for constitutional argumentation; (2) legitimizing constitutional arguments and sources of constitutional meaning; (3) facilitating a dialogue among national leaders about the meaning of the Constitution; (4) resolving particular cases or controversies (and helping to drive settlement); (5) chronicling (and shaping) constitutional history; (6) educating the public, political leaders, other judges, and future generations on the meaning of the Constitution; and (7) implementing constitutional values. A particular judicial decision usually performs one or more of these functions. Moreover, precedent is not unique to constitutional adjudication. There are at least as many precedents as there are constitutional authorities creating them, and non-judicial precedents perform many if not the same array of functions as judicial precedents do, including constraining or at least limiting the options available to non-judicial authorities.

Finally, Part IV proposes a new framework for analyzing precedent that blends multiple approaches to constitutional law and points to a number of significant projects for future research on the role of precedent in constitutional law. The latter include determining the numbers and kinds of areas of constitutional law that are settled and unsettled, exploring further the role of psychology in Supreme Court decision making, investigating the remarkable extensiveness and variety of non-judicial precedent, documenting the multiple functions performed by judicial and non-judicial precedents, and establishing the degree to which Article III judges fulfill the expectations (and selection criteria) of the administrations that selected them.

This Article concludes that the limited path dependency of precedent is integral to a coherent, comprehensive, and ultimately workable theory of constitutional law. Ironically, path dependency appears to be stronger in constitutional theory than it has generally been in constitutional adjudication. The presumption of path dependency among constitutional theorists has misled most theorists into treating the frequent absence of path dependency in constitutional law as a problem requiring resolution.

Constitutional theorists need to treat the absence of path dependency not as a problem but rather as a natural consequence of a number of different factors (mostly if not entirely) endogenous to constitutional adjudication. Consequently, the primary challenge for scholars who study the Supreme Court is to explain how, when, and why judicial closure of any particular constitutional matter is

achieved. They need to recognize that (and to explain why) the more entrenched the Court's constitutional decisions become—or the more deeply embedded within social and institutional practices and expectations that particular Supreme Court decisions become—the more path dependency they are likely to generate. Even when some questions in constitutional law have not been foreclosed, precedent performs its most significant function as a modality of argumentation. In performing this function, it helps to limit the range of possible decisions and permissible arguments in constitutional adjudication. Making sense out of, and building upon, the various factors producing the limited path dependency of precedent is a long-standing, underappreciated mission of constitutional theory.

I. THE MYTH OF THE PATH DEPENDENCY OF PRECEDENT

This Part examines the arguments for and against the two dominant social science models of the Supreme Court that advance most aggressively the “weak” view of precedent.⁶ Neither side in the debate over the “weak” view of precedent has yet dealt a decisive blow, much less a knock-out punch, in resolving conflicts over the role of precedent in constitutional law.

A. *The Implications of Social Science Research Against Path Dependency*

Most legal scholars are unaware of the two dominant models of the Court in social science. The common ground shared by these models is their claim that the Constitution and law in any other form, including precedent, do not meaningfully constrain the Supreme Court. The first is the attitudinal model. It asserts that Supreme Court Justices primarily base their decisions on their personal preferences about social policy.⁷ Perhaps the best known attitudinalists are

⁶ Both models purport to provide accurate descriptions of the role that precedent plays in constitutional law. Neither attempts to provide a normative view of precedent. While a few legal scholars make the normative argument that the Supreme Court ought to have a “weak” view of precedent, they acknowledge that in practice the Court consistently does not have such a view. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–24 (1994) (arguing that, despite the ubiquity of precedent in practice and in reasoning, adherence to precedent is unconstitutional); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1543 (2000) (“Stare decisis is conceded to be a matter of *policy*—a judicial practice rooted in pragmatic concerns.”).

⁷ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (analyzing the Supreme Court and its decisions from an attitudinal perspective) [hereinafter SEGAL & SPAETH, ATTITUDINAL]; HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999) [hereinafter SPAETH & SEGAL, MAJORITY RULE]; Robert M. Howard & Jeffrey A.

Harold Spaeth and Jeffrey Segal, who have undertaken extensive empirical studies showing that the law does not constrain the Justices from merely voting their policy preferences.⁸ They insist that legal scholars need to develop a model of the law that meets the exacting standards of testable scientific research. On their view, such a "model must be able to state a priori the potential conditions that, if observed, would refute the model."⁹ Because the legal model posits no such conditions, it is irrefutable and therefore unconvincing.

Segal and Spaeth consider "the best evidence for the influence of precedent" to be dissents because "we *know* that these [J]ustices disagree with the precedent."¹⁰ Segal and Spaeth reason that "[i]f the precedent established in the case influences them, that influence should be felt in that case's progeny, through their votes and opinion writing. Thus, determining the influence of precedent requires examining the extent to which [J]ustices who disagree with a precedent move toward that position in subsequent cases."¹¹ They searched 2,418 votes and cases for evidence of the "gravitational force" of precedent claimed by leading scholars, including Ronald Dworkin.¹² In categorizing attitudes towards precedent, Segal and Spaeth treated Justices who supported challenged precedents as "precedentialists" (ranging from strong to weak) and Justices who did not as "preferentialists" (ranging from strong to weak).¹³ Segal and Spaeth further broke down cases into "ordinary" and "landmark" cases as rated by Congressional Quarterly's Guide to the U.S. Supreme Court.¹⁴ Their data showed that "[t]he [J]ustices are rarely influenced by stare decisis."¹⁵ Indeed, they found "beyond doubt . . . that the modern Supreme Courts, heavily criticized for their activism, did not invent or

Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 116 (2002) (outlining the attitudinal model).

⁸ SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 80 ("[J]udges may pick and choose among precedents to find those that accord with their policy preferences, while simultaneously asserting that these are also the ones that best accord with the facts of the case at hand.").

⁹ *Id.* at 46.

¹⁰ *Id.* at 292.

¹¹ *Id.*

¹² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111-12 (1977) (arguing that judges will try to connect the justifications they provide for original decisions with decisions other judges have made in the past). For similar views on the Court's respect for precedent, see Ronald Kahn, *Interpretive Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 177, 180-82 (Cornell W. Clayton & Howard Gillman eds., 1999) (claiming, *inter alia*, that the Justices defer to precedent); C. Herman Pritchett, *The Development of Judicial Research*, in *FRONTIERS OF JUDICIAL RESEARCH* 42 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) (declaring that "[j]udges make choices, but they are not the 'free' choices of congressmen.").

¹³ SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 296.

¹⁴ *Id.* at 295.

¹⁵ *Id.* at 298.

even perfect preferential behavior; it has been with us since Washington packed the Court with Federalists.”¹⁶ The few instances in which Justices based their decisions on precedent are irrelevant because they are

more likely to be found in cases of the lowest salience: ordinary cases compared with landmark cases and, among ordinary cases, statutory cases over constitutional cases and modern economic cases over modern civil liberties cases. The influence of precedent appears to be quite minor, but it does not appear to be completely idiosyncratic.¹⁷

Indeed, Segal and Spaeth claim, “not one [J]ustice on the Rehnquist Court exercised deference to precedent by voting to uphold both liberal and conservative precedents.”¹⁸

A second camp of social scientists, known as rational choice or positive political theorists, claim that Supreme Court Justices base their decisions primarily on their strategic objectives.¹⁹ Rational choice theorists claim that Justices are not constrained by judicial precedent but rather manipulate it (and, for that matter, all other legal materials) to maximize their personal, policy, and institutional preferences. Some rational choice theorists claim that, for instance, Justices manipulate the law including precedent to maximize or vindicate their particular judicial philosophies. A common critique of rational choice theory is, however, that it is unscientific, because nothing it asserts can be demonstrated as false; every decision is rational because it can be explained as maximizing some Justices’ self- or institutional interests. Even when Justices seem to make a decision against their institutional or personal interests, it can be explained as a strategic move in the never-ending battle between the Court and other governmental institutions for dominance of policymaking. Rational choice theorists figure that every outcome must have been desirable (and that preferences can be inferred from every outcome), or else the Supreme Court would have decided its cases differently.

¹⁶ *Id.* at 300.

¹⁷ *Id.* at 306.

¹⁸ *Id.* at 310.

¹⁹ See, e.g., COURTS, JUDGES, AND POLITICS 16 (Walter F. Murphy et al. eds., 5th ed. 2002) (describing a contemporary strand of rational choice theory in judicial decision making); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 22–72 (1998) (arguing that Justices are strategic policy makers who balance their policy goals with the preferences of other Justices); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 32–56 (2000) (asserting that at the heart of the process of building majority opinions are policy-seeking Justices constrained by the positions taken by other Justices).

*B. The Major Critiques of Attitudinal and
Rational Choice Models of the Court*

Some law professors (including the author of this Article) and some social scientists have leveled a number of critiques of the attitudinal and rational choice models. First, the attitudinal and rational choice models attack a model of the law that simply does not exist. Attitudinalists' and rational choice theorists' descriptions of the legal model do not correspond to the conceptions of the law held by lawyers, judges, and law professors. Legal scholars do not purport to have constructed a formal model of legal reasoning, much less a scientific one. Indeed, legal scholars refuse to construct such a model, because they do not believe legal reasoning is a scientific endeavor or that the law is a scientific discipline.

The refusal to construct a scientific model is not unusual among legal scholars. As Jack Goldsmith and Adrian Vermeule observe,

legal scholarship frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones. Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists' rules can indict legal scholarship—any more than strict adherence to the rules of baseball supports an indictment of cricket.²⁰

Other "fact-based" fields, such as presidential studies and anthropology, employ similar empirical methods.

Second, the ubiquity of precedent presents a problem, particularly for the attitudinal model. The fact is that the most cited source in constitutional adjudication is precedent. The Court may decide some cases without reference to other sources such as original understanding, but it never decides a case without citing at least one precedent in support of its decision. Even when Justices challenge some prior decision(s), they most often do so in part on the ground that other precedents ought to control.

Rational choice theorists Lee Epstein and Jack Knight attach a great deal of importance to the fact that precedent is ubiquitous in constitutional adjudication. From that fact, they infer that "precedent can serve as a constraint on [J]ustices acting on their personal policy preferences."²¹ Although judges and Justices might prefer to ignore precedent in favor of their preferred policies, they are constrained by the utility of precedent in fostering social stability and judicial legitimacy. Others might react negatively if the Court did not

²⁰ Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153–54 (2002).

²¹ Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996).

follow its own precedent. In support of the significance of precedent in judicial decision making, Epstein and Knight pointed to the ubiquity of citations to precedent not only in published judicial opinions, but also in the arguments of litigants and the private discussions of the Justices. Segal and Spaeth respond that ubiquity is not influence and suggest the evidence demonstrates that the Justices felt little social pressure to adhere to precedents.²²

Third, rational choice theorists and particularly attitudinalists operate from a flawed premise. They suppose mistakenly that Justices should follow precedents from which they dissented. The same obligation that lower court judges have to obey Supreme Court precedent does not, however, extend to the Court's dissenters; dissenting Justices are not considered subordinate in any way to their colleagues and thus have no obligation to accept their colleagues' positions. There is no norm that obligates, or requires, Supreme Court Justices to defer to precedents to which they dissented. The Court allows dissent, and leaves the Justice with the discretion to determine the extent to which they will each adhere to, or refuse to follow, particular decisions to which they dissented.

Fourth, social scientists discount the fact that the Supreme Court's docket consists of hard cases. While the Court does not consider every conceivable hard case, it does tend to hear only the cases in which no source and certainly no single decision (or set of decisions) points to a clear, indisputable answer. In the close cases that do get to the Court, ideology arguably plays a significant role in shaping the Justices' attitudes toward, or manipulation of, legal materials. Yet, the pertinent ideology is not necessarily the Justices' personal attitudes about social policy. It is *judicial* philosophy or ideology, which entails a perspective on the Court's role in the constitutional order.²³ The Justices' basic understandings of the Court's function and of the proper method for interpreting the Constitution provide their respective operating premises and even the default principles on which they rely in deciding cases and controversies. For instance, a Justice might start each case with the presumption that the states retain ex-

²² See Jeffrey A. Segal & Harold J. Spaeth, *Norms, Dragons, and Stare Decisis: A Response*, 40 AM. J. POL. SCI. 1064, 1075 (1996) (citing motivated reasoning as a possible explanation for the ubiquity of the use of precedents). Interestingly, this response hardly ends the debate over the significance of the ubiquity of precedent in the Court's constitutional opinions. While such ubiquity does not necessarily demonstrate the precise influence precedent has over the path of constitutional law, it does reflect a major function of precedent besides constraining the Court—namely, precedent's function as a major modality of constitutional argumentation. See *infra* Part IV.B.1.

²³ See generally *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. (2001) (examining the judicial nominations process by way of a special hearing) [hereinafter *Hearing*].

clusive authorities over any realms in which the Constitution does not grant clear or unambiguous authority to the national government. A different Justice might approach a case with the inclination to defer to the Congress to the fullest extent in a realm over which the Congress has been the constitutional authority. Other Justices might approach cases with fixed prioritization of sources. Some might consider the text, structure, and original understanding as the first places to look in deciding cases, and when those sources are unclear then consult second-order sources, such as historical practices and Supreme Court precedent. Others might prefer different second-order prioritizations. Legal scholars then measure the quality of an opinion based on its author's fidelity to his or her stated philosophical preferences or prioritizations of possible sources of constitutional meaning.

Fifth, rational choice theorists and particularly attitudinalists have trouble reconciling their models with unanimous opinions.²⁴ Attitudinalists exclude such opinions from their databases, because they believe these opinions lack the friction necessary for pressuring Justices to rely on exogenous factors. Unanimity is, however, hard to square with a model that suggests the Justices never, or almost never, make decisions based on legal variables. Even worse for this model is the fact that many unanimous and nearly unanimous opinions involve politically salient issues on which the Justices transcend their supposed ideological differences to reach agreements about constitutional law.²⁵

Sixth, both the rational choice and attitudinal models vainly try to quantify subjective preferences and phenomena. While there are clearly some objective facts in constitutional law (for example, the

²⁴ See SEGAL & SPAETH, *ATTITUDINAL* *supra* note 7, at 295 (omitting unanimously decided cases from their study).

²⁵ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003) (upholding, seven to two, Congress's repeated extensions of the rights of copyright ownership in spite of constitutional language allowing Congress to do so for "limited terms"); *Reno v. Condon*, 528 U.S. 141, 142–43 (2000) (upholding unanimously Congress's power to bar states from disclosing or selling personal information required for driver's licenses); *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999) (holding, seven to two, that California's residency restrictions on welfare benefits violate the Privileges and Immunities Clause); *Clinton v. Jones*, 520 U.S. 681, 705–06 (1997) (holding unanimously that sitting presidents generally are not entitled to immunity from civil lawsuits based on their unofficial misconduct); *United States v. Virginia*, 518 U.S. 515, 518–19 (1996) (ruling, seven to one, that Virginia Military Academy's policy of excluding women as students violated equal protection); *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (agreeing, seven to two, that the Court lacks the power to review the constitutionality of the procedures employed by the Senate in judicial impeachment trials); *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988) (upholding, seven to one (Justice Scalia took no part in the decision), the constitutionality of the independent counsel provisions of the Ethics in Government Act); *United States v. Nixon*, 418 U.S. 683, 685, 713 (1974) (holding unanimously that presidents are not entitled to an absolute executive privilege that would have allowed them unilateral discretion over whether to comply with otherwise lawful subpoenas).

constitutional text, the winners and losers of lawsuits, and the Justices' and their nominating presidents' respective political parties) many other factors are largely if not wholly subjective, including the characterization of a Justice's interpretive methodology or ideology. Reducing these to quantitative terms, much less to the rigors of scientific measurement, is futile. Richard Posner has condemned academic law as "soft" and inhospitable to the methods of a "hard" field, such as physics, in which theorists reason to "divergent conclusions from shared premises."²⁶ Both attitudinalists and rational choice theorists search in vain for such premises. Ironically, legal scholars' lack of consensus on explanations for the Court's decisions or criteria for evaluating them is a problem more for social scientists than for legal scholars.

The search for objective verifications of judicial ideologies illustrates the dangers of quantitative analysis of the Justices' fidelity to precedent. For instance, the attitudinalists Segal and Spaeth rely on editorials from four major newspapers and Justices' votes as lower court judges to identify the ideologies of the Justices. Yet, it is unclear why newspaper editorials should be taken as neutral on this matter. It is possible (and many people believe) newspapers have ideological biases, so that their agendas inform the ideological designations they make. Moreover, the goal should not just be to find an external source for defining a Justice's ideology, but to find an external source on whose authority most experts can agree. If there are no experts or they cannot agree on a source, the futility of the research is all the more apparent. In addition, the reliance on the Justices' votes when they were lower court judges is problematic because many Supreme Court nominees have never served, or served only briefly, as lower court judges.²⁷ Nor do attitudinalists account for the fact that state and federal judges have had different caseloads and exposures to the questions they are likely to face on the Court. At the very least, they need to account for these differences in determining the relevance of past votes to possible future voting on the Court. Assessing Justices' likely behavior based on their votes as lower federal court judges is dubious, because as lower court judges they were obliged to follow Supreme Court precedents²⁸ that as Justices they are now free to question.

²⁶ RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 240 (1999).

²⁷ See SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 182 (observing that "93 of the 147 nominees [to the Court] (63%) have occupied judicial positions" prior to their appointments).

²⁸ Cf. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 867-79 (1994) (calling into question, but ultimately affirming, the obligation of lower courts to adhere to Supreme Court rulings where Congress has stripped the Court of its revisory jurisdiction).

Alternatively, rational choice theorists Lee Epstein and Gary King suggest that an appropriate proxy for measuring a judge's ideology is the ideologies of sponsoring senators.²⁹ As Richard Revesz has shown, this proxy is flawed, because only district court appointees have sponsoring senators, while appellate judges tend only occasionally to have sponsors except for those appointed in the District of Columbia who have none.³⁰ Supreme Court nominees are even less likely than appellate judges to owe their appointments to a single senator.

Seventh, rational choice theorists tend to assume that the only interest Justices are interested in maximizing is influence over policy making. Yet, the Justices have many interests they may wish to maximize, not the least of which is their respective judicial philosophies. The conventional assumption of economics that individuals seek to maximize wealth is largely inapplicable to federal judges, whose salaries are fixed and tenure is secure.³¹ A Justice cannot get a better salary by doing a better job as a Justice. A Justice may, however, try to maximize other interests, including preserving leisure time, desire for prestige, promoting the public interest, avoiding reversal, and enhancing reputation. Richard Posner identifies a number of other possible interests Justices might try to maximize:

personal dislike of a lawyer or litigant, gratitude to the appointing authorities, desire for advancement, irritation with or even a desire to undermine a judicial colleague or subordinate, willingness to trade votes, desire to be on good terms with colleagues, not wanting to disagree with people one likes or respects, fear for personal safety, fear of ridicule, reluctance to offend one's spouse or close friends, and racial or class solidarity.³²

Yet Justices might seek to maximize another interest: their sense of duty. They might seek, as Ronald Dworkin suggests,³³ to make the best decision in light of the relevant legal materials. These different interests suggest the possibility that the search for a single, universal maxim is futile.

²⁹ Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 83-84 (2002) (citing Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997)).

³⁰ See Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169, 180 (2002) ("Nobody exercises senatorial courtesy with respect to appointments to the D.C. Circuit.").

³¹ See U.S. CONST. art. III, § 1 (providing that federal judges are to "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

³² RICHARD A. POSNER, *OVERCOMING LAW* 130 (1995).

³³ See DWORKIN, *supra* note 12, at 82-90 (arguing that judges make civil case decisions on grounds of principle, not policy).

Eighth, attitudinalists concede the relevance of "context," or the facts of a given case, to judicial decisions.³⁴ The implications of the concession are huge. By granting that "context" matters, attitudinalists admit the relevance of precedent as a constraint on Justices, because the particular facts of a case are important for providing the grounds on which Justices distinguish and analogize prior decisions.

Perhaps the most serious problem with the attitudinal and rational choice models is, however, that neither fully explains constitutional change in the short- and long-terms. To begin with, the attitudinal model is based on the presumption that individual Justices have fixed ideological preferences when they begin their respective tenures. Fixed preferences can be easily measured. If, however, Justices' preferences shift, there would be no tangible measure of their ideologies against which to assess their subsequent decisions. Unfortunately, there is not much, if any, reliable data confirming that Justices have fixed, unalterable preferences at the outset of their respective appointments. It is especially hard to establish the fact if the Justices deny they have any such preferences.

Consider the case of John Marshall. Segal and Spaeth, for instance, accept the misconception of Marshall as dominating his Court intellectually to further the Federalist party's policy preferences.³⁵ They fail to acknowledge, much less appreciate, the fact that Marshall delivered nearly all of his constitutional opinions for a Court composed of a hand-picked Jeffersonian majority. Most of the Justices with whom Marshall served were chosen because of their antipathy towards Federalist policies and sympathy towards the Jeffersonian constitutional vision.³⁶ Thus, the Court, with Marshall as Chief Justice, repudiated Federalist preferences that the Constitution be construed rigorously with any ambiguities in its language resolved according to the "rule of choosing the meaning that best comported with the objects, or purposes, of the Constitution as stated in the Preamble";³⁷ that our Constitution is not one of only enumerated powers but rather vests the Congress with "a general lawmaking authority for all the objects of the government that the Preamble of the Constitution states";³⁸ that the "United States formed a single nation as to 'all

³⁴ See SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 319 ("Facts obviously affect the decisions of the Supreme Court . . .").

³⁵ See *id.* at 117 ("Unquestionably, John Marshall dominated his Court as no other Justice has.").

³⁶ During Marshall's tenure as Chief Justice, Republican appointees filled ten of the eleven vacancies arising on the Court.

³⁷ William Winslow Crosskey, *Mr. Chief Justice Marshall*, in *MR. JUSTICE 5* (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964).

³⁸ *Id.* at 12.

commercial regulations”;³⁹ and that the common law was part of the law of the United States and thus allowed for Supreme Court supremacy over the state courts with respect to all questions of state law and common law.⁴⁰ The attitudinal model cannot explain why Marshall abdicated these strongly held Federalist views as Chief Justice.

Moreover, the attitudinal model cannot explain why some Justices’ attitudes apparently shift. It is not uncommon for people, even legal scholars, to suppose that some Justices may have become more “liberal” or more “conservative” over time. If Justices’ ideological preferences change, the attitudinal model has to attribute the changes to exogenous factors. Yet the attitudinal model posits none of the specific changes mentioned by the authors or the general phenomenon of shifting judicial preferences.

An even more serious problem for the rational choice and the attitudinal models is that neither can explain why (or deal effectively with the fact that) the ideological categories to which they each assign Justices shift over time. Neither model can account for the phenomenon of ideological drift by which a view generally associated with one political faction is over time appropriated by or becomes associated with a different one.⁴¹ Thus, aggressive judicial review might in one period appear to be liberal, while in another it might appear to be conservative. The fact that such alterations occur is beyond doubt, even assuming particular Justices’ attitudes are fixed.

Two prime examples are John Marshall and Felix Frankfurter. Marshall was known throughout much of his career, particularly on the bench, as overseeing a Court that became a “fortress of conservatism,”⁴² because the decisions he joined expanded national power at the expense of state sovereignty and upheld private property rights at the expense of social and economic reform.⁴³ Chief Justice Taney exemplified the liberals of his day, because of his respect for popular democracy and states’ governmental and social reforms.⁴⁴ It is only

³⁹ *Id.* at 18.

⁴⁰ The Court rejected this view in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834).

⁴¹ See Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 637–38 (2002) (observing the changing “central interests” over the Court’s history).

⁴² ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 322 (1945).

⁴³ See CARL BRENT SWISHER, ROGER B. TANEY 349–50 (1935) (“The popularity of John Marshall . . . and the prestige acquired by the Supreme Court during his regime, resulted largely from the fact that he wrote into constitutional law the beliefs and prejudices of a class, the class, incidentally, from whose records and in terms of whose judgments most of the period of the history has been written. Outside that class he and his court were anything but popular . . .”).

⁴⁴ See Carl Brent Swisher, *Mr. Chief Justice Taney*, in MR. JUSTICE, *supra* note 37, at 35, 57 (“[H]e brought to the Supreme Court a preoccupation with local welfare He believed in regionalism within the national pattern . . .”).

because of ideological drift that contemporary liberals find something in common with Marshall and not Taney.

In contrast, Justice Felix Frankfurter was the strongest advocate for judicial restraint during his twenty-two-year tenure on the Court. Praised by liberals for his staunch defense of judicial restraint in evaluating progressive economic regulations through his first decade on the Court, Frankfurter was upset to find that in the late 1940s and early 1950s liberals were denouncing him.

Now, when he advocated judicial restraint, he was attacked by those very liberals [who had once praised him]. In his earlier years, pillars of the legal community like Henry Stimson, Emory Buckner, and Charles Burlingham praised him. Now, they were either dead or silent. . . . [I]n the Truman years, there was little White House contact. Frankfurter had never believed he was 'the single most influential man' in Washington but sometimes he had enjoyed the notoriety. Now there was no more notoriety; he was only one of nine, and one under increasing criticism from those once his friends.⁴⁵

While the categories with which social scientists describe the Court are not fixed, the same cannot be said for constitutional doctrine generally. The attitudinal model cannot fully explain stability in constitutional doctrine. While it is tempting to suppose (as many social scientists do) that Justices are appointed to further the interests of the governing political coalition, the latter does not always get the results it wants. Indeed, there are many areas in which judicial closure is achieved, in spite of the fact that many Justices might personally disagree with the position(s) reached.⁴⁶ A striking, recent example is the Court's seven to two decision in *Dickerson v. United States*, in an opinion by Chief Justice Rehnquist, which reaffirmed⁴⁷ *Miranda v. Arizona*⁴⁸ in spite of a longstanding conservative effort (in which the Chief had sometimes joined⁴⁹) to dismantle *Miranda*.

A final problem with the attitudinal and rational choice models is that neither addresses, much less fully assesses the implications of,

⁴⁵ LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* 456 (1984).

⁴⁶ These decisions include incorporating most of the Bill of Rights into the Due Process of the Fourteenth Amendment, for example, *Griswold v. Connecticut*, 381 U.S. 749 (1965); upholding the constitutionality of legal tender in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870); upholding the constitutionality of congressional regulation of private economic activity, for example, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); upholding abortion rights for more than a decade with *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and upholding the constitutional foundations of the New Deal in *Wickard v. Filburn*, 317 U.S. 111 (1942) and the Great Society with *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

⁴⁷ 530 U.S. 428, 432 (2000).

⁴⁸ 384 U.S. 436 (1966).

⁴⁹ See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984) (holding that the Fourth Amendment's exclusionary rule may be relaxed in light of good faith reliance on search warrants issued by detached and neutral magistrates).

the phenomenon of institutional path dependency.⁵⁰ While both models proclaim the absence of path dependency in constitutional law, political scientist Keith Whittington stresses that

[i]nstitutions are relatively persistent, and thus both carry forward in time past political decisions and mediate the effects of new political decisions. The creation of institutions closes off options by making it more costly to reverse course, by differentially distributing resources, and by tying interests and identities to the status quo. . . . On the other hand, the persistence of institutions across time can foster political crises and change as they enter radically changed social environments or abrade discordant institutions.⁵¹

Institutional path dependency presents less of a problem for rational choice theorists, who can argue that it merely defines the options available to the Justices at any given moment. But neither of the dominant social science models of the Court adequately addresses the link between constitutional design and social or political change.

C. The Forecasting Study

The preceding criticisms of the two dominant social science models for analyzing the Court are by no means all that could be said about either. Impressive comparative analysis of predictions of outcomes and individual votes in a recent forecasting study done by two law professors and two social scientists support some important claims of attitudinalists and rational choice theorists.⁵² The forecasting study employed two methods for construing data on the Court's decisions. One was a statistical model that forecasted outcomes based on six general case characteristics: the circuit from which the cases originated, the issue areas of the cases, the types of petitioners, the types of respondents, the ideological direction of the lower court rulings, and whether the petitioner argued that the law or practice being challenged was unconstitutional. The other method used a set of independent predictions from a group of 83 legal experts.⁵³ The statistical model predicted 75% of the Court's affirm/reverse results correctly, while the experts (operating in panels of three) got only

⁵⁰ See THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 1-2 (Howard Gillman & Cornell Clayton eds., 1999) (remarking on the absence of institutional considerations in behavioralist studies); Keith E. Whittington, *Once More Into the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 617 (2000) (reviewing SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999) (praising the relative increase in attention being paid to institutional influences).

⁵¹ Whittington, *supra* note 50, at 616 (citations omitted).

⁵² Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

⁵³ *Id.* at 1168.

59.1% affirm/reverse results correct.⁵⁴ The legal experts predicted 67.9% of individual votes correctly, while the social science model predicted 66.7% correctly.⁵⁵

The forecasting study is not without some potentially serious problems. First, the group that best forecasted the Court's opinions was attorneys. They did much better than any other group or the models in predicting outcomes of, or individual votes in, particular cases: they predicted 92% of the Court's affirm/reverse results correctly, while legal scholars predicted only 53% of the results correctly.⁵⁶ The authors of the forecasting study dismiss the relative success of the attorneys on the ground that they constituted a statistically insignificant sample—12 out of the 83 legal experts consulted.⁵⁷ This outcome suggests to me, however, the need to undertake other studies to determine whether and why attorneys may be able to predict best the outcomes of cases. It might be useful to examine more closely the factors that attorneys took into account in formulating their predictions of the Court's rulings. It is possible that they may simply pay much closer attention to concurring and dissenting opinions than do other legal experts. It is also possible they base their predictions on their studies of the Justices' respective attitudes or strategic objectives.

Second, one could question whether the legal experts chosen might not have been the best available, whether some panels were better than others, or whether some factor(s) might explain why this Term the experts performed less well than the model at predicting outcomes. The authors of the study speculate that legal scholars might have had trouble in clarifying which factors mattered most, given that in the aggregate survey respondents ranked twenty-three of the twenty-six possible factors "very important" to making predictions.⁵⁸ Such trouble does not necessarily support the forecasting study; it supports instead an appreciation for the complexity of legal reasoning. The success of the attorneys suggests further the possibility that legal specialists might be better qualified and more successful than anyone else in making predictions. So, it probably makes sense to consult a bankruptcy specialist rather than a constitutional scholar on the likely outcomes of, or individual votes, in bankruptcy cases and to consult experts on criminal procedure on search-and-seizure cases rather than specialists in other areas of constitutional law, such as the First Amendment.

⁵⁴ *Id.* at 1155.

⁵⁵ *Id.* at 1172–73.

⁵⁶ *Id.* at 1177–78.

⁵⁷ *Id.* at 1178.

⁵⁸ *Id.* at 1185.

Third, there is another credible explanation for the results of the forecasting study other than those recognized by its authors. It is that different models might be appropriate for explaining different Justices. The Justices, in other words, might each follow different models. Different models might explain or apply to different Justices. So it is conceivable that some Justices vote their attitudes, others vote to maximize their strategic objectives, some employ conventional legal analysis, and still others some combinations of these. More data is needed to clarify which models best explain or apply to which Justices.

For instance, more data might help to clarify the extent to which path dependency is evident with respect to particular Justices. It is common for Justices to avoid refusing to follow the Court's doctrine altogether in only a few areas. Each Justice tends to dissent persistently in only a select number of areas. It would be illuminating to know to what extent Justices pay close attention to their past votes and opinions and thus constrain themselves to follow the patterns of their own particular decision making.

The fact that the forecasting study leaves some significant questions unanswered does not, however, undermine its utility. Presumably, if constitutional precedents have path dependency, then those with special legal training ought to be able to spot the choices, or outcomes, mandated or foreclosed by the Court's doctrine. In other words, legal experts ought to be superior in predicting from legal doctrine the likely direction in which the Court will move. Legal experts might have been better able than the statistical model to predict the range of choices before the Court in any given case, but, after the study of the 2002 Term, legal scholars will have more difficulty in claiming that their special training uniquely provides them with superior insights into the particular paths of decision making in which the Court will go. The less than perfect prediction rate of legal experts, coupled with their scoring lower than the social science model in predicting outcomes, suggests at the very least a *prima facie* claim that the law lacks one of the essential properties of path dependency—namely, predictability. The next section examines the extent to which precedent lacks predictability and other properties essential to path dependency.

II. THE REQUISITE PROPERTIES OF PATH DEPENDENCY

A judicial precedent imposes path dependency in constitutional adjudication if it has at least five properties. Indeed, it imposes meaningful path dependency only if it has all of the requisite properties. This Part briefly examines each of these.

A. Path Dependency Requires Permanence

The first essential element of path dependency is permanence. Permanence refers to a particular judicial decision's enduring resolution of some disputed constitutional issue(s). A judicial decision cannot be said to impose path dependency if it does not alter the options before the Court in some enduring way(s). Permanence requires the closure of a question of constitutional meaning for all time.

There are, however, a large number of decisions in constitutional law that did not permanently or finally settle particular controversies. The Court has expressly overruled more than 130 of its prior decisions.⁵⁹ While the Court has achieved closure with respect to a number of constitutional issues (that it has not revisited in quite a long time, and shows no signs of revisiting), it has left unsettled many other constitutional issues. For instance, the Supreme Court shows no inclination whatsoever to revisit a number of landmark decisions, including those establishing incorporation of most of the Bill of Rights in the Fourteenth Amendment,⁶⁰ its broad reading of the Necessary and Proper Clause in *McCulloch v. Maryland*,⁶¹ its decision to uphold the constitutionality of legal tender,⁶² or its decision to recognize corporations as persons for purposes of the Due Process Clause.⁶³ These are some examples of precedents that have become "entrenched," or so widely accepted by the Court, the government, and society generally that they have become practically immune to modification by the Court. Entrenchment entails, *inter alia*, substantial governmental and social reliance.⁶⁴ Yet, some lines of decision, such as those on incorporation were hardly linear and did not follow a straight or inexorable path to their present state of entrenchment. Many other areas of constitutional law have shifted, some more than once, over the years. For confirmation, one need look no further

⁵⁹ See MICHAEL J. GERHARDT, *THE PRISM OF PRECEDENT* (forthcoming) (manuscript on file with author).

⁶⁰ See, e.g., Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA L. REV. 103, 113 n.25 (1987) (stating that "[i]ncorporation . . . is now settled law").

⁶¹ 17 U.S. (4 Wheat.) 316 (1819). While the Court has not subsequently tinkered with the portion of the Court's opinion in *McCulloch* on the Necessary and Proper Clause, I hasten to add that it has not taken a consistent position on the issue of intergovernmental tax immunity first raised in *McCulloch*.

⁶² The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870); see also Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 88-89 (1991) (discussing reliance on the *Legal Tender Cases* as a source of immunity from being overturned).

⁶³ *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

⁶⁴ See Easterbrook, *supra* note 4, at 431 (suggesting that reliance protects precedent from being overruled).

than every constitutional law casebook, each of which provides numerous examples of areas in which the Court's decisions have defied permanence and instead been marked by seemingly perennial twists and turns.⁶⁵

Even some areas of constitutional law that appear settled or the product of path dependency might not be. A case in point is the Court's Commerce Clause jurisprudence.⁶⁶ Richard Fallon observes that the Rehnquist Court, in the course of reviving constitutional federalism, failed to overrule any significant Commerce Clause precedents that uphold congressional power to regulate commercial activities. This failure, he suggests, reflects the path dependency of such precedents.⁶⁷ Yet, as Fallon acknowledges, these precedents have only stabilized for about six decades. Prior to their having been decided in the mid to late 1930s, a different albeit more confusing set of precedents had governed the scope of Congress's Commerce Clause authority. The Court eventually moved away from those precedents, thereby restricting their path dependency. The current set of precedents pertaining to congressional power to regulate commercial activities can claim some path dependency but cannot yet claim permanence.

Moreover, in the more than 130 constitutional cases in which the Court has explicitly overruled prior decisions,⁶⁸ the plurality is Commerce Clause cases. Even so, Professor Fallon identifies the constitutionality of congressional regulation of commercial activity as one of the few issues arising under the Commerce Clause that has been settled for a significant period of time. Even though Fallon claims that path dependency explains the doctrine on congressional regulation of private economic activity, the Court has arguably signaled in recent opinions its intention to fine tune or revise its understanding of what constitutes a commercial as opposed to a non-commercial activity.⁶⁹

⁶⁵ These areas include, but are not limited to First Amendment freedom of speech, free exercise of religion, and separation of church and state; the scope of the Fourth Amendment's search and seizure guarantee; substantive due process and equal protection under both the Fifth and Fourteenth Amendments; case or controversy requirements for federal jurisdiction; the privileges or immunities clause of the Fourteenth Amendment; and separation of powers.

⁶⁶ See Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 229 (1997) (arguing that "[w]ith recent cases tending to reaffirm the Court's holding in *Lopez*, and with more cases to follow, notions that the Supreme Court has 'settled' the issue of congressional Commerce Clause power are no longer valid").

⁶⁷ See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 432 (2002) ("Although the Court has imposed limits on Congress's general regulatory powers, its decisions in that domain have displayed a cautious tentativeness. Notably, the Court has not overruled a single case upholding congressional power to regulate commercial activities.").

⁶⁸ See GERHARDT, *supra* note 59, at Table I (listing all of the overruled Supreme Court cases).

⁶⁹ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding that a gender-motivated violent crime is not an economic activity); *United States v. Lopez*, 514 U.S. 549 (1995) (holding

This fine-tuning requires the Justices to tinker with precedents on such far-ranging topics as environmental and criminal law. The extent of path dependency in Commerce Clause cases thus remains to be seen.

B. Path Dependency Requires Sequentialism

The second essential property required for path dependency is sequentialism. Sequentialism means the order in which the Court decides cases makes a difference to their outcomes. Sequentialism presupposes that what came before has some definitive or measurable effect(s) on what follows. The problem is that it is impossible to prove sequentialism as a general phenomenon within constitutional adjudication. It is pure speculation whether the Court would have ruled differently if it were to have decided a series of cases in a different sequence than it did.

The Court's privacy decisions illustrate the difficulty of proving sequentialism in constitutional adjudication. A common assumption is that the sequence of the Court's decisions on privacy led inexorably to *Roe v. Wade*.⁷⁰ Many assume that had the Court decided *Roe* prior to, say, *Griswold v. Connecticut*,⁷¹ the Court might have had more trouble deciding *Roe* in the manner in which it did. This assumption is mistaken. First, consider the implications of the fact that there is no consensus on the precedents that might qualify as the Court's so-called privacy decisions. Legal scholars, if not the Justices themselves, hardly agree on the particular decisions that are relevant to *Roe*'s formulation or that led inexorably to *Roe* or, for that matter, any other privacy decisions. Path dependency presumes that prior decisions not only set the stage for *Roe* but led inexorably to it. This was not the case. The path of the Court's privacy decisions, to the extent there has been a discernible one, is far from clear and highly contentious. While some might claim the path begins with the Court's 1920s decisions in *Meyer v. Nebraska*⁷² and *Pierce v. Society of Sisters*,⁷³ the

that the possession of guns in school zones is not an economic activity); see also Michael J. Gerhardt, *On Revolution and Wetlands Regulation*, 90 GEO. L.J. 2143, 2160–66 (2002) (describing, *inter alia*, the questions left unanswered in the Court's recent Commerce Clause decisions).

⁷⁰ 410 U.S. 113 (1973) (holding that state criminal abortion laws violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right of privacy, including a woman's qualified right to terminate her pregnancy).

⁷¹ 381 U.S. 479 (1965) (finding that a state statute prohibiting the use of contraceptives violates married couples' right to marital privacy and is thereby unconstitutional).

⁷² 262 U.S. 390 (1923) (striking down a state law that prohibited teaching non-English languages to any child in the eighth grade or below).

⁷³ 268 U.S. 510 (1925) (holding that an Oregon law compelling school children to attend school within their district of residence was an unconstitutional interference with parents' liberty to direct their children's education).

connections between those cases and *Roe* are dubious, because they did not directly involve a person's autonomy over his or her body, much less sexual activity. While others might argue the path of the privacy opinions begins with *Skinner v. Oklahoma ex rel. Williamson*,⁷⁴ *Skinner* was an equal protection case, not a due process one. If, however, one were to think that the path of privacy decisions begins with *Griswold*, *Griswold* hardly leads inexorably to *Roe*. Most of the Justices in *Griswold* either explicitly distinguished the context of abortion from the one before the Court in *Griswold*,⁷⁵ or later distinguished their vote in *Roe* from their vote in *Griswold*.⁷⁶ *Griswold* is only one of the many cases cited in *Roe*,⁷⁷ none of which *Roe* cites as compelling its result. Nor did the decision in *Roe* lead the Court in any subsequent case to recognize or uphold a substantive due process claim. Indeed, *Roe* did not preclude the Court from rejecting the substantive due process claims in *Bowers v. Hardwick*.⁷⁸ Nor did a majority of the Court in *Lawrence v. Texas*⁷⁹ follow the lead of *Bowers*. In short, not a single privacy decision appears to have followed inexorably from an earlier one.

Nor is it possible to see how reversing the path of the Court's privacy decisions would necessarily alter outcomes. The Court rarely takes cases in which the outcomes are clearly dictated by a single precedent or set of precedents. Even in cases in which the fate of a particular precedent is at issue, the Court rarely bases its decision on a single, earlier decision. Further, one might suppose that had the Court decided *Roe* before *Griswold*, the fallout from *Roe* would have discouraged the Court from recognizing substantive due process claims in other cases such as *Griswold*. Besides being purely speculative, this may not be true. Yale Law School Professor Jed Rubenfeld has suggested that *Roe* but not *Griswold* was correctly decided because the former, and not the latter, involved the state's forcing a woman to make a lifestyle choice completely incompatible with her constitutional right to make such a choice unfettered by governmental inter-

⁷⁴ 316 U.S. 535 (1942) (finding that the Oklahoma Habitual Criminal Sterilization Act violated the Equal Protection Clause of the Fourteenth Amendment).

⁷⁵ 381 U.S. at 485–87 (noting that the opinion is confined to the right to privacy within marriage).

⁷⁶ *Roe v. Wade*, 410 U.S. 113, 159 (1973) (stating that “[t]he situation . . . is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned”).

⁷⁷ See *id.* at 152 (citing a litany of cases dealing with the right to personal privacy drawn from many different Amendments).

⁷⁸ 478 U.S. 186, 196 (1986); see also *infra* text accompanying notes 81–85.

⁷⁹ 539 U.S. 558 (2003) (finding that Texas criminal laws banning consensual sodomy violated the Due Process Clause of the Fourteenth Amendment).

ference.⁸⁰ He argues that *Roe* and *Griswold* are distinguishable from each other on the merits. As long as cases are distinguishable from each other, they are disconnected. If they are disconnected, then the sequence in which the Court decided them should not have affected—or did not affect—their outcomes. Distinguishing one decision from another means that the decisions do not depend on each other.

It follows, as I have suggested, that the Supreme Court's recent opinion in *Lawrence* does not follow inexorably from *Roe*, or for that matter from any other opinions of the Court. In *Lawrence*, the Justices could have declared that overturning the Texas anti-sodomy statute had been foreclosed by *Bowers*, the position maintained in the dissent of Justice Scalia.⁸¹ That would constitute some evidence of path dependency. Indeed, prior to *Lawrence*, the Court had refused to extend the notion of privacy recognized in *Roe* to contexts other than abortion, including the right to die and homosexual sodomy.⁸²

While it is true that the Court upheld the equal protection challenge in *Romer v. Evans*,⁸³ *Evans* hardly followed inexorably from the Court's prior decisions. *Evans* itself deviated from a series of prior opinions upholding state constitutional referenda and overturned for the first time ever on federal constitutional grounds a law disadvantaging gays and lesbians. Moreover, *Evans* argues in favor of the Court's deciding in *Lawrence* not on due process grounds but rather on equal protection grounds, as suggested by Justice O'Connor in her concurrence in *Lawrence*.⁸⁴ Indeed, Justice O'Connor's concur-

⁸⁰ See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 244–45 (2001) ("Marriage may be sacred, but the idea it occupies a domain of 'private life' unregulable by law is a fantasy.").

⁸¹ *Lawrence*, 539 U.S. at 585–605 (Scalia, J., dissenting).

⁸² See *Vacco v. Quill*, 521 U.S. 793, 807–08 (1997) (unanimously rejecting the argument that New York's ban on physician-assisted suicide violates the Equal Protection Clause because the state allowed competent persons to refuse lifesaving medical treatment); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990) (holding that a state may constitutionally impose higher evidentiary requirements in the matter of terminating treatment for incompetent patients); *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) ("[W]e think it evident that none of the rights announced in [*Roe*] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . ."). Interestingly, *Vacco* and *Glucksberg* led then-Professor, now-Judge Michael McConnell to believe that the Court had repudiated the notion that the federal courts "have authority to resolve contentious questions of social policy on the basis of their own normative judgments." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666.

⁸³ 517 U.S. 620, 623–25 (1996) (holding unconstitutional an amendment to the Colorado Constitution that prohibited state government action designed to protect homosexuals from discrimination).

⁸⁴ 539 U.S. at 580 ("We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause, where as here, the challenged legislation in-

rence in *Lawrence* dramatically underscores the limited path dependency of *Bowers*, in which she had joined the majority's opinion.⁸⁵

C. Path Dependency Requires Consistency

The third property required for path dependency is consistency. Consistency requires that a current decision fits logically or coherently into a sequence of cases. It requires that a decision can be reasonably reconciled with the Court's prior decisions on the same subject.

Consistency is both an obvious and extremely elusive condition of path dependency. On the one hand, Justices can satisfy the demands of consistency relatively easily in areas in which there are few prior cases, such as the Second Amendment. In such areas, there may not yet be a clear or settled framework through which the Justices could analyze the constitutionality of some gun control legislation. Even if there were a framework in place, its elements might be sufficiently capacious to allow the Justices a good deal of maneuverability to fit particular judicial decisions coherently together. For instance, in *United States v. Lopez*,⁸⁶ Chief Justice Rehnquist inferred from the Court's Commerce Clause decisions from 1937 through 1995 a three-part test for measuring the constitutionality of a congressional regulation of private activity enacted pursuant to the Commerce Clause. With this framework in place, he then demonstrated how the Gun-Free School Zones Act⁸⁷ at issue in *Lopez* did not satisfy any of the elements or conditions of that test. The Chief Justice even went so far as to reconcile some of the Court's most controversial Commerce Clause decisions with the test.⁸⁸ He could not reconcile the Gun-Free School Zones Act with the other cases in which the Court upheld Commerce Clause enactments because the Act at issue involved merely carrying a firearm into school and thus not any "economic" or

hibits personal relationships."). Some might believe the outcome in *Bowers* was the product of path dependency brought about by the increasing disenchantment of some Justices with substantive due process. Yet this belief is hard to square with the recognition of a fundamental dynamic of constitutional adjudication that the meaning of a precedent is determined less by those who created it than by those who subsequently define it. The series of substantive due process cases prior to *Bowers* could have emboldened rather than frightened many Justices into recognizing an expanded right of privacy. After all, *Roe* and *Griswold* were part of that series of decisions, not to mention the Court's cases upholding incorporation of the Fourteenth Amendment via the Due Process Clause. In any event, the pre-*Bowers* cases on substantive due process did not constrain or compel a particular choice in *Bowers* by a majority of the Justices.

⁸⁵ *Bowers*, 478 U.S. at 186.

⁸⁶ 514 U.S. 549 (1995).

⁸⁷ 18 U.S.C. § 922(q) (1990).

⁸⁸ See *id.* at 560 (reconciling with the test such decisions as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Darby v. United States*, 312 U.S. 100 (1941); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

“commercial” activity. The Act thus involved activity that could be reasonably distinguished from the activity regulated in legislation previously upheld by the Court.

On the other hand, consistency may be extremely hard to achieve or maintain in areas in which the Court has rendered a large number of decisions. The problem may be that even if a current decision is consistent with some past decisions it may not be coherently reconciled with all prior decisions on the same subject. Free Exercise and Establishment Clause precedents illustrate this problem. In its recent decision in *Locke v. Davey*,⁸⁹ the Supreme Court acknowledged that these two clauses are in “tension,” and it is not surprising to find as a result that many of its precedents in these two areas are also in “tension.” In *Locke*, the Court upheld, against a Free Exercise challenge, a Washington state law that had awarded merit scholarships to college students, but had excluded students pursuing degrees in “devotional theology.” On behalf of the majority, Chief Justice Rehnquist read the Court’s prior decisions as having enough “play in the joints” to allow the state of Washington to enact the law at issue in the case.⁹⁰ Indeed, the Court found *Locke* to be analogous to its recent decision in *Zelman v. Simmons-Harris*,⁹¹ which upheld a school voucher program available to certain public and private schools (including parochial schools) in the Cleveland area. But the Court says little in response to Justice Scalia’s argument in dissent⁹² that *Locke* is actually more analogous to *Church of Lukumi Babalou Aye, Inc. v. City of Hialeah*,⁹³ in which the Court had declared that “[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny”⁹⁴ and that “the minimum requirement of neutrality is that a law not discriminate on its face.”⁹⁵ While the Court in *Locke* did not use heightened scrutiny, the *Church of Lukumi* decision on which Justice Scalia relied did use it.

But it is also hard to square Justice Scalia’s reliance on the latter because it does not fit with his earlier opinion in yet another case, *Employment Division v. Smith*,⁹⁶ in which he insisted that the Court did not need to use heightened scrutiny to examine the constitutionality of a generally applicable, neutral law that may impose some burdens on particular religious practices. *Smith* in turn is hard to square with

⁸⁹ 540 U.S. 712 (2004).

⁹⁰ *Id.* at 718.

⁹¹ 536 U.S. 639 (2002).

⁹² See *Locke*, 540 U.S. at 726 (Scalia, J., dissenting) (finding *Lukumi* to be “irreconcilable with *Locke*, which sustains a public benefits program that facially discriminates against religion”).

⁹³ 503 U.S. 520 (1993).

⁹⁴ 503 U.S. 520, 546 (1993) (quoted in *Locke*, 540 U.S. at 726 (Scalia, J., dissenting)).

⁹⁵ *Id.* at 533 (quoted in *Locke*, 540 U.S. at 726 (Scalia, J., dissenting)).

⁹⁶ 494 U.S. 872, 882–85 (1990) (discussing the reasons for rejecting heightened scrutiny).

earlier Free Exercise precedents in which the Court did use heightened scrutiny to examine the constitutionality of a law that had the effect of significantly burdening a religious practice even if the law were generally and neutrally worded.⁹⁷

These cases illustrate a related problem with ensuring consistency in constitutional adjudication. The difficulty is that a particular decision's meaning or significance often depends on how subsequent Justices use or characterize it. And it is not unusual for Justices to take liberties in characterizing prior decisions. For instance, in *Brandenburg v. Ohio*,⁹⁸ the Supreme Court developed a highly protective test for political speech, which it claimed to have derived from prior freedom of speech cases. This, however, was not true. The test in *Brandenburg* required courts examining laws regulating advocacy to commit lawless action to determine whether "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."⁹⁹ The cases from which the Court supposedly took this test, however, never articulated such a test. Instead, these cases suggested a "clear and present danger" test, which the *Brandenburg* Court did not discuss in any meaningful detail.¹⁰⁰ The latter phrase does not even appear in *Brandenburg*.

Similarly, a majority in *Adarand Constructors, Inc. v. Peña*¹⁰¹ overruled the Court's prior decision reached in *Metro Broadcasting, Inc. v. FCC*¹⁰² ostensibly on the ground that the latter could not be reconciled with the Court's prior decisions on affirmative action—the use of race-based classifications supposedly to benefit minorities.¹⁰³ The problem with this characterization is that there had only been one

⁹⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("Where fundamental claims of religious freedom are at stake . . . we must searchingly examine the interests the state seeks to promote . . ."); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("We must . . . consider whether some compelling state interest justifies the substantial infringement of appellant's First Amendment right.").

⁹⁸ 395 U.S. 444 (1969).

⁹⁹ *Id.* at 447.

¹⁰⁰ See, e.g., *Yates v. United States*, 354 U.S. 298 (1957) (considering the application of a "clear and present danger" analysis in determining the standard needed to convict Communists for advocating and teaching the duty to overthrow the government of the United States by force and violence, in violation of the Smith Act); *Dennis v. United States*, 341 U.S. 494, 505 (1951) (examining the standard needed to convict Communists for conspiring to advocate the overthrow of the government of the United States by force and violence, in violation of the Smith Act, by assessing in part whether the speech was a "clear and present danger"); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (affirming the standard for evaluating conspiracy to violate provisions of the Espionage Act of Congress, in the case of Defendants publishing disloyal material about the form of government in the United States during the First World War).

¹⁰¹ 515 U.S. 200 (1995).

¹⁰² 497 U.S. 547 (1990).

¹⁰³ See *Adarand*, 515 U.S. at 225–27 (holding that *Metro Broadcasting* rejected longstanding jurisprudence requiring congruence of standards for evaluating federal and state racial classification).

prior decision, reached only six years before, in which the Court had struck down an affirmative action program.¹⁰⁴ Every other precedent, including *Metro Broadcasting*,¹⁰⁵ that had squarely dealt with a race-based scheme for hiring or awarding government contracts had gone the other way. Prior precedents could thus be quite reasonably read, as Justice Stevens did in dissent, as upholding exactly the opposite outcome as the one reached in *Adarand*.¹⁰⁶

D. Path Dependency Requires Compulsion

The fourth property required for path dependency is compulsion. Compulsion entails forcing Justices to reach, or to forego, some choices or decisions and favor others they might personally prefer not to make. Yet, there are a number of precedents that do not appear to have compelled the Justices to reach certain results.

Consider, for instance, the path of the Supreme Court's voting rights decisions, beginning with *Baker v. Carr*,¹⁰⁷ in which it held challenges to racial gerrymandering to be justiciable, and its divisive opinion in *Bush v. Gore*,¹⁰⁸ in which it found Florida's manual recount procedures to be unconstitutional. A conventional critique of *Bush v. Gore* is that it deviated from the path of the Court's voting rights decisions, in which the Court had generally subjected to heightened scrutiny only those governmental actions or decisions that impeded the voting rights of racial minorities, particularly African Americans.¹⁰⁹ Alternatively, some have argued that in *Bush v. Gore* the Supreme Court should have treated then-Governor Bush's equal protection

¹⁰⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (finding that the city of Richmond's Minority Business Utilization Plan violated the Equal Protection Clause of the Fourteenth Amendment).

¹⁰⁵ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 491–92 (1980) (upholding federal legislation requiring ten percent of federal funding for local public works projects be set aside for minority applicants); *Regents of University of California v. Bakke*, 438 U.S. 265, 320 (1978) (reversing an injunction that would prevent the University from ever considering race in admissions procedures). It is noteworthy that *Croson* was the first so-called affirmative action case in which the Court rendered a majority opinion; in the other cases, the majority had been so fractured that it was unable to agree on a single opinion for the Court. The absence of a majority opinion on the question of affirmative action for more than a decade undoubtedly helped to make the law on affirmative action more, rather than less, confusing.

¹⁰⁶ See *Adarand*, 515 U.S. at 256–57 (Stevens, J., dissenting) (finding that *Adarand* was “an unjustified departure from settled law”).

¹⁰⁷ 369 U.S. 186 (1962).

¹⁰⁸ 531 U.S. 98 (2000).

¹⁰⁹ See, e.g., Markenzy Lapointe, *Bush v. Gore: Equal Protection Turned on its Head, Perhaps for a Good Though Unintended Reason*, 2 WYO. L. REV. 435, 479 (2002) (arguing, *inter alia*, that “the result cannot be justified by any of the Court’s prior equal protection decisions”).

claims either as nonjusticiable or as not supporting heightened judicial review.¹¹⁰

The problems with these criticisms of *Bush v. Gore* should be obvious. First, no cases clearly mandated or compelled the Court to recognize then-Governor Bush's claim as nonjusticiable. *Baker* arguably did the opposite by recognizing the constitutionality of judicial review over governmental decision making affecting voting rights. *Baker*, however, is a classic case demonstrating the non-path dependency of precedent because it rejected the prior formulation of the political question doctrine in *Colegrove v. Green*.¹¹¹

Second, *Baker* initiated a path of decision making, but the path it initiated has hardly been linear, predictable, or perfectly coherent. *Baker* upheld judicial review of racial gerrymandering, but this ruling did not clarify the constitutionality of political gerrymandering, which has raised different questions and produced a less than coherent body of law. Earlier this year, in *Vieth v. Jubelirer*,¹¹² the Court fell one vote short of overturning its 1986 decision in *Davis v. Bandemer*,¹¹³ in which the Court had allowed judicial review of political gerrymandering. Nevertheless, Justice Scalia, speaking for a plurality of Justices in *Vieth*, declared *Davis* "wrongly decided"¹¹⁴ and urged its overruling in order to make way for a clear ruling from the Court that the Constitution did not provide "a judicially enforceable limit on the political considerations that the states and Congress may take into account when districting."¹¹⁵

Third, the Court's voting rights decisions hardly lend themselves to a single reading. It is possible but not inexorable to read them as having been largely, if not wholly, about protecting minority voting rights from unfair or discriminatory treatment. One could, however, read them differently, as did seven Justices, to strike down a scheme for allowing recounts in a contested election without some clear test

¹¹⁰ See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300 (2002) (stating that the point of the political question doctrine is that some issues should be left to the political branches and not the federal judiciary).

¹¹¹ 328 U.S. 549 (1946) (holding that the Court lacked the power to intervene on election district reapportionment issues).

¹¹² 124 S. Ct. 1769 (2004).

¹¹³ 478 U.S. 109 (1986).

¹¹⁴ *Vieth*, 124 S. Ct. at 1778.

¹¹⁵ *Id.* at 1792. Justice Scalia stressed *Davis* required overruling because "[e]ighteen years of essentially pointless litigation have persuaded [a plurality] that [*Davis v. Bandemer*] is incapable of principled application." *Id.* In a separate concurrence in *Vieth*, Justice Anthony Kennedy resisted overruling *Davis* because he would not "foreclose all possibility of judicial review if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 1793 (Kennedy, J., concurring in the judgment).

for determining which votes to count.¹¹⁶ The chances for mischief within such a scheme were enormous. The prior case law could be read as disallowing any electoral scheme with a high potential for mischief against a candidate or minority voters.¹¹⁷ The case law made Bush's claim conceivable but not inevitable.

E. Path Dependency Requires Predictability

The final property required for path dependency is predictability. Path dependency is predicated on the likelihood that past choices make forecasting future or subsequent ones easier. Predictability requires that the choices the Justices make create expectations about the path of constitutional adjudication and that these expectations are largely justified and realized.

To some extent, the path of constitutional adjudication is predictable. For instance, once the Court reaffirmed *Roe* in *Planned Parenthood v. Casey*,¹¹⁸ no one expected that in the next abortion rights case the Court took that it would refrain from revisiting the merits of *Roe*. Similarly, once the Court decided *Nixon v. United States*,¹¹⁹ one could have reasonably expected that it would probably not entertain other challenges to Senate impeachment trial procedures. Once *Nixon* held judicial challenges to Senate impeachment trial procedures to be nonjusticiable, the decision would strongly discourage similar challenges and relieve the Court from adjudicating similar questions in the future.¹²⁰

In still other areas, the path dependency of precedent appears relatively strong if not predictable. A striking example is the Court's Eleventh Amendment jurisprudence.¹²¹ One can trace one path of

¹¹⁶ At issue in *Bush v. Gore* were the meanings and significance of a number of prior voting rights decisions. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (declaring the state poll tax unconstitutional); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding unconstitutional uneven apportionment of congressional districts in Georgia); *Baker v. Carr*, 369 U.S. 186 (1962) (finding justiciable a cause of action involving state reapportionment decisions).

¹¹⁷ See, e.g., Matthew J. Festa, Note, *The Origins and Constitutionality of State Unit Voting in the Electoral College*, 54 VAND. L. REV. 2099, 2140 (2001) (observing that "seven Justices agreed that the Florida recount raised a valid equal protection problem").

¹¹⁸ 505 U.S. 833 (1992).

¹¹⁹ 506 U.S. 224 (1993).

¹²⁰ The only impeachment proceeding to run its full course through the House and the Senate after Walter Nixon's was the impeachment and trial of President William Jefferson Clinton. President Clinton considered the suggestion, but ultimately declined to initiate any judicial challenge to his impeachment by the House. See generally RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON (1999).

¹²¹ The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Eleventh Amendment decisions back to at least the 1890 decision in *Hans v. Louisiana*.¹²² There, the Court ruled that the Eleventh Amendment barred federal lawsuits against a state by its own citizens, in addition to lawsuits by citizens of other states. In spite of acknowledging serious questions about the merits of this ruling, particularly its conflict with the plain language of the Amendment itself,¹²³ several contemporary Justices have not only insisted that it is too late in the day to reconsider *Hans* but also joined together to extend it.¹²⁴

Notwithstanding, the predictability of constitutional adjudication should not be overstated. The most significant implication of the previously mentioned forecasting study¹²⁵ becomes apparent in the area of predictability. Path dependency requires that outcomes, as well as individual votes, are predictable, because they supposedly follow both logically and inexorably as a consequence from a prior sequence of decisions. None of the groups surveyed in the forecasting study perfectly predicted the outcomes, or individual votes, in the cases from the 2002 Term.¹²⁶ Indeed, each group but one fell short of Segal's and Spaeth's rate of success—seventy-seven percent—in predicting outcomes.¹²⁷ The outcomes of the Court's cases might have been consistent with prior precedents, but consistency is not the same as predictability. The question is the extent to which the outcomes, or individual votes, were foreseeable. The failure to predict outcomes and individual votes flawlessly suggests that they were not compelled by prior decisions.

One might counter that the forecasting study did not establish the impossibility of accurately predicting outcomes of Supreme Court cases. At best, the study did not rule out predictability as a requirement for path dependency. Nor did the survey assess the degree of certitude of the experts' guesswork or their predictions of the range of possible outcomes in given cases.

¹²² 134 U.S. 1 (1890).

¹²³ See Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 281 (2002) (noting that the Court's holding in *Hans* is "contrary to the plain language of the Eleventh Amendment").

¹²⁴ See *Dellmuth v. Muth*, 491 U.S. 223, 229 n.2 (1989) (declining "this most recent invitation to overrule [its] opinion in *Hans*").

¹²⁵ See *supra* Part I.C.

¹²⁶ See Ruger et al., *supra* note 52, at 1151–52 (noting that a machine did "significantly better at predicting [case] outcomes than did the [academic legal] experts").

¹²⁷ SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 319 ("The model predicts 77 percent of the Court's cases correctly . . ."). I hasten to add that a seventy-seven percent success rate in predicting outcomes is not necessarily that good. Under most grading systems, seventy-seven percent is either a B or a C. In contrast, the ninety-two percent success rate of attorneys in the forecasting study is either a very high B or a low A. For the significance of the differences in these rates of success, see *supra* notes 56–57 and accompanying text.

Nevertheless, some of the Court's most famous—or infamous—lines of decisions have defied prediction. For instance, immediately after *Griswold*, no one on the Supreme Court or in legal academia predicted it would lead inexorably to a case such as *Roe*. In *Griswold*, the majority set forth five theories for recognizing the privacy claim in the case;¹²⁸ and no one could have known or predicted which of any of these a majority might have followed in a subsequent case involving a privacy claim much less a claim to terminate an unwanted pregnancy. Nor after the Court reaffirmed *Roe* could anyone have predicted with certainty which abortion regulations would be found to be unconstitutional under the new “undue burden” standard set forth in *Casey*.¹²⁹ Prior to the Court's historic decision in *Brown v. Board of Education*,¹³⁰ mandating the end of segregation in public schools, no one predicted that constitutional doctrine at the time made such a decision possible. As David Strauss of the University of Chicago Law School has explained, *Brown* did not set forth a clear principle of equal protection. Instead, he argues, *Brown* can be read as setting forth one of at least five different principles of equal protection.¹³¹ No one after *Brown* could have been sure which of these principles, if any, the Court might follow in subsequent cases. Nor, for that matter, was it even clear after *Brown* whether or to what extent the Court intended to mandate the end of segregation outside of the context of public education.

Predictability also seems to be lacking in at least some Commerce Clause cases. In *Lopez*,¹³² the Court's striking the Gun-Free School Zones Act was its first decision in almost six decades to overturn on Commerce Clause grounds a congressional regulation of private conduct. In doing so, the Court refused to defer to Congress's determination of a reasonable link between its regulation and the activity it was trying to regulate.¹³³ Moreover, after the Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Authority*¹³⁴ that the political safeguards states had in the federal political process obviated the need for judicial review of federal regulation of the states under

¹²⁸ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (considering the “zones of privacy” implicated in the penumbras cast by the First, Third, Fourth, Fifth, and Ninth Amendments).

¹²⁹ *Cf. Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a state statute criminalizing performance of partial-birth abortions because the law lacked a health exception and thereby placed an undue burden on a woman's right to choose to have an abortion).

¹³⁰ 347 U.S. 483 (1954).

¹³¹ See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940–44 (1989) (identifying those principles as “lack of impartiality,” “subordination,” “stigma,” “second-class citizenship,” and “encouragement of prejudice”).

¹³² *United States v. Lopez*, 514 U.S. 549 (1995).

¹³³ See *id.* at 567 (declining to continue the history of automatic deference to Congress in rational basis analysis).

¹³⁴ 469 U.S. 528, 551 (1985).

the Commerce Clause, no one could be sure how long *Garcia* would be good law. *Garcia* had overruled¹³⁵ another decision issued only nine years before, *National League of Cities v. Usery*, which had overruled¹³⁶ another precedent.¹³⁷ Given that then-Justice Rehnquist threatened in dissent in *Garcia* to secure its overruling,¹³⁸ its future was very much in doubt from the outset. It was no surprise that the decision seemed to have lacked any path dependency given that it was partially overruled in the very next case to raise a question about the scope of congressional authority to regulate state activity under the Commerce Clause.¹³⁹ *Garcia* gave no hint, and thus no one at the time it was decided could have predicted, that the bases on which the Court would recognize congressional authority under the Commerce Clause would be further limited by the Eleventh Amendment in *Florida v. Seminole Tribe*.¹⁴⁰

In addition, prior to Election Day 2000, not a single voting rights expert in the United States had predicted the ultimate outcome of *Bush v. Gore*.¹⁴¹ Nor did any experts declare that a decision like *Bush v. Gore* was even possible. Nor, for that matter, is any expert sure whether, or to what extent, *Bush v. Gore* will apply outside the context of presidential elections to such problems as disparities in voting technology.¹⁴² If one were to believe the Court, the case would have no effect. After all, the Court itself declared that its decision was intended to govern only the dispute between candidates Bush and

¹³⁵ See *id.* at 557 ("*National League of Cities v. Usery* is overruled.") (citation omitted).

¹³⁶ 426 U.S. 833, 855 (1976) ("We are . . . persuaded that *Wirtz* must be overruled).

¹³⁷ See *Maryland v. Wirtz*, 392 U.S. 183 (1968) (stating that under the Commerce Clause the Fair Labor Standards Act could be applied to state-operated hospitals and schools).

¹³⁸ *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (finding that it is not "incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court").

¹³⁹ See *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot compel states to enact or administer a federal regulatory program).

¹⁴⁰ 517 U.S. 44, 53 (1996) ("[T]he Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause.").

¹⁴¹ 531 U.S. 98 (2000); see also *supra* notes 108–10 and accompanying text.

¹⁴² See Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 657–74 (2002) (criticizing the opinion for ignoring disparities in voting technologies). Moreover, the obvious difficulties with predicting *Bush*'s impact on voting rights law were apparent in the days leading up to the 2004 presidential election. Experts were predicting all sorts of dire legal scenarios, none of which came to pass. Compare *Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances . . ."), with Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357, 357 (2002) ("[A] number of voting rights advocates have tried to use the *Bush* decision to push for long overdue electoral reform.").

Gore.¹⁴³ It declared, in other words, that its decision would not have *any* path dependency.

Bush v. Gore and other cases have demonstrated the ease with which one can identify the absence of path dependency in constitutional adjudication. One need only demonstrate how a Supreme Court precedent lacks one or more of the essential properties required for path dependency. It is much harder to explain why, when, and how some cases generate path dependency or achieve closure while other cases lack at least one of the essential attributes of path dependency. The next Part lays the groundwork for explaining these differences.

III. THE LIMITED PATH DEPENDENCY OF PRECEDENT IN CONSTITUTIONAL ADJUDICATION

This Part suggests that Supreme Court precedent cannot possibly play the role that social scientists (and some legal scholars) insist that it will. Social scientists expect that if particular decisions of the Court are really “law” then they must impose relatively robust path dependency on the doctrine of constitutional law. The absence of such path dependency then leads these social scientists to conclude that precedents do not matter (or at least only matter to the extent they can be manipulated by the Justices to facilitate their desired strategic objectives). Ideologies or personal preferences thus play a significant role in deciding the path of constitutional law. Yet, there are at least eight related factors endogenous to the process of constitutional adjudication that demonstrate both how and why some constitutional precedents but not others generate at least some path dependency. These factors include: (1) constitutional design; (2) the unique nature of constitutional adjudication; (3) how the Court frames its judgments; (4) the different kinds, or degrees, of entrenchment in constitutional doctrine; (5) changes in the Court’s composition; (6) the dynamics of the Court as a multi-membered institution that makes decisions by majority vote; (7) the absence of formal rules for construing or overruling precedents; and (8) the X factor—the term I use to refer to the mysterious reasons that preclude judicial closure of some disputed area(s) of constitutional law. The operation of and interaction among these factors in constitutional adjudication undercut the boldest claims of social scientists about the complete absence of path dependency in constitutional law. They provide some support for the *limited* path dependency in constitutional adjudication.

¹⁴³ See *Bush*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

A. *Constitutional Design and Legal Indeterminacy*

The indeterminacy of the law bothers many constitutional scholars, particularly in the social sciences, because it arguably prevents the Constitution from being mechanically applied; however, the indeterminacy of the law is widely accepted among legal scholars. Legal scholars generally agree further on the reasons for the indeterminacy of the law. The first is the nature of the Constitution. A written constitution, like other laws reduced to writing, must be abstract; it must speak in "broad outlines" and generalities, as Chief Justice Marshall famously suggested.¹⁴⁴ The abstractness of a written constitution limits its ability to guide concrete decisions taken in its name, and increases the likelihood of unpredictability in its construction.¹⁴⁵

The abstractness of the American Constitution is evident in its broad, non self-defining terms. No one has yet comprehensively identified the full extent to which its terms are not self-defining. Nor do legal scholars agree on precisely how widespread the ambiguity is in our Constitution. There are, however, more than enough vague, open-ended terms—as well as troublesome questions raised by the silence and design of the Constitution—to make the legal indeterminacy of the Constitution a real problem. The range of vague, ambiguous, non-self-defining terms within the Constitution is daunting.¹⁴⁶ These terms are not self-defining, but instead subject to

¹⁴⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (stating that a constitution's "nature . . . requires[] that only its great outlines should be marked . . .").

¹⁴⁵ For a discussion of how the indeterminacy of the law facilitates its unpredictability, see Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 579–84 (1993).

¹⁴⁶ For a small sampling of such phrases and terms, see U.S. CONST. art. I, § 8, cl. 3 (vesting the Congress with the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *id.* art. I, § 8, cl. 18 (giving Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"); *id.* art. I, § 9, cl. 3 ("No Bill of attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *id.* art. II, § 4 ("The President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican form of Government . . ."); *id.* amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); *id.* amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law . . ."); *id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

several plausible interpretations. The Constitution provides no guidance on how its terms ought to be interpreted or on which interpretation is superior.

Second, a number of practical problems exacerbate the indeterminacy of constitutional law. The Constitution delegates substantial authority to those charged with administering, making, and interpreting the law. The Framers and Ratifiers were not able to anticipate every contingency, they failed to reach consensus on more specific language, and they agreed on general terms for different, often complex reasons. As Columbia Law School Professor Michael Dorf explains, the difficulty of achieving consensus on more specific language in the Constitution "is particularly problematic for constitutional interpretation. Given profound disagreement, any foundational set of procedures or principles sufficiently abstract to secure consensus and thereby work its way into a popularly chosen constitution will be too abstract to resolve the most acute subsequently arising constitutional controversies."¹⁴⁷

The text of the Constitution is, however, not the only source of constitutional meaning that is open-ended, lacks consensus on rules for its construction, and is subject to multiple interpretations. For instance, the structure of the Constitution raises inferences, but the Constitution does not dictate which inferences ought to be controlling. In a classic dispute that has existed at least as long as the Constitution, some people support construing the Constitution as setting forth the full range of areas in which the branches may share power, while others argue that the Constitution limits only how much power may be shared by the heads of each branch but not how much may be shared by officials operating below the apexes. In another long-standing (and ultimately bloodier) dispute, authorities have disagreed over the areas in which the federal government is supreme to the states as well as the scope of state sovereignty protected by the Constitution. The open-ended terms of the Constitution, as well as the inferences raised by the design of the Constitution, lend themselves to several plausible interpretations; however, the Constitution provides no guidance on how it ought to be interpreted, much less on which one of several plausible interpretations is superior or ought to be adopted by the Court.

¹⁴⁷ Michael C. Dorf, *Legal Indeterminacy and Constitutional Design*, 78 N.Y.U. L. REV. 875, 884 (2003); see generally *id.* at 889–909 (describing several theories seeking to alleviate the indeterminacy problem in constitutional norms).

Similarly, original understanding is not subject to a single, authoritative construction (or interpretive approach).¹⁴⁸ Scholars and others disagree over the original understanding of original understanding; whose understandings are relevant for determining original understanding; how the plain meaning of the Constitution ought to be determined; how the public or common understanding of the Constitution at the time of ratification ought to be determined; at what level of generality original understanding ought to be defined; and how many Framers or Ratifiers need to have agreed on an understanding in order to attribute that understanding to the Framers or Ratifiers as a whole. These questions are difficult to answer because there simply are no rules for originalists to follow in divining original understanding.¹⁴⁹

My purpose in raising the indeterminacy of sources of constitutional meaning is not to express agreement with the attitudinal complaint that the indeterminacy of the law precludes the legal model from scientific verification.¹⁵⁰ For attitudinalists, the indeterminacy of the law impedes principled interpretation altogether. I have already suggested their notion of the legal model as not bearing any resemblance to how the law actually functions. Moreover, a major problem with their claim is their failure to empirically support their claim that all law is as indeterminate as their own standards demand.¹⁵¹ Sometimes the text of the Constitution is relatively clear,¹⁵² but the ambiguity or lack of clarity in the Constitution does not necessarily preclude the possibility of principled interpretation altogether.

Third, the Court's principal job is not to remove the ambiguities, or vagueness, within the Constitution. The Court's primary duty is to decide concrete cases or controversies.¹⁵³ As a matter of design, the Court is not necessarily well suited to determining, once and for all, the definitive meaning of the Constitution. For instance, the Justices might have difficulty in agreeing not only on how to resolve the case before them but also on what else they ought to do. Undoubtedly,

¹⁴⁸ See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (arguing that no one unified theory explains constitutional law, despite attempts to formulate such a theory).

¹⁴⁹ See generally H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (arguing that the originalist interpreter himself shades the "original" interpretation).

¹⁵⁰ See *supra* Part I.A.

¹⁵¹ See Michael J. Gerhardt, *Attitudes About Attitudes* 101 MICH. L. REV. 1733, 1750–51 (2003) (reviewing SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7) (noting that Segal and Spaeth's model predicts accurately only seventy-seven percent of Supreme Court decisions).

¹⁵² A few minor examples are that we have one President of the United States, one Supreme Court, and the Congress is composed of two chambers—a House of Representatives and a Senate.

¹⁵³ U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . [and] to Controversies . . .").

the Justices will have difficulty in choosing from and prioritizing sources, and thereby settling as a group upon a preferred interpretation of the Constitution. Because no law clearly directs the Court on how to choose among these competing understandings, the Justices have difficulty in explaining how the law rather than their own inclinations, leads them to adopt one plausible interpretation rather than another. Nor is this, by any stretch of the imagination, the only difficulty confronting the Justices. Their difficulties in bringing further clarity to the law are significant, and the remainder of this Part explores the more significant (and enduring) problems in detail.

B. The Significance of the Distinction Between Constitutional and Common Law Adjudication

Thus far, we have yet to address a critical failure of the dominant social science models of the Supreme Court: they misapprehend a basic dynamic in constitutional adjudication. Both attitudinalists and rational choice theorists have the wrong paradigm in mind when they think of the Supreme Court or attempt to describe the process of constitutional adjudication. They presume mistakenly that constitutional adjudication ought to operate in precisely the same manner as does common law judging. The paradigm they have in mind for judging is, in other words, the common law system; however, the dynamics in constitutional adjudication and common law judging are quite different and those differences, have significant implications for path dependency in each system.

Within the American legal tradition it is the common law—not constitutional adjudication—that provides the basic paradigm for legal analysis, and a fundamental tenet of the common law is path dependency. It is this paradigm that many social scientists and even some law professors have in mind when they talk about path dependency in the law. Yale Law School Professor Oona Hathaway defines path dependency in common law adjudication as “a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage.”¹⁵⁴ This is almost precisely the same causal relationship that many legal scholars presume exists in constitutional adjudication. Even prominent legal scholars such as Frank Easterbrook, Richard Posner, and Richard Fallon, have acknowledged that path dependency, to at least some meaningful degree, in constitutional adjudication is similar if not

¹⁵⁴ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001).

identical to path dependency in the common law.¹⁵⁵ Other scholars go further not only to treat constitutional adjudication as akin to common law judging but also to treat the path dependency in constitutional adjudication as akin to that in the common law.¹⁵⁶

It should go without saying, however, that precedent functions differently in common law and constitutional adjudication. To begin with, the structure of our legal order reflects these differences. The structural differences between constitutional adjudication and judicial resolution of common law and statutory issues dictate a different status for precedent in each context. In a common law system, precedents are the exclusive source of legal authority. By definition, common law cases are those in which a legislature or higher authority has not yet spoken (at least explicitly) to the issues. While it is true that in common law cases the judges may be trying to resolve particular disputes in light of some abstract principles of the law, they are common law cases precisely because these abstract notions have not been codified. In the common law system, cases thus are the primary constituents. What follows is that path dependency then becomes a basic expectation in the common law system. While cases are not the

¹⁵⁵ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 366 (1992) (criticizing the argument that—because of the phenomenon of path dependency—“the meaning of the Constitution varies with the order in which cases reach the Court”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 434–35 (2002) (describing how the Rehnquist Court’s federalism decisions reflect the conventional conception of path dependency); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 585–86 (2000) (acknowledging that because of path dependency the “structure of common law doctrine (broadly understood as doctrine forged in the process of deciding cases, whether or not they technically are common law cases) seems on the whole pretty efficient”); see also Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1023 (2003) (acknowledging, without further discussion, the phenomenon of path dependency in constitutional law); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 9–33 (1998) (employing the conventional conception of path dependency to describe the process of constitutional adjudication); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 655 (2002) (acknowledging, without further discussion, the phenomenon of path dependency in the Court’s opinions on military authority). But see Fallon, *supra*, at 436 (urging “capacious conception of path dependence [as] the idea that as the Court proceeds along a doctrinal path, both it and the attentive public assess what the Justices may properly do next in light of past experience”); Posner, *supra*, at 586 (recommending conceiving of the law as “a servant of social need, a conception which severs the law from any inherent dependence on its past”).

¹⁵⁶ See, e.g., FRIED, *supra* note 5, at 4 (“[B]ecause the Supreme Court in deciding constitutional cases has acted like a common law court . . . those five-hundred-odd volumes of Supreme Court Reports are the principle source of constitutional law, of constitutional doctrine.”); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (analyzing the Supreme Court’s 1974 Term to illustrate the use of common law reasoning in constitutional cases); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing in favor of constitutional interpretation based on the common law).

primary or sole constituent of litigation over the meaning or application of a statute, statutory and common law cases have one essential feature in common: a legislature may overrule or displace a court's decision on the meaning of either the common law or a statute. Because of this common feature, judges have tended to defer to earlier common law or statutory decisions so as to give legislatures a fixed target toward which they may legislate.

There is, however, less need for such deference in constitutional adjudication. The dynamic in constitutional adjudication is fundamentally different from that in common law judging. No one seriously disputes that in constitutional adjudication the primary constituent is the Constitution.¹⁵⁷ There is nothing analogous to the Constitution in the American common law system.¹⁵⁸ The Constitution provides the framework for decision in contrast to the common law in which the cases—the precedents, if you will—are the principal framework. Thus, precedent is a primary medium in the common law while precedent is, as a practical matter, not necessarily the primary one in constitutional adjudication. It is clearly not the only one in constitutional adjudication. The choice in a common law case is almost always defined by prior cases; one has to choose which prior case is most like the one before the court. In contrast, the choice in constitutional adjudication is often, but not always, between prior cases. In choosing between them, however, the Justices pay attention to what fidelity to the Constitution commands. The fact that our written Constitution makes it very difficult for democratic authorities to overturn the Court's constitutional decisions compels the Court to treat fidelity to precedent as a concern, but not necessarily the primary one in constitutional adjudication.

Moreover, constitutional history reflects a growing awareness among the Framers regarding the uniqueness of constitutional adjudication. To the extent that the Framers and Ratifiers openly discussed how precedent would function in constitutional adjudication, they initially appear to have believed it would be similar to how it operated in common law cases.¹⁵⁹ By the mid to late nineteenth century,

¹⁵⁷ Some people might dispute the clarity of the text of the Constitution, but no one seriously questions the status of the Constitution as the supreme law of the land.

¹⁵⁸ To be sure, for the English judges with whom the Framers were quite familiar, the unwritten Constitution provided a backdrop to litigation. In the revolutionary era, lots of common law talk informed constitutional interpretation even before any of the colonists had a written constitution. In a sense, we inherited a common law mode of constitutional argumentation from the British. See *supra* note 156 and accompanying text.

¹⁵⁹ See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–66 (1999) (surveying the Framers' commentary on precedent).

Supreme Court Justices changed their minds.¹⁶⁰ After decades of experience, the Justices realized that constitutional cases pose a different dynamic than common law ones and thus precedent came to function quite differently in the two systems. Because common law and statutory precedents could be easily overturned by legislatures, Justices generally seem to have concluded that these precedents should be given substantial deference so that the law would have substantial degrees of stability, predictability, and consistency until such time as lawmakers decided it needed to be changed. In contrast, the impossibility of overturning the Court's mistaken constitutional interpretation(s) except by the extraordinary means of amending the Constitution pressured the Court over the years to give less deference to its constitutional decisions than to its statutory ones.¹⁶¹ It gives its constitutional precedents relatively less deference to avoid the risk of allowing its mistakes to become permanent fixtures in constitutional law. Thus, the Justices developed the modern doctrine of *stare decisis*, which allows the Court to give some but not absolute deference to its prior decisions. This is essentially a prudential doctrine, which enables the Justices to balance the need to revisit some decisions in order to avoid writing their mistakes permanently into the Constitution and to uphold some erroneous constitutional interpretations for the sake of such institutional values as fairness, consistency, reliability, predictability, stability, and finality.

The Justices seem to have further recognized the now generally accepted fact that in our legal order, different kinds of precedents perform different functions. Common law precedents reflect the principle(s) judges or Justices try to vindicate.¹⁶² In contrast, some statutes are commonly thought to give courts the authority to fill any gaps in order to clarify the broad or ambiguous language within them;¹⁶³ legislatures generally enact statutes with the likelihood of their being subject to subsequent judicial review in mind. Consequently, there is an ongoing relationship—or, some call it a “dialogue”—between courts and legislatures that is largely absent in constitutional adjudication. When construing statutes, courts place a

¹⁶⁰ *Id.* at 661.

¹⁶¹ See Easterbrook, *supra* note 4, at 426 (“For a long time judges have said that statutes are different from common law and constitutional law.”).

¹⁶² See, e.g., *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992) (holding that “[i]t is a rule that precedent must be followed *except* when departure is necessary to vindicate other principles of law or to remedy continued injustice”) (citation omitted).

¹⁶³ See, e.g., 42 U.S.C. § 1983 (1994) (stating very generally a private right of action for the deprivation of rights by government actors); Sherman Act, 15 U.S.C. §§ 1–2 (2000) (stating broadly the illegality of trusts in restraint of interstate trade or commerce and of monopolies of any part of interstate trade or commerce); see also Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (“[S]tatute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”).

premium on not second guessing themselves. The reluctance to second guess serves several objectives, including maintaining the respect or good will of the other partner(s) in the dialogue and making it easier for legislatures to correct the Court's interpretation(s) by not changing them erratically. In constitutional adjudication, courts do not generally view precedents as evidence of the law. They view them as being synonymous with the law. As a practical matter, precedents achieve supremacy within the law because the Constitution is structured to allow for their displacement only through the narrow means of constitutional amendments¹⁶⁴ or overturning by the Court. In the process of constitutional adjudication, precedents may be subject to reconsideration on the basis of whether they comport with the Constitution or perhaps other sources such as original understanding. Nevertheless, they retain their status as law by the Court's, if not other institutions' willingness to stand by them unless or until they have been revised.¹⁶⁵

Finally, there is a striking difference in the rates of overruling constitutional and common law precedents. If there were similar degrees of path dependency of precedent in constitutional and common law adjudication, then the rates of overruling in each system ought to be similar. Yet, the rates are radically different. During the nineteenth century the Supreme Court overruled fewer than twenty constitutional precedents, but it overruled more than 120 in subsequent years.¹⁶⁶ It is tempting to infer from these numbers that the Court had greater respect for precedent in the nineteenth century.

One should, however, resist the temptation to believe that the Court no longer respects precedent as much as it once did. First, it was much easier to distinguish precedents in the first hundred years of the Republic than it has become in subsequent years. Early in the history of constitutional adjudication, the Court usually wrote on a blank or nearly blank slate. There were fewer, sometimes no, prior decisions on the issues that came before the Court. Even when there were some prior decisions in particular areas of constitutional law, it was not difficult for subsequent courts to distinguish or narrow them. As precedents have increased in number, distinguishing them has be-

¹⁶⁴ See U.S. CONST. art. V (prescribing the means for formally amending the Constitution of the United States).

¹⁶⁵ See *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (asserting that in constitutional adjudication, "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided").

¹⁶⁶ In the nineteenth century, the Court overruled only seventeen precedents. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 175-89 (1996) (listing all Supreme Court cases that have been overruled). By April 1, 2004, the Court had explicitly overruled a total of 133 constitutional precedents. GERHARDT, *supra* note 59 (manuscript at tbl. 1 on file with author).

come more difficult and potential conflicts have grown. With greater potential for conflict, the Justices confront greater pressure not to distinguish but to overrule conflicting precedent(s).

Second, as Thomas Lee suggests, the Justices recognized over time that constitutional adjudication was not analogous to common law decision making.¹⁶⁷ The soundest speculation is that this realization did not fully take shape until some time in the latter quarter of the nineteenth century.¹⁶⁸ No one knows for sure why it took so long for this realization to take hold, why it took hold at all, or why the Framers did not come to this realization more quickly. One searches in vain for explanations within the leading treatises or commentaries of the era. All that can be safely said is that once the realization took hold, the Justices increasingly acknowledged the possibility of error in constitutional adjudication. With this acknowledgment came a corresponding realization now shared by every Justice on the need in constitutional adjudication to balance their individual views on the merits of particular decisions with various institutional considerations, such as the need for stability or governmental reliance.

C. *The Significance of Rules and Standards*

The Justices' training and duties narrow their options for packaging their decisions. Generally, they frame their judgments as rules or standards. Rules and standards constrain the Court's decision making differently, and these differences illuminate how precedent has limited constraint on the Court's decisions.

By design, rules constrain choices more than do standards.¹⁶⁹ Rules constitute broad, inflexible principles that provide clear notice to those to whom they apply, and that allow minimal discretion from those charged with implementing or enforcing them. A speed limit is a prime example of a rule. Any driver who exceeds the speed limit is violating the law. The law allows for no exceptions. The only discretion permitted by the law is measuring the speed at which someone has been driving and then matching that speed against the maximum allowed to determine compliance.

The more absolutist the rule set forth by the Supreme Court in a given area, the more strongly it imposes path dependency on constitutional law. Interestingly, the Court frames relatively few judgments as rules. Good examples are the Court's holdings that Section Five of

¹⁶⁷ See Lee, *supra* note 159, at 712–28 (discussing the change from the Marshall Court to Justice Brandeis's approach in the Court's view of constitutional adjudication).

¹⁶⁸ See *id.* at 718–22 (chronicling this turn of events).

¹⁶⁹ On differences between rules and standards, see generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

the Fourteenth Amendment does not authorize the Congress to regulate private activity¹⁷⁰ and that the Commerce Clause forbids the Congress to commandeer the States.¹⁷¹ Another good example is the rule that Justice Scalia proposes in racial discrimination cases. His rule would forbid almost all racial preferences.¹⁷² If the Court were to adopt his suggested rule, it would significantly constrain the path of the Court's subsequent rulings on racial discrimination. Indeed, such constraint is Justice Scalia's objective.

In contrast, standards set forth criteria against which governmental action is measured.¹⁷³ Compliance with a standard entails discretion because a standard's implementation requires a decision maker to interpret the criteria in order to determine whether the criteria have been met. A classic example of a standard is a parent's will leaving his money to his children as long as they eat healthily. Someone must adjudicate what constitutes healthy eating and whether the food consumed fits within the applicable criterion. Standards abound in constitutional law. A few examples include the balancing tests the Court employs for determining the reasonableness of searches or sei-

¹⁷⁰ See *United States v. Morrison*, 529 U.S. 598, 621 (2000) ([T]he Fourteenth Amendment, by its very terms, prohibits only state action. . . . 'That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'") (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

¹⁷¹ See *New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). Two other examples are the Court's holdings that the Eleventh Amendment forbids the Congress from requiring the states to pay damages in judicial proceedings brought against them and that the police may not interrogate people in their custody without providing *Miranda* warnings. See *supra* text accompanying notes 121–24, 47–48. Congress may, however, abrogate states' Eleventh Amendment immunity in statutes that provide clearly for such abrogation. See *supra* note 118. Moreover, the Justices disagree over the clarity with which the Congress may abrogate Eleventh Amendment immunity, while there are so many exceptions to the rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966) that they are widely regarded as virtually swallowing the rule. See, e.g., Susan Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417 (1994) (arguing that developments on Fifth Amendment law encourage the violation of *Miranda* rights); Christopher E. Smith, *Criminal Justice and the 1996–97 Supreme Court Term*, 23 U. DAYTON L. REV. 29, 31 (1997) ("[T]he Court has allowed so many exceptions that *Miranda* survives only as a hollow symbol of the Warren Court." (quoting DAVID M. O'BRIEN, STORM CENTER: THE CONSTITUTION AND CRIMINAL PUNISHMENT: FIRST PRINCIPLES 1 (1997))); Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 HARV. L. REV. 2074, 2093 (2001) ("[T]he Court has imposed so many exceptions and qualifications to the *Miranda* rule that a growing number of confessions are admissible . . .").

¹⁷² See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part, dissenting in part) ("The Constitution proscribes government discrimination on the basis of race . . ."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (arguing that "only a social emergency rising to the level of imminent danger to life and limb" justifies racial classification at the state and local level).

¹⁷³ See Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 753–58 (1998) (demonstrating the application of constitutional standards).

zures,¹⁷⁴ the propriety of some congressional encroachments on the powers of other branches, and the Court's varying levels of scrutiny for discrimination in cases not involving racial discrimination. Even the kind of heightened scrutiny adopted by the majority in affirmative action cases such as *City of Richmond v. J.A. Croson Co.*,¹⁷⁵ *Adarand Constructors, Inc. v. Peña*,¹⁷⁶ and *Grutter v. Bollinger*,¹⁷⁷ is a standard. It does not operate mechanically like a rule, but it requires discretion on the part of adjudicators to determine if the government has demonstrated a compelling justification for a disputed practice.¹⁷⁸

Though the Supreme Court rarely addresses the significance of the difference between rules and standards, it did so in *Crawford v. Washington*¹⁷⁹ in 2004. The case involved the constitutionality of a conviction based in part on the admission into evidence of the statement of a woman who later refused to testify against her husband based on the marital privilege. Prior precedent had allowed such admissions as long as the evidence was "reliable." The Court overturned the conviction. In a unanimous opinion by Justice Scalia, the Court discussed the importance of framing its judgment as a rule rather than as a standard. Justice Scalia condemned the practice of employing standards, which allowed unpredictable, manipulative balancing by the Justices.¹⁸⁰ Justice Scalia defended the Court's deciding the case on the basis of an absolute rule¹⁸¹ because the Court could apply it more easily, other courts and authors could follow (and be bound by) it more easily, and it comported with the Confrontation Clause's apparently flat requirement that in every criminal case de-

¹⁷⁴ See *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (holding that reasonableness of a search or seizure can be determined by "balancing the need to search [or seize] against the invasions which the search [or seizure] entails'" (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)) (alteration in original)).

¹⁷⁵ 488 U.S. at 473 (1989) ("Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case . . .").

¹⁷⁶ 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

¹⁷⁷ 539 U.S. at 343 (2003) (upholding a narrowly tailored affirmative action program in a law school admissions program).

¹⁷⁸ Just how strenuous, or strict, the Court's standard should be is what divides the majority Justices in all the affirmative action cases.

¹⁷⁹ 124 S. Ct. 1354 (2004).

¹⁸⁰ See *id.* at 1373 ("By replacing constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . .").

¹⁸¹ *Id.* at 1370 ("[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . . The Clause thus reflects a judgment, not only about the desirability of reliable evidence, but about how reliability can be best determined.").

fendants are entitled to confront adverse witnesses.¹⁸² Accordingly, the Court overturned its precedent.

To date, no one has assembled, much less analyzed, data on standards and rules. The Court's judgments can be categorized in terms of the number of rules it has formulated; the breakdown of its rules into subject areas, and in terms of the rules' relative clarity; the number of standards (likely to be enormous); and the breakdown of standards into subject matter and clarity. These data will clarify patterns in the Court's decision making, including the areas in which the Court frames its most restrictive judgments and those in which it frames its least restrictive. The research will also clarify how many clearly stated judgments have failed to constrain or lead to predictable outcomes and how many resist categorization (or easy application). For instance, David Strauss has explained that *Brown v. Board of Education*¹⁸³ did not announce a clear principle of equal protection, but rather can be read as setting forth one of at least five different principles.¹⁸⁴ Similarly, in *Griswold v. Connecticut*, the majority announced several different theories supporting the outcome.¹⁸⁵ Research on how many other decisions declare unclear, ambiguous, or multiple rationales would illuminate the precedents, as claimed by Dworkin,¹⁸⁶ allowing "weak" and "strong" discretion.

Further research is also needed on determining the stability of standards and rules. Over time, a judicially-created rule or standard may not be path dependent. At least one reason is obvious: The meaning of a precedent in constitutional law ultimately depends less on what the Justices who created it thought it meant than on the meaning assigned to the precedent by subsequent Justices. For instance, the Justices who decided *Korematsu v. United States*¹⁸⁷ and *Brown* did not frame either decision with affirmative action in mind. Yet, in *Adarand* and *Croson*, a majority of Justices relied on *Korematsu* for the proposition that all race-based classifications must be subjected to strict scrutiny.¹⁸⁸ It did not matter that *Brown* had not even clarified

¹⁸² See U.S. CONST. amend. VI ("In all criminal prosecutions . . . the accused shall enjoy the right . . . to be confronted with the witnesses against him."); 124 S. Ct. at 1374 ("Where testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

¹⁸³ 347 U.S. 483 (1954).

¹⁸⁴ See Strauss, *supra* note 131, *passim*.

¹⁸⁵ 381 U.S. 479, 483, 487, 500, 503 (1965) (using "penumbral" rights, the Ninth Amendment, substantive due process, and mere rationality to overturn a state ban on contraceptive sales).

¹⁸⁶ See *supra* note 12 and accompanying text.

¹⁸⁷ 323 U.S. 214 (1944).

¹⁸⁸ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215-16 (1995) (stating that *Korematsu*'s pronouncement on the immediately suspect nature of curtailing a racial group's rights applies to the federal government as well as to the states.); *City of Richmond v. J.A. Croson Co.*,

the level of scrutiny it had employed, or that *Korematsu* plainly involved a race-based classification directed against a relatively powerless minority. What mattered was how Justices in the present and the future read the prior decisions in *Brown* and *Korematsu*. Path dependency turns out to depend in part on both how a particular majority has packaged a decision and how subsequent Justices construe the packaging of their predecessors.

D. The Constitutional Significance of Entrenchment

At least as a descriptive matter, the Supreme Court's constitutional decisions have become entrenched, or deeply engrained within our legal system, in at least three significant forms. Both individually and collectively, these forms pose serious challenges to the dominant social science models of the Court, particularly the attitudinal model.

The first form in which constitutional law becomes entrenched consists of foundational institutional practices. These are particular patterns or instances of decision making of the third branch (and other governmental institutions) that have become so deeply entrenched within our society that they may be undone only through extremely radical, unprecedented acts of political and judicial will. A prime example of a foundational institutional practice is judicial review. Over the course of two hundred years, judicial review has become a fixture in our constitutional order. Moreover, the scope of judicial review has grown not shrunk. While academics and political leaders sometimes urge abandoning the practice of judicial review altogether or at least seriously curbing the Court's jurisdiction,¹⁸⁹ their calls remain unfulfilled. Nor is there any likelihood, at least in the foreseeable future, that those calls would be heeded. There simply are no signs of a serious political or social movement to abandon judicial review or even to restrict it over politically and socially divisive subjects.

488 U.S.469, 501(1989) ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis).

¹⁸⁹ See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96 (1996) ("The Court . . . undertakes to decide hot button issues that are, strictly speaking, none of its business."); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the public, not the judiciary, should have ultimate control over interpretation of the Constitution); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154-76 (1999) (considering the jurisprudential benefits of abandoning judicial review). The Republican platform on which President George W. Bush successfully ran for reelection denounced "activist" judges and strongly endorsed radical measures that would strip all Article III courts, including the Supreme Court, to hear any constitutional claims regarding marriage, public acknowledgments of God, and the Ten Commandments.

A second form of entrenchment in constitutional law is foundational doctrine. Foundational doctrine refers to the Supreme Court decisions that govern, clarify, and undergird the Court's standard of review, or approach to, certain general categories, kinds, and classes of constitutional disputes. A prime example of this form of entrenchment is the Supreme Court's incorporation doctrine, which provides the basis for the Court's review of state action allegedly violating most of the Bill of Rights. The bulk of First and Fourth Amendment jurisprudence has been forged in cases involving the constitutionality of state, rather than federal, action. Incorporation makes judicial review of those cases possible. It does not dictate how the Court ought to resolve particular claims of state violations of most of the individual rights guarantees in the Bill of Rights, but it does provide the basis for judicial review of the pertinent claims. Other examples of foundational doctrine are the Court's standing and political question doctrines. Neither doctrine compels the Court to do anything in particular with respect to certain constitutional claims, but they provide a foundation and framework for the Court to use in deciding who may bring constitutional claims in Article III courts and what kinds of claims they may litigate there.

The third form of deeply entrenched constitutional law in our society consists of particular constitutional decisions that are well settled and practically immune to reversal. An obvious example of one such decision, to which I have previously alluded, is the Supreme Court's decision upholding the constitutionality of paper money.¹⁹⁰ Whatever its merits, the possibility of overturning the decision is nil. Overturning the decision is simply unthinkable. No one seriously suggests the Court ought to ever revisit it, not even legal scholars who generally believe erroneous decisions should not be entitled to any judicial deference.¹⁹¹ The extraordinary chaos provoked by its overturning has long led the Court (and anyone who would even think of challenging it) to allow the decision to remain standing.

Any effort to explain how the Justices decide cases must account for the entrenchment of constitutional law in each of these forms. One possible explanation is that these forms of entrenchment reflect the network effects of different judicial practices and decisions. Once other institutions invested in, or relied upon, particular judicial practices and decisions, they became more ingrained into our legal sys-

¹⁹⁰ See *infra* text accompanying note 209.

¹⁹¹ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) ("The previous decision may be clearly incorrect but nevertheless have become so embedded in the life of the nation . . . so fundamental to the private and public expectations of citizens and institutions, that the result should not be changed now."); Raoul Berger, *Original Intent and Boris Bitlker*, 66 IND. L.J. 723, 753-54 (1991) (citing George Washington's farewell address for the idea that even precedent ought not be easily overruled).

tem. The more ingrained a particular judicial practice or decision is the more difficult it is to undo.¹⁹² As layers become deeply embedded and encrusted, the more immune they become to judicial tinkering or excavation. Of course, why some rather than other, judicial decisions and practices become ingrained (at least to the extent of becoming effectively immune to overturning) remains a difficult question. Because these may be network effects, it might be useful to examine the network within which the Justices operate more closely. In particular, certain features of constitutional adjudication may be pertinent to the phenomenon of entrenchment. I turn next to perhaps the most obvious of these.

E. The Significance of Changes in the Court's Composition

A change in personnel on the Supreme Court is unquestionably the main trigger to a shift in precedent. It has been extremely rare for Justices to join in overruling a prior decision that they wrote or joined. In only four cases has a Court with no change in membership overruled itself.¹⁹³ In every other case in which the Court has explicitly overruled itself, the composition of the Court has been different from what it had been in the precedent being overruled. In particular, of the more than 130 cases overruled by the Court, seven involved a Court with one new Justice, seven involved a Court with two new Justices, nine involved a Court with three new Justices, fourteen involved a Court with four new Justices, seven involved a Court with five new Justices, fifteen involved a Court with six new Justices, eighteen involved a Court with seven new Justices, eleven involved a Court with eight new Justices, and seventy involved a Court with nine different Justices.¹⁹⁴ Interestingly, these figures suggest that, at least with respect to overruling, a Supreme Court decision probably has its strongest claim to generating path dependency immediately after it has been created. Its path dependency becomes more unpredictable over time, depending on the various factors discussed in this Section.

The fact that the most significant, explicit lack of deference to Supreme Court precedent coincides with the arrivals of new Justices

¹⁹² Barry Friedman and Scott Smith have referred to this phenomenon as our "sedimentary constitution," in which different doctrines have been built up over time one atop the other, just like different layers of sediment. See Barry Friedman & Scott Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 36 (1998) (describing the metaphor).

¹⁹³ *State Dep't. of Health & Rehab. Servs. v. Zarate*, 407 U.S. 918 (1972) and *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972), overruled by *Edelman v. Jordan*, 415 U.S. 651 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972), overruled by *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Harshman v. Bates County*, 92 U.S. 569 (1875), overruled by *County of Cass v. Johnston*, 95 U.S. 360 (1877); *Rose v. Himeley*, 8 U.S. (4 Cranch) 241 (1808), overruled by *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

¹⁹⁴ GERHARDT, *supra* note 59 (manuscript on file with author).

on the Supreme Court is not surprising. The Constitution allows only two ways to undo the Court's mistaken constitutional interpretations. The first is by constitutional amendment, while the other is to convince the Court that it erred. There is no question as to which of these is easier to accomplish. To be sure, it is difficult to convince the Justices who rendered an opinion that their opinion was wrong. As the statistics above indicate, this method is unlikely to work. Justices might resist overturning cases they joined in deciding for many reasons. One is to protect scarce judicial resources. Standing by their decisions simply allows the Court to build doctrine and to spend time on other cases and areas of the law. Another reason is the Justices' reluctance to admit they have made mistakes. Such admissions might make the Justices appear to be indecisive or incompetent.

It may, however, be easier to persuade Justices that the Court erred in opinions in which they did not participate. Indeed, it is possible new Justices might be more inclined to reconsider precedent. Many presidents appoint Justices with the hopes and expectations that they would vote to overrule particular decisions or doctrines.¹⁹⁵ Life tenure allows Justices to serve for a substantial amount of time on the Court, but they cannot serve forever. Vacancies on the Court provide presidents and senators with their best and only chances to directly shape the composition and direction of the Court.

Every president has recognized the significance of a vacancy on the Court, and in almost every presidential campaign the candidates have made assurances, if not pledges, with respect to the kinds of Justices they would nominate. For instance, Richard Nixon campaigned against the Warren Court's activism, particularly its decisions favoring criminal defendants and curbing states' rights.¹⁹⁶ He vowed that if elected he would appoint "strict constructionists" who would be tough on criminals.¹⁹⁷ Nixon's appointees helped to close some of the loopholes created or recognized by the Warren Court to help criminal defendants.¹⁹⁸ Subsequently, Presidents Ronald Reagan and George H.W. Bush both campaigned against liberal judicial activism to stifle school prayer and other majoritarian preferences, singled out

¹⁹⁵ Of course, another method is to pack the Court. Packing the Court requires, however, the Congress to expand the size of the Court, something the Congress has not done since 1869. See *infra* text accompanying note 335.

¹⁹⁶ See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 16 (2001) (discussing Nixon's search for a strict constructionist Justice).

¹⁹⁷ *Id.* at 15.

¹⁹⁸ See Jessica Natali, Note, *Criminal Procedure—The Supreme Court Gives Parole Officers Carte Blanche to Invade Parolees' Fourth Amendment Privacy Rights—Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998); 73 TEMP. L. REV. 451, 452 (2000) ("The post-Warren Court introduced the 'deterrence theory' and gradually began to retrench the rights of criminal defendants.").

Roe for especially virulent criticism, and vowed to appoint Justices who would, *inter alia*, overrule *Roe* and be tougher on criminals.¹⁹⁹ Their appointees helped to make overturning convictions and abortion regulations more difficult.²⁰⁰ More recently, President George W. Bush won re-election based in part on his vows to appoint Justices like Antonin Scalia and Clarence Thomas, and the platform on which he ran denounced the "activist" judges deciding *Roe v. Wade*, removing school prayer and the Ten Commandments from public life and schools, striking down laws criminalizing homosexual sodomy, and requiring a state to accept gay marriages.²⁰¹

Newly appointed Justices are likely to arrive on the Supreme Court with several possible attitudes regarding precedent. Some new Justices are not likely to feel any personal investment, or stake, in decisions in which they did not participate. Alternatively, newly appointed Justices might defer to earlier decisions because they want to show the same degree of respect for those decisions as they would hope theirs would get from their successors. Yet another possibility is that newly appointed Justices might recognize the need to respect precedent as a means to protect the Supreme Court institutionally from attacks for inadequately respecting the rule of law. Newly appointed Justices might also believe that the Court's status will be enhanced if they undo its mistakes and therefore improve the quality of the Court's output. And, of course, an entirely new set of possibilities might arise if the vacancy being filled were that of the Chief Justice. The person who acts as Chief Justice may feel different institutional pressures than Associate Justices. They may feel greater pressures, for instance, to forge majorities, to maintain cordial relations on the Court, to facilitate greater stability on the Court (and its decisions), to promote respect for the Court that bears their name, or to pay more attention to how the public perceives the Court.

While these are only some of the possible attitudes newly appointed Justices might have, a Justice's attitudes toward precedent might not be fixed. It is always possible that the interaction on the Court might shape a new Justice's attitudes about precedent or about the Court itself. It is even possible that the interaction among the Justices might produce unforeseeable or unexpected outcomes. As

¹⁹⁹ See Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 67 n.2 (1993) (citing Reagan's and Bush's positions on abortion).

²⁰⁰ See Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1122 (1994) ("The Supreme Court approved governmental regulations affecting women's choices about abortion that would never have been approved by the Justices comprising the majority in *Roe v. Wade*.").

²⁰¹ See *The Republicans: The Convention in New York, the Platform on Gay Marriage*, N.Y. TIMES, Aug. 30, 2004, at A8 (reprinting text of the Republican platform).

the next Section shows, the impact that Justices have on the Court and their abilities to control the path of constitutional adjudication are limited or unpredictable at best.

F. Rational Choice Theory

The path dependency of a particular judicial decision depends in part on the size and jurisdiction of the court creating it. A single judge on an inferior court will not decide cases in the same manner (or be subject to the same pressures or norms) as a three-judge panel or the nine-member Supreme Court of the United States. A federal district judge, for instance, has relatively little discretion in handling precedent.²⁰² She is bound by a directly superior court's precedents; they impose an order—indeed, they often contain directions—on what she must do.²⁰³ If a district judge were deciding a question on which the federal appeals court for her circuit had not yet ruled, she would have the discretion to follow whichever reasoning she found to be the most persuasive.²⁰⁴ As for her own rulings, a judge is bound to the practical extent to which she strives for consistency and coherence.²⁰⁵

The dynamics of the nation's highest appellate court—the Supreme Court—are unlike those of any other court. A common, but misleading image of the Court is that of a single Justice or a monolithic institution. It is neither. Adrian Vermeule has emphasized that the Court really is a “they” and not an “it.”²⁰⁶ Nor do the Court's precedents relate to its decision making as they do to other courts. Whereas the Supreme Court's precedents are binding on inferior courts, its judgments are not, by definition and design, subject to review by any other tribunal. The Court's precedents apply horizontally to each of the Justices, or as persuasive authority from an equal rather than a superior authority. Rational choice theory posits that under

²⁰² See Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1028 (1996) (arguing that “[l]ower courts are generally obligated to interpret and apply existing Supreme Court precedents faithfully, having little discretion to determine that old precedent has lost its binding force”).

²⁰³ See Caminker, *supra* note 28, at 818 (“[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court ‘superior’ to it.”).

²⁰⁴ See *Don E. Williams Co. v. Comm’r of Internal Revenue*, 429 U.S. 569, 573 (1977) (observing that because the Seventh Circuit Court of Appeals had not yet ruled on an issue, the Tax Court was free to decline to follow decisions of the Third, Ninth, and Tenth Circuits).

²⁰⁵ Caminker, *supra* note 28, at 853 (“[I]nternal consistency strengthens external credibility.”).

²⁰⁶ Adrian Vermeule, *The Judiciary is a They, Not an It: Two Fallacies of Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005) (pointing to the underlying assumptions about the judiciary's collective character that render generally accepted views on statutory interpretation tenuous).

such circumstances in which decisions are made by majority vote and not subject to review by a higher authority, the Court will not act as a single person would. Instead, it will produce inconsistent, unpredictable, and even irrational decisions because its members have different orderings and intensities of preferences and because of the ensuing phenomenon of cycling.²⁰⁷ Rational choice theory suggests that the Justices will not share similar orderings, or intensities, of preference regarding precedent. They will differ in how they prioritize precedent, and they will differ in how strongly they each feel about the institutional benefits and costs of fidelity to precedent. These differences ensure that the Court will often produce outcomes that are not the primary preferences of each of the Justices in the majority. Its reasoning and holdings will thus tend to be inconsistent and thus lack an essential element of path dependency. Periodic changes in the composition of the Court exacerbate the potential inconsistencies in outcomes because new members will introduce into the decision making process new or different orderings, or intensities, of preferences from those held by their colleagues.

It is, however, not impossible for members of a multi-membered institution sometimes to share similar orderings of preference. One can expect, for instance, Justices to agree, if ever asked, not to overrule either *Brown v. Board of Education*²⁰⁸ or the *Legal Tender Cases*.²⁰⁹ We also know that the Court will not be asked (at least for the foreseeable future) to reconsider either of those cases. At the very least, we can expect the Court to be asked to consider more difficult, more divisive questions and not whether it ought to stand by a precedent as well-settled as *Brown*.

Presidents (and their advisers) have yearned to control the Justices' individual or collective orderings of preferences. This desire has led them to try to control those orderings, if only at the margins, by choosing Supreme Court nominees based on their likely ideologies.²¹⁰ Ideologies supposedly constrict or preclude preferences. They presumably restrict how judges approach certain questions, re-

²⁰⁷ See MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 46 (2000) ("Cycling arises when, for any given outcome, another has majority support in a direct binary comparison. . . . [W]hen a [voting paradox] rule is employed, no outcome is stable. For this reason, we can conceive of [voting paradox] rules as possessing the characteristic feature of unlimited majority veto . . ."); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815-17 (1982) (giving a hypothetical example of how cycling operates in judicial decision making).

²⁰⁸ 347 U.S. 483 (1954).

²⁰⁹ 79 U.S. (12 Wall.) 457, 553-54 (1870), overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869) (finding constitutional the federal law that made interest-bearing United States notes legal tender in payment of debts previously contracted).

²¹⁰ See generally *Hearing*, *supra* note 23, at 1-2 (explaining the relevance of ideology to federal judicial selection).

ardless of the facts in particular cases. Hence, presidents will often choose nominees with the ideologies—or commitments to approaching constitutional issues in particular ways—they would prefer to drive the Court's jurisprudence. The more vacancies a president can fill the greater control he can hope to have over the Court's decision making, particularly if his appointees share certain pre-commitments on the issues likely to come before the Court. Consequently, it can hardly be a surprise that the presidents who have filled the most vacancies have had the most influence over the course of the Court's decision making: George Washington with eleven, Andrew Jackson with six, Abraham Lincoln with five, William Howard Taft with six, and Franklin Roosevelt with nine appointments.²¹¹ These presidents each preferred to choose nominees based on their likely judicial ideologies.

The major problem with presidents' efforts to pack the Court, other than the practical ones of ensuring a number of vacancies and a hospitable Senate, is that sometimes presidents guess wrong. Sometimes presidents, or their advisers, simply fail to accurately predict the path of the Court's docket.²¹² No president who appointed at least six Justices ever lived long enough to see his appointees eventually fracture over unexpected issues that came before the Court.²¹³ Over time, the Justices fractured over the rulings in particular cases and how to interpret, or apply, the precedents they had created.

G. The Absence of Rules for Interpreting Precedents

The absence of any formal rules for the Court to follow in construing its decisions further undermines the path dependency of precedent in constitutional adjudication. The Court has no rules for determining the breadth or narrowness of a particular ruling, the degree of deference a Justice ought to give a prior decision, the requisite conditions for determining error in constitutional law or for overruling constitutional precedents, the proper way to prioritize sources of decision, or the best method of reading prior cases, including the appropriate level of generality at which to state the principles set forth within precedents.

²¹¹ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 99–100 (rev. ed. 2003) (discussing the greater likelihood of achieving long term goals by appointing several justices).

²¹² On the unpredictability of Supreme Court appointments, see generally HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 69–70 (3d ed. 1992).

²¹³ See *id.* at 51–52 tbl. 1. (indicating the following presidents appointed six or more Justices: George Washington with ten; Andrew Jackson with six; William H. Taft with six; and Franklin D. Roosevelt with nine).

If we genuinely want precedents to have path dependency, we should be prepared to change the conditions under which they are made and interpreted. Rational choice theory suggests that one way to preclude or inhibit the Court from producing inconsistent (and thus not path dependent) precedents is through structural alterations to the Court's decision making process. These changes could include requiring a supermajority vote of the Justices or the passage of a minimal amount of time before formally reconsidering one of its rulings.

It is no accident that the Court has never had such rules (or never will, in all likelihood). The Court has avoided, or refused, such rules for several reasons. The first is structural. The supermajority requirement for an overruling would undoubtedly transform the dynamics on the Court in particularly undesirable ways. It would, for instance, allow a minority to prevent a simple majority from resolving a particular constitutional claim as long as there were a potential for its decision to weaken a precedent. The requirement would no doubt make changes in constitutional doctrine more difficult than they already are.²¹⁴

Moreover, heightening the requirements for the Court to overrule itself will conflict with the independence of the Justices. Most, if not all, are likely to want for themselves and therefore for each other, the complete, unfettered discretion to rule as they see fit in a given case. The current system allows each an equal opportunity to influence outcomes, but the supermajority requirement would give simple majorities a distinct advantage in preserving their decisions.

Second, the Court would be forced to abdicate its constitutional duty to decide cases or controversies if it were prohibited from reviewing the scope of some prior decisions. During a period in which the Court lacks a supermajority disposed to overrule a contested prior decision, a majority might be precluded from reaching any decisions that might be construed as narrowing and therefore effectively overruling any precedents. Litigants who perceive that they might benefit from such hesitancy would rush to have their claims adjudicated in the interim. Furthermore, the supermajority requirement might pressure a majority to avoid being candid about its attitudes towards a precedent for fear that their candor might preclude them from reviewing a case in which the fate of precedent is at risk.

Third, requiring a supermajority vote for the Court to overrule itself might allow errors in constitutional interpretation to be preserved indefinitely or needlessly. No matter how compelling the rea-

²¹⁴ See generally ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989) (examining structural evolution in Supreme Court doctrine).

sons may be for overruling a precedent, no overruling could be achieved without the requisite minimum number of votes. If those votes were not forthcoming, whatever harm that the erroneously decided precedent has caused would remain in effect.

Even if the Justices were to craft rules to guide their decision making on precedent, the rules may not constrain the Justices' preferences. Adrian Vermeule's notion of a "veil rule" nicely captures this dimension of constitutional adjudication.²¹⁵ He is interested in demonstrating the difficulty of the Court's developing rules of decision making that will genuinely constrain how it decides cases. To illustrate his point, he suggests that if the Justices were to adopt a rule beforehand to govern their decision making in constitutional cases—the one realm in which they are completely free from legislative correction—the knowledge that they would have to live or comply with this rule would lead them to avoid rules that would unduly restrict their discretion and instead develop rules that allow themselves a lot of wiggle room.²¹⁶ In other words, they would develop a rule that does not preclude them from achieving their preferences. He thus suggests that while the Justices might have developed the basic rule of limited deference to precedent as a veil rule designed presumably to tie their hands in constitutional adjudication, it does no such thing. It does not constrain outcomes in part because the parties are free to construe past cases as broadly or as narrowly as they wish depending on whether they want to follow or distinguish them. Even if there were rules for constructing or construing precedents, there is no way to ensure uniform application of them. It is unlikely the Justices would unanimously or consistently agree on such basic things as how to apply the rules and how to implement or revise them.

The likely impossibility of implementing any rules on the Court for constructing or construing its prior decisions is maddening to many students and observers of the Court. Even more maddening for many people is the fact that predicting long-term change in constitutional law is harder to explain and to control than short-term change.

H. The X-Factor

More than two-hundred years after ratification of the Constitution, we still have many more questions than answers about how enduring shifts in constitutional understanding and law occur. The enduring constitutional changes to which I refer are not just formal

²¹⁵ Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (explaining the use of the veil rule to suppress self-interested behavior).

²¹⁶ *Id.*

constitutional amendments. Article V sets forth relatively difficult procedures for formal amendments to the Constitution.²¹⁷ Hence, in spite of support from President George W. Bush, a constitutional amendment prohibiting gay marriage is quite unlikely to succeed.²¹⁸ This is not a comment on the merits of the proposal. Instead, it is an acknowledgment of the unlikelihood—of which I suspect even the President and his supporters are aware—that at least two-thirds of each chamber of Congress and three-fourths of the states would support an amendment prohibiting, or impeding, gay marriage. The odds are always against supermajorities in the Congress and among the states for formally amending the Constitution. Less formal changes in constitutional law, such as shifts in the Court's doctrine or popular understandings of the Constitution, are easier to achieve than formal amendments. No one, for instance, predicted the boldness of the Massachusetts Supreme Judicial Court in declaring that the state's constitution prohibited denying marriage to two people of the same gender, much less that three members of the majority would have been Justices appointed by Republican governors.²¹⁹

I refer to the unpredictable elements of enduring shifts in constitutional understandings and doctrine as the X-factor. Social scientists are more comfortable and adept than legal scholars at examining the possible connections between doctrine and social, political, and economic developments.²²⁰ For instance, social scientists have demon-

²¹⁷ See U.S. CONST. art. V (requiring two-thirds of each house of Congress to propose amendments and three-fourths of the state legislatures to ratify them).

²¹⁸ See Cass R. Sunstein, *President Versus Precedent: Bush's Reckless Bid for an Amendment Defies an Oval Office Tradition*, L.A. TIMES, Feb. 26, 2004, at B13 (explaining how President Bush's deviation from previously successful efforts to amend the Constitution likely dooms his proposed amendment to ban gay marriage).

²¹⁹ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) ("[B]arring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

²²⁰ Among legal scholars, Bruce Ackerman has proposed the most ambitious theory of effecting enduring constitutional changes in the absence of formal amendments satisfying the tough requirements of Article V of the Constitution. Ackerman claims that there are five stages through which national political leaders work in conjunction with the American public to alter constitutional law (and fundamental constitutional understandings) without complying with the procedures set forth in Article V of the Constitution. See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768 (1992) (reviewing BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991) and criticizing Ackerman's promotion of non-Article V amendments); Sanford Levinson, *Transformation in American Constitutionalism, Transitions*, 108 YALE L.J. 2215, 2235 (1999) (arguing that Ackerman's theory provides too little guidance); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 924-30 (1992) (reviewing BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991)) (criticizing Ackerman's theory as relying on simplistic historical analysis). See generally BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 4-5 (1998). Ackerman's critique has provoked intense criticisms. Richard Posner critiques Ackerman's scheme for determining constitutional moments thus:

strated how interest groups (and other organizations) have helped to frame the Court's agenda.²²¹ Another interesting study indicates a pattern in which the Court tends to favor the side with the larger number of amicus briefs filed on its behalf.²²² This pattern surfaced in *Grutter v. Bollinger*,²²³ in which most amicus briefs supported the University of Michigan Law School's admissions program. The same pattern held in *Dickerson v. United States*²²⁴ in which the vast majority of police departments and other law enforcement organizations asked the Court to reaffirm *Miranda*.²²⁵ But neither *Dickerson* nor *Grutter* involved an enduring shift in doctrine; *Dickerson* reaffirmed *Miranda*, while *Grutter* reaffirmed the test that the Court used since 1976 for determining the constitutionality of higher education admissions programs.

The relationship of certain factors to enduring shifts in constitutional doctrine has yet to be clarified. It remains a promising field of research in constitutional law. For instance, some political scientists and a growing number of legal scholars have argued that the Supreme Court tracks majoritarian sentiments.²²⁶ Yet, no one has yet explained how we, or Supreme Court Justices, ought to determine majoritarian preferences on the questions that have come before the Court. Moreover, scholars have yet to show how well Justices measure majoritarian preferences, which constitutional opinions track or diverge from majoritarian preferences, which opinions reaffirm or replace doctrine, and in which of these cases judicial closure is or is not

[Ackerman's] thesis is wrong and even dangerous. Wrong because the history of constitutional law since 1868 cannot be explained as the effort of judges to interpret and preserve moments of revolutionary consciousness. Dangerous because it invites judges to treat the popular will as a form of higher law entitling them to disregard ordinary concepts of legality.

RICHARD A. POSNER, *OVERCOMING LAW* 228 (1995); see also Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115, 142-43 (1994) ("But I fear that the criteria for constitutional moments [will] become so malleable that almost any significant popular movement addressed to a constitutional issue will suffice.").

²²¹ See, e.g., H.W. PERRY JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 127 (1991) (arguing that certain highly respected interest groups have better success in the certiorari process); Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639 (1993) (examining the frequency, goals, kinds, issues, and efficacy of interest group litigation).

²²² Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000) (studying cases from 1946-1995 that triggered twenty or more amicus briefs).

²²³ 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part) (contesting the majority's use of the amicus briefs in their opinions).

²²⁴ 530 U.S. 428 (2000).

²²⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²²⁶ See, e.g., Kevin L. Yingling, Note, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81, 91 (1999) (suggesting "the Court's countermajoritarian ability has been vastly overstated").

achieved. The data would help to clarify the kinds of cases in which shifts occur and are enduring. If shifts were to occur largely in cases not tracking majoritarian preferences, then one might expect some kind of backlash. At the very least, it might be illuminating to measure whether shifts contrary to majoritarian preferences are enduring or not. A related question involves the extent to which the support of national political leaders is essential for constitutional changes to be enduring. A number of scholars have argued that such support was essential for *Brown*²²⁷ and its progeny in order for *Brown*'s promise to begin to be realized,²²⁸ and that the constitutional foundations for the New Deal have been settled for several decades in part because all three branches fell squarely into line behind it.

Almost seven decades after the Court's apparent abdication in 1937²²⁹ of meaningful review of progressive economic regulations, scholars still argue over whether it was a consequence of the pressure that President Roosevelt's infamous Court-packing plan had applied on the Court, a genuine change of mind for some Justices, no radical shift in Commerce Clause doctrine, or other factors.²³⁰ In any event, the difficulties scholars have had in reaching consensus on the constitutional significance of the events of 1937 derives in part from several factors that complicate analysis of the Court.

The first and most basic factor is the impossibility of proving a negative. Proving categorically that a particular factor or set of factors, had no effect on or relevance to an outcome is impossible, though we can use our common sense to calculate the odds. For instance, I am unable to prove the sun will rise tomorrow morning, but the odds, based on past experience (and our knowledge of astrophysics) favor it. Moreover, some events might be so removed in time and space from the event we are studying that we can exclude, or at least

²²⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²²⁸ See, e.g., TUSHNET, *supra* note 189, at 145 (1999) ("The Court's decision in *Brown* might best be understood as enforcing a national political view against a regionally dominant one that happened to have excessive power in Congress."); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996) ("*Brown* is better understood as the product of a civil rights movement spawned by World War II than as the principal cause of the 1960s civil rights movement."); Gerald N. Rosenberg, *Bringing Politics Back In*, 95 NW. U. L. REV. 309 (2000) (reviewing LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) and criticizing Powe for placing too much emphasis on *Brown*'s influence over the Civil Rights Movement); see also Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001) (discussing the impact of social norms on judicial decision making).

²²⁹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (ruling that the National Labor Relations Act was a constitutional use of the Commerce power, thereby turning away from previous rejection of New Deal legislation).

²³⁰ The debates over Professor Ackerman's controversial theory of constitutional change reflect the differences of academic opinion over the constitutional events of 1937. See *supra* note 220.

substantially discount, their relevance on the bases of logic and human experience. Within the boundaries of our experience and logic, we search for relatively plausible influences on certain outcomes.

The second complication in searching for the elusive X-factor is figuring out the significance of the Justices' choices about what to reveal and not to reveal in their opinions. This complication calls attention to the question of the relative importance of the Court's legal reasoning. Poking holes in the Court's reasoning hardly proves it was irrelevant to the outcome, or to the votes, in particular cases. Nor does supposing a different explanation for the outcomes or votes establish its relevance. For instance, one explanation for *Bush v. Gore*,²³¹—the need for the Court to have averted a constitutional crisis²³²—does not appear in any of the opinions. No doubt, this explanation is consistent with the outcome, as is the possible disdain some Justices might have had for Congress or other political authorities to settle the dispute between Bush and Gore. This explanation provides the motivation for finding an equal protection violation in the case, but it does not constitute proof of one. Moreover, the Justices had to make a showing as a group that there was such a violation of the Constitution; the group dynamics within the Court are not irrelevant to the choices that Justices must make in both reaching decisions and formulating how to express them. Explaining how coalitions are reached and maintained, as well as the choices made in opinion writing, are perennially fruitful sources of inquiry in constitutional theory.

A third factor is the Court's unique status as the most secretive, least understood of America's governmental institutions. Almost everything we know about the Supreme Court is based on its public statements and actions. It is rare for information about what occurs on the Court to become public in the absence of the release, or publication, of the Court's records (including the Justices' personal papers). One reason for the great fanfare surrounding the publication of a Justice's private papers is because it fills a void about the influences on a particular Justice's deliberations, apart from the briefs in cases, the Justice's background, and interaction with clerks and colleagues. Focusing on individual performance on the Court helps to illuminate a particular vote or career on the Court, but it comes at a price. It reinforces our proclivity for stressing individuality on an institution that never takes final action through individual action (except, of course, through the delegations of opinion-writing responsi-

²³¹ 531 U.S. 98 (2000).

²³² Judge Richard Posner favors this approach. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001) (viewing the decision in terms of "judicial pragmatism").

bility or through temporary stays granted by the Justices in their capacities as circuit Justices). A critical question that focusing on individual performances on the Court cannot answer is whether the Court can ever be said to be a significant actor or institution apart from aggregating the individual actions of its members. Focusing on the extent to which precedent constrains the Court usually risks becoming a preoccupation with the attitudes, or strategies, of individual Justices and thus risks overlooking how precedent influences constitutional law, besides constraining what the Court does in a particular case. The next Part suggests a different vantage point from which to better understand the multiple functions of precedent in constitutional law.

IV. NEW INSTITUTIONALISM AND THE MULTIPLE FUNCTIONS OF PRECEDENT

To comprehensively account for the limited path dependency of precedent, a shift in perspective is in order. This shift must treat the Court as an institution rather than as the aggregation of the individual Justices' votes. An emerging, new perspective on the Court focuses on this institutional aspect. This approach operates under various names, such as post-positivism, the new institutionalism, and/or historical institutionalism.²³³ Hereafter, I will refer to it interchangeably as post-positivism or institutionalism, although such scholarship is relatively new and scholars may share some but not many beliefs about how the Court functions. This Part initially describes the post-positivist or institutionalist perspective on the Court and its critique of the competing attitudinal and rational choice models. I then show how this perspective helps to enrich our understanding of how precedent functions in constitutional law.

A. *Beyond the Attitudinal and Rational Choice Methods*

The post-positivist or institutionalist perspective differs from the attitudinal and rational choice models in several important respects. First, post-positivists are not troubled by the indeterminacy of the law. Instead, they believe, as Howard Gillman has explained, "judging in good faith" is all we can expect of judges.²³⁴ Indeed, post-positivists

²³³ See SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 432 ("[P]ostpositivist legalists now argue that all that can be expected of judges is that judges *believe* that they follow legal principles."); SUPREME COURT DECISION MAKING, *supra* note 3.

²³⁴ Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the 'Legal Model' of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 486 (2001) (quoting STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 44 (1992)); see also SEGAL & SPAETH, *ATTITUDINAL*, *supra* note 7, at 48.

have amassed considerable empirical data to support their conception of judges and Justices as trying to “make the best decision possible in light of [their] general training and sense of professional obligation.”²³⁵ Critics of this perspective disclaim it as not only impossible to falsify but as possibly an outcome of motivated reasoning—the process by which people find reasons to explain outcomes or behavior to which they are already committed.

This critique fails, however, to grapple with many, if not all, of the most significant insights and research of institutionalists. Institutionalists recognize that understanding the Court requires doing more than merely aggregating the individual votes of the Justices. They also appreciate the implications of the specific institutional context in which Supreme Court Justices operate. Fundamental to their project is recognizing that the institutional context in which Justices operate has substantive effects (for instance, by imposing certain norms), while attitudinalists and rational choice theorists suggest that the Court largely, if not wholly, operates as a cipher for the Justices’ individual preferences. While rational choice theory suggests that the different orderings and intensities of preference among the individual Justices might produce inconsistent outcomes, institutionalists seek to illuminate patterns in the Court’s decision making that can be fairly attributable to the Court as such. The institutionalist objective is to determine the operative norms of constitutional adjudication, including the Court’s distinctive practices.

Post-positivists have gathered an impressive amount of empirical support for their claim that structure shapes judicial decision making. Though not strictly falsifiable, the evidence can be assessed on the bases of logic, coherence, experience, and history.

One of the leading post-positivists, Howard Gillman has comprehensively summarized significant post-positivist research.²³⁶ Some of the research focuses on showing how legal variables explain and shape how constitutional doctrine has evolved, including the Court’s due process and commerce clause decisions from the late nineteenth century to the New Deal era,²³⁷ the Warren Court’s failure to constitu-

n.12 (“To postpositive legalists, the only required influence of law is a subjective influence that resides within the Justice’s own mind.”).

²³⁵ Gillman, *supra* note 234, at 486.

²³⁶ *See id.* at 490–91 (providing examples of empirical studies that seem to undermine behavioralist claims).

²³⁷ *Id.* at 490 (citing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993)).

tionalize welfare rights,²³⁸ and the developments of modern free speech²³⁹ and death penalty²⁴⁰ jurisprudence. Other research focuses on demonstrating how the judicial process shapes practices and choices within constitutional adjudication, including "the use of precedent by lawyers in case briefs and by Justices in conference discussions, where discussion of legal materials cannot be merely a matter of public relations";²⁴¹ "precedential effects on other [lower] courts";²⁴² "judicial practices, such as writing concurring and dissenting opinions (forms of expressive behavior that are not about policymaking), inviting legislative overrides, and patterns of case selection during the cert-granting process";²⁴³ and how "distinctive jurisprudential categories or doctrines have influenced voting and opinion writing on the Supreme Court."²⁴⁴ At the very least, post-positivist research has undermined the claim that the post-positivist model is nothing more than motivated reasoning (or impossible to disprove). As Gillman explains, this research has "[a]ll [been] written by scholars who were mindful of the debates in the literature about legal versus personal influences on decision making, and all attempted to show how the judges' expressed beliefs and patterns of behavior could only be explained with reference to distinctive legal norms."²⁴⁵ Moreover, this research counters the attempts by attitudinalists, rational choice theorists, or others to rule out the relevance of legal variables and the legal process to judicial decision making.²⁴⁶

²³⁸ *Id.* at 490 (citing ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996)).

²³⁹ *Id.* at 490 (citing MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991)).

²⁴⁰ *Id.* at 490 (citing LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992)).

²⁴¹ *Id.* at 480 (citing Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996)).

²⁴² *Id.* at 481 (citing John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502, 504 (1980); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987)).

²⁴³ *Id.* at 481 (citing Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 305-09 (1997)).

²⁴⁴ *Id.* at 481 (citing JOHN BRIGHAM, CONSTITUTIONAL LANGUAGE: AN INTERPRETATION OF JUDICIAL DECISIONS (1978); BUSSIERE, *supra* note 238; CUSHMAN, *supra* note 237).

²⁴⁵ *Id.* at 491.

²⁴⁶ Gillman concludes that

the major difference [between their empirical work and Spaeth's and Segal's] seems to be that Spaeth and Segal create what some legalists would consider a fairly artificial standard for what should count as a legal frame of mind (gravitate toward precedents from which you dissented) while these other scholars made it a focused object of their research to understand and reconstruct the actual legal standards under which these judges were operating.

B. Precedent's Multiple Functions

In this Section, I demonstrate the utility of the institutionalist perspective for illuminating the multiple functions of precedent, or the Court's prior decisions, besides as a constraint on the Court in constitutional law. Attitudinalists and rational choice theorists tend to overlook or discount these functions, even though these functions enrich our understanding of how the law influences judicial and other authorities' constitutional decision making.

1. Precedent as a Modality of Argumentation

The first, most common function of precedent is as a modality of constitutional argumentation. In a classic treatise, Philip Bobbitt describes precedent as one of the six conventional modalities of constitutional argumentation. The other five are text, history, structure, ethos, and pragmatism (or consequences). Bobbitt suggests that none of these modalities can establish its primacy based on its own terms, for it would merely be engaged in circular reasoning. Instead, Bobbitt maintains, the strongest arguments in constitutional law are based on combinations of the best possible arguments made within each of the classic modalities.²⁴⁷

Although attitudinalists and rational choice theorists of course recognize that precedent functions as a modality of argument, they do not attach much, if any, independent significance to that function. They are able to discount precedent, even as a modality of argumentation, because they define it narrowly as merely the outcome of a particular case. Yet, precedent is much more than that. To be sure, it is the ruling of a particular case. Whenever lawyers are confronted with a legal question, their first thought is almost always about precedent—they consider what the Court has had to say about their issue. The popularity, or prominence, of precedent as a modality of argumentation in constitutional law is evident from the fact that the Justices rely on precedent far more than they do on any other source of constitutional meaning. Indeed, there is not a single case in which the Supreme Court has failed to cite at least a single precedent as a source of authority for its decision. The same cannot be said for other sources, such as original understanding.²⁴⁸ The litigants and

Id. at 492.

²⁴⁷ See Philip C. Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1303 (1989) (explaining that modalities "are not true in themselves, but provide criteria by which we can determine whether statements about the American Constitution are true"); see also PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (describing the six modalities under which a constitutional argument may be made).

²⁴⁸ See *supra* note 149 and accompanying text.

Justices know that they cannot make a decision without coordinating it with precedent and they employ precedent-based arguments because other Justices will understand them and will respond to them. A basic question the Justices will also invariably ask in the course of making a constitutional decision is what kind of precedent they will make. Precedent serves as a modality of argumentation for the parties in every constitutional dispute. Sometimes, it is the only source of authority employed by the parties and the Court. A prime example is *Bush v. Gore*,²⁴⁹ in which the Court's voting rights decisions were the only sources cited and debated by the Justices. The decision turned on the construction of precedent.

Serving as a modality of argumentation requires more than merely serving as a source for a particular argument. It also entails providing some legal legitimacy for constitutional argumentation, including sources of authority, interpretive methodologies, and constitutional conceptions. Precedent thus serves as a forum, or testing ground, for each of these things, and how the Court handles these things in constructing precedents significantly shapes constitutional argumentation within and outside of the judicial process. For instance, the Court defers to original understanding in some disputes but not in others.²⁵⁰ In some cases, the Court employs intratextual analysis—clarifying the meaning of a constitutional term by examining how it has been used throughout the Constitution.²⁵¹ In still other cases, the Court clarifies the relevance of historical practices and tradition.²⁵²

Closely related to the significance of precedent as a modality of argumentation is the function performed by prior decisions as a con-

²⁴⁹ 531 U.S. 98 (2000).

²⁵⁰ Compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806–15 (1995) (looking to the Framers' intent in holding that a provision of the Arkansas Constitution that imposes term limits for members of Congress violates the Federal Constitution), with *Brown v. Bd. of Ed.* 347 U.S. 483, 492 (1954) (stating that "[the Court] cannot turn the clock back to 1868 when the Amendment was adopted" in holding that racial segregation in public schools violates the equal protection guarantee of the Fourteenth Amendment).

²⁵¹ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749–76 (1999) (discussing use of intratextualism by the Court in *Roe v. Wade* 410 U.S. 113 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *McCulloch v. Maryland*, 17 U.S. 316 (1819), *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); and *Marbury v. Madison*, 5 U.S. 137 (1803)).

²⁵² See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) ("History and tradition are the starting point but not in all cases the end point of the substantive due process inquiry."); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (according fundamental rights status to interests "deeply rooted in history and tradition"); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (suggesting, *inter alia*, that tradition supports a right of privacy broad enough to include a woman's right to choose); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (using historical practices to illuminate the meaning of the Establishment Clause and the intent of the drafters); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (discussing the necessity of "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . .").

ceptual framework for understanding constitutional law. Ronald Dworkin has famously conceived of precedent as a heuristic for judicial action as well as a genuine constraint on judicial discretion.²⁵³ From this perspective, precedent provides an interpretive framework for understanding the world and an authoritative structure defining which judicial actions are appropriate. Precedent serves, in other words, as a short-hand for understanding and even characterizing judicial decision making. For instance, some cases—*Dred Scott v. Sandford*,²⁵⁴ *Lochner v. New York*,²⁵⁵ *Brown v. Board of Education*,²⁵⁶ and *Roe v. Wade*²⁵⁷—are universally synonymous with judicial activism. Some cases, again including *Dred Scott*, illustrate the risks of originalism.²⁵⁸ Chief Justice Marshall's opinion in *McCulloch v. Maryland*²⁵⁹ and the Court's famous fourth footnote in *United States v. Carolene Products*²⁶⁰ are significant for, *inter alia*, employing a methodology for constitutional interpretation—representation-reinforcement—that is basic to understanding many modern federalism and equal protection cases.²⁶¹

2. Precedent as Binding Authority

The legitimacy of a precedent—a prior decision's force as binding or persuasive authority—depends on at least three, interrelated factors. The first is the constituencies to which a prior decision either applies or has appeal. There are five potential constituencies, including the parties to a case or controversy, other actors confronting similar but not identical legal questions, lawyers and other jurists, the general public, and political leaders and institutions. Among these groups, the ones most tightly bound by a particular constitutional de-

²⁵³ See generally RONALD DWORKIN, *LAW'S EMPIRE* 225–38 (1986) (incorporating a conception of precedent into his notion of law as integrity); DWORKIN, *supra* note 12, at 110–15 (describing precedent as a “gravitational force” that constrains judgments).

²⁵⁴ 60 U.S. 393 (1856) (granting appellate courts the discretion to consider issues not specifically before the court).

²⁵⁵ 198 U.S. 45 (1905) (interpreting the Fourteenth Amendment as guaranteeing a freedom to contract).

²⁵⁶ 349 U.S. 294 (holding that racial discrimination in public schools is unconstitutional).

²⁵⁷ 410 U.S. 113 (1973) (ruling that there is a constitutionally protected right to privacy and to choose abortion).

²⁵⁸ See, e.g., Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37 (1993) (arguing that *Dred Scott* “carries a warning” for critics of *Casey* and *Roe*).

²⁵⁹ 17 U.S. (4 Wheat.) 316 (1819) (holding that Congress has the power to establish a bank).

²⁶⁰ 304 U.S. 144, 152–53 n.4 (1938) (addressing the scope of judicial review of the constitutionality of an act of Congress).

²⁶¹ See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985) (arguing that *Carolene Products* established a lasting premise of judicial interpretation).

cision are the parties who litigated it.²⁶² Otherwise, a prior decision is persuasive authority whose relevance depends on the extent to which the circumstances in which it was made are similar to those in other cases.²⁶³ Disputes that are identical to those involved in decided cases will have strong incentives to settle, unless the litigants bringing the action or considering appeals have reason to believe the Court might change its mind. The more closely analogous a dispute to one that has been decided the more likely it will either settle or not make its way to the Supreme Court because lower courts will simply follow what they regard as binding or authoritative vertical precedent.

The second factor is context. The impact, or binding authority of a Supreme Court ruling, may depend on the purpose for which it is being used. In the previous Section, I suggested precedent may constitute an important validation of other sources of constitutional meaning, constitutional arguments, or particular interpretive methodologies. Such validation need not be limited to actions within the judicial process, for judicial precedents can give respectability, or a stamp of approval, to constitutional arguments or perspectives lending a prestige these arguments may not otherwise have. Thus, a judicial decision may be instrumental not just to a court but to other authorities as validating the use of a particular interpretive method, such as original understanding, rather than one not yet approved or employed specifically in constitutional adjudication, such as Bruce Ackerman's provocative theory of constitutional moments.²⁶⁴

Judges and Justices are hardly the only authorities that validate constitutional arguments or perspectives. Indeed, the validations of judicial precedents often depend on the support they generate or receive within the political branches. Political legitimacy entails approval of particular judicial decisions by national political authorities.²⁶⁵ A judicial decision does not have political legitimacy merely because it claims to have it.

²⁶² See generally HENRY CAMPBELL BLACK, *HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS* § 81 (1912) ("[T]he rule of res judicata prevents the parties . . . from maintaining a new and different suit upon the same cause of action . . . or from raising the same issues which were settled for them by a former judgment.").

²⁶³ See *id.* §§ 1, 15 (discussing the relationship between degrees of factual similarity in cases and their precedential value).

²⁶⁴ ACKERMAN, *supra* note 220, at 4–5 ("This country's Constitution focuses with special intensity on the rare moments when transformative movements earn broad and deep support for their initiatives. Once a reform movement survives its period of trial, the Constitution tries to assure that its initiatives have an enduring place in future political life.").

²⁶⁵ Cf. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 784 (2002) ("Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution . . .").

The extent to which a judicial precedent achieves political legitimacy depends on three interrelated factors. First, a judicial decision's legitimacy depends on social acquiescence. Generally, the American people may have come to accept a particular judicial decision as a rule of law in our society. Second, it has to receive the genuine, enduring commitment of political institutions to the principle(s) set forth within it. To the extent that the Court's decision in *Brown* can be fairly described as a success, it depended on critical support from presidents and the Congress over time. Third, persuasion is instrumental to the social and political acceptance of a particular judicial decision. Here, I do not mean that judicial decisions can only achieve political legitimacy if their reasoning is so strong as to convince opponents that they have been correctly decided. Instead, I mean that judicial decisions need to be grounded in sufficiently persuasive reasoning, argumentation, or even imagery as to cultivate, maintain, or win the support of successor Courts and the leadership of other institutions.

A third factor is how different constituencies construe the relevance of a judicial decision. As we have seen, the absence of rules for creating or interpreting precedent effectively leaves subsequent interpreters to determine its significance.²⁶⁶ Opportunities for determining the meanings of judicial decisions abound, including in each instance of constitutional adjudication and every time the Court or other authorities are called upon to consider either following or distinguishing some judicial precedent(s). A particular judicial decision cannot, at least as a practical matter, easily retain the meaning its creators assigned to it but instead is perennially vulnerable to being reinterpreted once it falls within the jurisdiction of other authorities. Hence, a judicial decision that touches upon a similar, perhaps identical, question of constitutional meaning is relevant only to the extent that the other branches claim it to be.

3. *Setting the Supreme Court's Agenda*

Another important function of precedent is framing the Court's agenda. Precedent does so in at least two ways. The first is to frame the Justices' choices of which constitutional matters not to hear. The Justices' respect for precedent is perhaps most evident in these choices. While the Justices' decisions to deny certiorari are considered not to have any formal legal significance, refusals to hear cases may nevertheless be significant for providing insights into the Jus-

²⁶⁶ See *supra* notes 169–88 and accompanying text.

tices' priorities.²⁶⁷ The Court's refusal since 1939 to grant certiorari in a case involving a Second Amendment²⁶⁸ issue might discourage litigation to enforce the Second Amendment,²⁶⁹ though as litigation over its scope percolates in the lower courts, pressure undoubtedly increases on the Court to hear a Second Amendment claim.²⁷⁰ Until the Court agrees to hear a Second Amendment claim, its silence is bound to provoke speculation; perhaps the Court wants the matter to percolate for a while longer in the lower courts, perhaps many if not most Justices wish to avoid the question for as long as possible, and maybe some Justices prefer to deal with other constitutional issues relating to gun control before ever getting to the Second Amendment.

The Court's prior decisions also frame its choices of which matters to hear. Patterns or trends in the Court's certiorari decisions reveal its agenda. They may also reveal the areas of constitutional law that the Justices might be interested in trying to clarify or in which they may be disposed to reconsider certain precedents. For instance, from 1994 to the present, federalism has been the area in which the Rehnquist Court has granted the most petitions for certiorari.²⁷¹ This trend contrasts sharply with the Rehnquist Court's first eight years during which it granted certiorari most frequently in cases involving social issues, such as abortion and school prayer.²⁷²

In setting its agenda, the Court inevitably signals its certiorari patterns to litigants, lower courts, and other authorities. It also may en-

²⁶⁷ This deliberation is framed by litigants' choices of which cases to try to bring before the Court. While there may be many issues on which a Justice would like to rule, she is bound by the fact that the Court is able to decide only matters brought to it through the certiorari process and by the Court's rule providing that the approval of at least four Justices is needed to grant petitions for certiorari.

²⁶⁸ See U.S. CONST. amend. II (providing that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed").

²⁶⁹ See *United States v. Miller*, 307 U.S. 174, 178 (1939) (determining that the Second Amendment did not guarantee a citizen's right to possess a "shotgun having a barrel of less than eighteen inches in length" because that weapon had not been shown to be "ordinary military equipment" that "could contribute to the common defense").

²⁷⁰ See, e.g., *United States v. Parker*, 362 F.3d 1279, 1280, 1284 (10th Cir. 2004) (holding that the Assimilative Crimes Act, which prohibits carrying a loaded firearm "in a vehicle or on a public street" does not violate the Second Amendment), *cert. denied*, 125 S. Ct. 88 (2004); *Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003) (affirming the constitutionality of a county ordinance prohibiting firearm displays at county fairs), *cert. denied*, 125 S. Ct. 60 (2004); *Silveira v. Lockyer*, 328 F.3d 567, 578 (9th Cir. 2003) (denying a petition for a rehearing en banc of the decision to uphold California's Assault Weapons Control Act), *cert. denied*, 124 S. Ct. 803 (2003); *United States v. Emerson*, 270 F.3d 203, 264–65 (5th Cir. 2001) (holding that Second Amendment rights are subject to reasonable restrictions), *cert. denied*, 124 S. Ct. 2435 (2004).

²⁷¹ See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003) (describing the dominant theme of the "second" Rehnquist Court, which began in October 1994, as "constitutional federalism").

²⁷² See *id.* at 569–70 (contrasting the "first" Rehnquist Court's tendency to hear controversial social issues with the "second" Rehnquist Court's federalism theme).

courage further litigation in some areas, particularly when its opinions are vaguely worded, narrowly reasoned, and under-theorized. It may sometimes strongly discourage further litigation, at least before it rules on the same or similar questions, as was plainly the case with *Nixon v. United States* in which the Court unanimously declared challenges to removal proceedings in the Senate are nonjusticiable.²⁷³

4. *The Structural Functions of Precedent*

Precedent performs several important structural functions. First, precedent imposes order on the legal system. At its most basic, precedent settles disputes between parties (including the other branches), frames judicial and other agendas (in response to what the Court has done), and clarifies the rules of the game for what litigants need to do in order to prevail in constitutional adjudication. Besides framing legal analysis of a constitutional question, precedent helps to illuminate the constitutional underpinnings of particular statutes or actions, fashions doctrine (or the accumulated rulings or judgments that constitute the pertinent law within particular domains of human or governmental endeavor),²⁷⁴ influences the Justices' different constitutional outlooks, affects how the legal system works, and determines how disputes get settled.

Second, the Court's prior decisions illuminate and shape constitutional structure. Precedent demonstrates the Court's place in the American political and legal order as well as the scope of the Court's authority.²⁷⁵ Precedent influences the relationship between the Court

²⁷³ 506 U.S. 224 (1993); see also *Bush v. Gore*, 531 U.S. 98, 109 (declaring "our consideration is limited to the present circumstances for the problem of equal protection in election processes generally presents many complexities.") The Court's declaration is widely understood as an attempt to preclude its opinion from generating any path dependency. Ironically it will avoid having path dependency only if the opinion itself has path dependency, that is, if the Court adheres rigidly to its own directive.

²⁷⁴ The continuity that Charles Fried describes as an essential attribute of constitutional doctrine is not an essential aspect of the decisions within particular domains of constitutional law, for "precedent is only a presumption. If constitutional doctrine is not to become rigid, driven by the path-dependence of common law adjudication, there must be room for distinguishing, narrowing, and abandoning precedent altogether. The dissent contains the germ of such changes of direction." FRIED, *supra* note 5, at 11–12. I differ with Fried in that I believe, as I have suggested throughout this Article, that the so-called "germ of . . . changes of direction" is not confined to dissenting opinions but rather is a function of a number of different factors. Fried ultimately appears disposed to agree with the limited path dependency of precedent, for he concedes later on the same page that "doctrine and precedent constrain more or less loosely." *Id.* at 12. This is my point exactly. In the final analysis, constraint based on precedent cannot be presumed in constitutional adjudication for a number of reasons, not the least of which is what a person defines as the relevant precedent(s) or law on the question before the Court or other lawful decision maker.

²⁷⁵ See, e.g., Ronald C. Kahn, *Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419, 1446–49 (1997)

and other governmental branches or institutions. Precedent also clarifies the extent and limits of the Court's authority.

Third, precedent serves as an outlet for airing differences of opinion about constitutional matters and for resolving disputes as peaceably as possible.²⁷⁶ The point is not just that opinions reflect the differences among the Justices but that the Justices know they may express their differences in their opinions if necessary. Thus, prior decisions that do not contain clear rulings or majority opinions nevertheless provide an outlet for differences of opinion that cannot be accommodated in a single opinion as in cases dealing with such socially divisive issues as the rights of biological parents in *Michael H. v. Gerald D.*²⁷⁷ and the right to die in *Washington v. Glucksburg*.²⁷⁸ At the same time, some of the Court's opinions might inflame political controversies, such as the disastrous opinion in *Dred Scott v. Sandford*,²⁷⁹ which unquestionably helped to lead to the terrible bloodshed in the Civil War,²⁸⁰ while some other opinions arguably settled heated controversies without bloodshed, as in *Bush v. Gore*.²⁸¹

Moreover, precedent may take the pressure off other branches. In some cases, precedent allows the Court to dispose of issues that the other branches would prefer not to decide, or to provide cover for decisions or actions with which the other branches might have expected and could otherwise have learned to live. For instance, once the Court had struck down a state statute prohibiting flag burning for violating the First Amendment,²⁸² Congress quickly passed a federal anti-flag burning statute that most members could have expected to have been similarly struck down by the Court.²⁸³ It is possible many members of Congress, who may have thought it was politically impor-

(examining how historical institutionalists view the Supreme Court with respect to other political actors).

²⁷⁶ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (considering the abortion issue); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (examining the issue of marital privacy for the use of contraception); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (dealing with the reach of executive authority).

²⁷⁷ 491 U.S. 110 (1990) (plurality opinion) (finding no substantive due process right of a natural father to establish his paternity).

²⁷⁸ 521 U.S. 702 (1997) (holding that Washington's ban on physician-assisted suicide did not violate substantive due process, with only five Justices supporting the majority opinion).

²⁷⁹ 60 U.S. (19 How.) 393 (1856) (denying freedom to a slave, even though he had traveled to a free state).

²⁸⁰ See generally Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 MONT. L. REV. 277, 296 n.65 (2002) (noting that *Dred Scott* precipitated a crisis because Lincoln and the Congress refused to accept the ruling as legitimate).

²⁸¹ 531 U.S. 98 (2000).

²⁸² See *Texas v. Johnson*, 491 U.S. 397 (1989) (overturning a Texas flag desecration statute).

²⁸³ See *United States v. Eichman*, 496 U.S. 310 (1990) (striking down the federal Flag Protection Act of 1989 in part because of the fact that the federal law could not be distinguished from the Texas statute struck the previous year).

tant to denounce publicly flag burning, privately accepted (perhaps with relief) the inevitability of the Court's striking down the statute in question. Conversely, members of Congress voted for a federal hate crimes statute²⁸⁴ with the almost certain knowledge it was consistent with the Court's decision upholding an almost identical state statute.²⁸⁵

Fourth, the Court facilitates what social scientist James Scott describes as "projects of legibility."²⁸⁶ Scott argues that the government cannot regulate—or manipulate—something unless the government can see it. Legibility is the process through which the government, often working with the Court (or other governmental institutions), makes something visible in order to facilitate its governmental regulation. Ken Kersch demonstrates, for instance, how precedent can facilitate the states' achievement of the law's regulatory imperatives.²⁸⁷ This was particularly true, he suggests, in the late nineteenth and early twentieth centuries during which the interaction among the national political and legal elites over the content of constitutional doctrine on privacy was indispensable to the project of constructing the scope of the Congress's Commerce Clause power.

Moreover, precedent might not facilitate seeing but rather clarifying the point beyond which the government may not look. *United States v. Morrison*²⁸⁸ is a good example of this phenomenon. In *Morrison*, the Court explained that the civil remedies provision of the Violence Against Women Act was defective in part because Section Five of the Fourteenth Amendment empowered the Congress to regulate only state activity.²⁸⁹ The Court's ruling clarified that the Congress's authority under Section Five of the Fourteenth Amendment did not reach any private activity. This ruling is also telling, particularly with respect to the power of precedent, because it is entirely consistent with the Court's 1883 decision in the *Civil Rights Cases*,²⁹⁰ in which the Court held precisely the same thing. *Morrison* thus closely follows the

²⁸⁴ Hate Crimes Sentencing Enhancement Act, 28 U.S.C. § 994 (1994).

²⁸⁵ See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993) (finding that the Wisconsin hate crimes statute did not violate the First Amendment's prohibition of punishment for a person's beliefs).

²⁸⁶ JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 9 (1998). Scott explains how governments have systematically designed projects intended "to arrange the population in ways that simplified the classic state functions of taxation, conscription, and prevention of rebellion," and that the legibility of such projects has been "a central problem in statecraft." *Id.* at 2.

²⁸⁷ See Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 *STUD. AM. POL. DEV.* 61, 67 (2002) (describing the project of legibility for constitutional rights to privacy).

²⁸⁸ 529 U.S. 598 (2000).

²⁸⁹ *Id.* at 619–21.

²⁹⁰ 109 U.S. 3 (1883).

Civil Rights Cases in holding that congressional power does not extend to private activity. In addition, the Court in *Morrison* ruled that the Commerce Clause empowered the Congress to regulate private economic activity, but that the activity at issue in *Morrison* did not qualify as economic activity.²⁹¹ Consequently, the Court held that the Commerce Clause did not authorize the Congress to manipulate private, non-economic activity. In short, *Morrison* clarified the realm into which the federal government may not intrude by wielding either its Commerce Clause power or its authority under Section Five of the Fourteenth Amendment.

Fifth, precedent exposes the operations of the Supreme Court to the public, the legal community, and the world. Granted, we expect judges and Justices to turn to sources through which they can better or more appropriately understand the Constitution; however, Supreme Court precedents also function as lenses through which people can better understand the Court's role within our constitutional order. Indeed, precedent perhaps more than any other source performs bipolar operations in which it serves not only as a medium through which the Court views other sources, its own authority and the authority of the other branches but also as the starting point or basis for how others view the Court.

Furthermore, precedent helps to foster stability in constitutional law in a few ways. First, even though precedent generally lacks strong dependency, it serves as a fundamental unit of exchange in constitutional adjudication. Indeed, it is the primary, if not only, source of constitutional meaning that lawyers are formally trained to analyze. Particular questions of constitutional meaning might have resisted closure or be in a state of flux, but in constitutional adjudication all participants can expect that precedents are the fundamental medium of exchange. Discourse about constitutional law is impossible without reference to precedent.

Second, judicial closure contributes to stability in constitutional law. Firmly settled separation of powers precedents help to define basic governmental organization and relationships;²⁹² other precedents have provided the foundation of modern administrative law²⁹³

²⁹¹ See 529 U.S. at 613.

²⁹² See generally Easterbrook, *supra* note 4, at 431-32 (maintaining that some precedents can have immutable structural effects on governmental operations); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 730-34, 749-52 (1988) (demonstrating how precedents have shaped governmental structure).

²⁹³ See, e.g., *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (holding that absent a finding of clear congressional intent, courts should defer to agency interpretation of organic statutes); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding that even in an informal adjudication, an agency must give an adequate explanation and supply a sufficient factual record to permit a reviewing court to determine if the agency has engaged in rea-

and environmental regulation;²⁹⁴ and still other precedents involving individual liberties allow citizens to organize their lives better.²⁹⁵

5. *Dialogue*

Among legal scholars, a longstanding, popular characterization of the function of precedent has been facilitating a national dialogue about the meaning of the Constitution.²⁹⁶ The participants in the dialogue are varied and include Justices and judges, the leaders of other governmental institutions, interest groups, the media, and the public. Precedent helps frame, inform, and facilitate a dialogue among and within the branches on constitutional questions.

In performing this function, precedent does not necessarily foreclose or compel outcomes but rather helps to clarify the range of possible outcomes in particular disputes. No Justice is free, at least as a practical matter, to simply disregard all existing precedent that is arguably relevant to a particular decision. At the very least, Justices must reconcile their preferred methodological approaches (or commitments) with precedent. In formulating this balance, the Justices must therefore engage in a dialogue not just with themselves but also with their colleagues (and even their predecessors) and oftentimes with the leaders of other branches.

The extent to which prior judicial decisions foster discourse is consistent with the limited path dependency of precedent. A dialogue does not have to be linear or predictable in order to constitute a dialogue. The discourse among interested parties may be about the Supreme Court's errors, the problems with particular decisions, and

soned decision making); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (upholding a statute restricting the power of the president to remove heads of non-executive agencies).

²⁹⁴ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding that agency ordered moratoria on development are not per se Fifth Amendment takings); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (defining categorical regulatory takings and creating an exception for regulations rooted in background principles of law); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (interpreting the Endangered Species Act as prohibiting further construction of a multi-million dollar dam in order to preserve an endangered species). See generally Gerhardt, *supra* note 69 (detailing the Court's reliance on existing rather than revolutionary constitutional doctrine to shape the course of environmental regulations).

²⁹⁵ See generally Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (employing numerous precedents to illustrate the importance of the reliance interest of those who follow precedent for the preservation and promotion of the rule of law).

²⁹⁶ See generally NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 28 (2004) ("Judicial supremacy finds no support in our legal development. The Court recognizes time and again that constitutional values are hammered out as part of a broader dialogue."); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988) (observing several examples of forces external to the courts that influence constitutional interpretation); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 668-70 (1993) (explaining how the courts synthesize society's views and turn them back to society for further discourse).

the relative scope of each branch's authority to address particular problems. Nor does a constitutional dialogue have to be friendly; it can be heated and even involve strongly worded condemnations of each other's constitutional judgments. Moreover, judicial closure seems antithetical to discourse; it signifies the end of debate, rather than its perpetuation or maintenance. The more flux, the richer the dialogue.

6. *The Supreme Court as Moral Educator*

A notion of precedent once popular among academics was that it served the important function of educating the public and other governmental actors about the Constitution.²⁹⁷ For some, precedent was instrumental to such education; it was the principal means by which the Court spoke to others, including the public, about the Constitution. While other institutions produced commentaries of one sort or another on the meaning of the Constitution, none could match the Court for the quality of its reasoned elaboration about constitutional meaning. The leaders of other institutions simply lacked the time, training, and resources to produce any constitutional commentary nearly as thoughtful as the Court's. Moreover, the special training of Supreme Court Justices, coupled with their insulation from political pressure or retaliation, ensured that the Court's pronouncements on the Constitution would be the least informed or affected by the partisan self-interests of its members. To the contrary, the institutional virtues of the Supreme Court imbued its pronouncements on the Constitution with a special, moral authority no other governmental institution could match.²⁹⁸

Within the past few years, the ideal of the Court as moral educator has crumbled. For one thing, the notion of the Court as educator was hard to square with our democratic system of government. It presumptively treated popular discourse about the Constitution with disdain, and granted an exalted status to Supreme Court Justices that reinforced their elitist status in American society. Moreover, as the Court increasingly issued controversial opinions, it was no longer clear that the Court did a better job than other institutions or even the public in constructing the Constitution.²⁹⁹ In addition, the notion

²⁹⁷ See, e.g., Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (providing a well-known defense of the Court as educator on constitutional questions). See generally Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (commenting on the literature on the Court as educator).

²⁹⁸ See Rostow, *supra* note 297, at 208 ("The prestige of the Supreme Court as an institution is high . . . and the members of the Court speak with a powerful voice.").

²⁹⁹ See, e.g., MARK V. TUSHNET, *supra* note 189, at 104-08 (1999) (discussing *Nixon* as presenting an argument for self enforcement of constitutional values).

of the Court as educator encouraged Justices to expand on constitutional issues, while a number of scholars, including Alexander Bickel, favored reticence or less discourse as a virtue.³⁰⁰ Consequently, admiration for the Court as an educator has fallen into disfavor, even though its precedents continue to provide perhaps a more visible and extensive discussion of constitutional meaning than any that the other branches provide.³⁰¹

7. *The Historical Functions of Precedent*

Supreme Court decisions perform at least two historical functions. First, the Court's constitutional opinions often are intertwined with historical events to such an extent that it is not possible to understand those events without considering the degree to which the Court's opinions contributed to their development. Perhaps the most famous example of this function is *Dred Scott v. Sandford*,³⁰² "which divided the Court and the nation" over the extent to which the Constitution resolved the moral, political, social, and legal dilemma posed by slavery.³⁰³ *Dred Scott* set the stage for the Civil War and was a major target of the Reconstruction amendments. *Dred Scott* is important to the Justices and others "as the precedent overturned by the Reconstruction Amendments and as an important symbol for the consequences of the Court's reliance on questionable historical analysis and interference with socially divisive issues."³⁰⁴

A more recent example of a particular decision of the Court as intertwined with an historical event is *Bush v. Gore*.³⁰⁵ The decision did not merely settle a dispute. The dispute over who was entitled to claim Florida's electoral votes in the presidential election cannot be understood without reference to the Court's decision in resolving

³⁰⁰ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-83 (2d ed. 1986) (discussing several devices of judicial restraint); see also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-6 (1999) (describing the merits of judicial minimalism, or "saying no more than necessary to justify the outcome"); Cass R. Sunstein, Foreword, *Leaving Things Undecided, The Supreme Court 1995 Term*, 110 HARV. L. REV. 4, 48 (1996) (observing that the narrowness of Justice Powell's *Bakke* opinion "left the democratic process ample room to maneuver" and was "an effort to promote both democracy and deliberation").

³⁰¹ Obviously, each of the other branches issue public commentaries on the Constitution. They do so through a much wider variety of means than do the Justices, and they are much freer than Justices with respect to the people whom they may consult in formulating constitutional judgments.

³⁰² 60 U.S. (19 How.) 393 (1856).

³⁰³ See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 84 (1991).

³⁰⁴ *Id.*

³⁰⁵ 531 U.S. 98 (2000).

that dispute. That is, the story of the post-electoral dispute of 2000 cannot be told without including the Court as a central player.³⁰⁶

Particular judicial decisions can also reflect the attitudes of a particular historical period. For instance, the development of the civil rights movement in this country was intertwined with a long list of cases in which the Justices' attitudes on race not only evolved independently but also paralleled or mirrored those of the era in which they lived.³⁰⁷

The second historical function performed by precedent is that it can constitute a chronicle of constitutional history for the Court and others. Because the Court is a critical interpreter of and player in historical events, its decisions preserve, illuminate, and provide a perspective on the nation's social, political, and legal traditions.³⁰⁸ The Court defines the relevant past for itself and the other branches. The Court's construction of the past, including its own past, is a part of its decision making. The Court may not only legitimize recourse to original understanding or historical practices, but its take on original understanding or historical practices is presented to other institutions as well as to subsequent Courts as authoritative. The point is not that its historiography is inexorably binding or immune to review but rather that it cannot be lightly ignored. On the Court in particular, historiographic significance has to be acknowledged so that it can be accepted or built upon in subsequent cases.

Furthermore, the Court's choice to join one side in a historical debate is a matter of historical concern.³⁰⁹ There are also many other precedents providing useful surveys of constitutional history, including *Nixon v. United States* on the scope of Congress's impeachment authority,³¹⁰ *Jones v. Alfred H. Mayer Co.* on the history of the Thirteenth Amendment,³¹¹ *New York Times v. Sullivan* on the original understanding of the scope of the First Amendment's protection of the press

³⁰⁶ See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001) (discussing the politicization of the *Bush v. Gore* decision).

³⁰⁷ See Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 227 n.84 (1998) (noting that "the Court has not always been suspicious of racial classifications; the Justices' attitudes toward race evolved over time (as did society's attitudes)").

³⁰⁸ See, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1043-47 (1990) (arguing that our judicial precedents and traditions have shaped our current attitudes and practices).

³⁰⁹ See, e.g., *United States v. Butler*, 297 U.S. 1, 65-66 (1936) (agreeing with Hamilton's rather than Madison's understanding of the scope of Congress's spending power); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 332 (1819) (agreeing with Hamilton's rather than Madison's understanding of the Necessary and Proper Clause); see also HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 134-49 (1990) (detailing the regularity with which the Court has cited historical support for its siding with the President on separation of powers issues).

³¹⁰ 506 U.S. 224, 229-30 (1993).

³¹¹ 392 U.S. 409, 428-32 (1968).

from libel actions,³¹² *Harmelin v. Michigan* on the extent to which the Framers meant for the Eighth Amendment to guarantee proportionality of punishment,³¹³ and *Marsh v. Chambers* on both the original understanding of the Establishment Clause and the practice of opening legislative sessions with prayers.³¹⁴ The more each branch, including the Court, relies on the Court's historiography, the more entrenched prior decisions built on it will become, and the less likely the Court will be to revisit or reconsider it.

Moreover, the Court's mediations of past events are arguably more reliable than the histories compiled by other governmental institutions. First, the Court is more adept than the other branches at retrospective analysis. The president and the Congress tend, for the most part, to be prospective, or forward-looking, when tackling constitutional problems. Second, non-judicial authorities traditionally do not have to explain the reasons for their interpretations of history as fully or as thoroughly as the Court does. Third, the adversaries who appear before the Court closely scrutinize the information submitted to and issued by the Court. A fundamental premise of the adversarial system is that strong advocacy on each side of a dispute will expose the flaws of the historical material submitted to the Court. The adversarial system provides a check on the Court's historiography, so that if there is a flaw in it then the Court can make corrections during the course of subsequent litigation.

No case better illustrates this dimension of adjudication better than *Lawrence v. Texas*.³¹⁵ The Court rejected the earlier conclusion, reached in *Bowers v. Hardwick*,³¹⁶ that the states had traditionally criminalized homosexual sodomy.³¹⁷ Instead, the Court in *Lawrence* revised its historiography of governmental regulation of homosexuality to show that the states had not criminalized homosexual sodomy (as opposed to sodomy generally) and that the criminalization of homosexual sodomy is a relatively recent phenomenon in this country.³¹⁸

Lawrence does not, however, signify the end of the debate over either gay rights or government's authority to restrict the opportunities available to gays and lesbians. After *Lawrence*, the debate has evolved. It has moved into the public domain, where it has focused on the necessity for a constitutional amendment protecting traditional marriage and on the needs for states to amend their Constitutions to

³¹² 376 U.S. 254, 270–71 (1964).

³¹³ 501 U.S. 957, 978 n.9 (1991).

³¹⁴ 463 U.S. 783, 786–89 (1983).

³¹⁵ 539 U.S. 558 (2003).

³¹⁶ 478 U.S. 186 (1986).

³¹⁷ *Id.* at 192.

³¹⁸ *Lawrence*, 539 U.S. at 571–73.

prohibit same-sex marriages.³¹⁹ In short, the dialogue on same-sex marriage has become a dramatic instance of constitutional activity outside the Court.

C. Non-Judicial Precedent

As the debate over gay marriage demonstrates, the Court is by no means the only constitutional actor that creates precedents. On November 3, 2004, not only was President George W. Bush re-elected but also the voters in eleven states voted to ban gay marriage.³²⁰ Whatever anyone thinks of those results, the voters in those states, as well as the president who supports a constitutional amendment banning gay marriage, are expressing their constitutional judgments. These and other constitutional judgments, which have not been addressed and may not ever be overturned by courts, comprise an important set of precedent. As constitutional scholar Philip Bobbitt observes, "there are as many different kinds of precedent as there are constitutional institutions creating them."³²¹ It is perhaps more precise to note that there are at least as many different kinds of precedents as non-judicial authorities creating them, for non-judicial authorities each create large, diverse numbers of precedents, which perform as many functions as judicial precedents do, including facilitating a national dialogue about constitutional meaning and implementing constitutional values. An entire article, or book, would be needed to analyze the constitutional significance of non-judicial precedent fully, but it ought to suffice here to note that the social scientists who analyze whether precedent constrains the Court have completely ignored the constitutional significance of non-judicial precedent. Social scientists tend to view constitutional law strictly from the vantage point of the Supreme Court, and thus they have missed understanding constitutional law from the vantage point of non-judicial authorities.

³¹⁹ On President Bush's call for a constitutional amendment to protect states' efforts to preserve traditional marriage and outlaw same-sex marriage, see Peter S. Canellos, *Bush Seeks Marriage Amendment; From Both Sides, Danger of Alienating Moderates*, BOSTON GLOBE, Feb. 25, 2004, at A1. For the debate engendered by Bush's and other officials' pleas with respect to traditional marriage, see, for example, Elizabeth Mehran, *Acceptance of Gays Rises Among New Generation; But a Slim Majority of Americans Still Oppose Adoptions by Same-Sex Couples and Favor a Ban on Homosexual Marriage*, L.A. TIMES, Apr. 11, 2004, at A1; Gayle White, *GOP Gays Mull Dilemma over Bush: They Like President, Hate Marriage Ban He Backs*, ATL. J. CONST., Apr. 18, 2004, at 4A.

³²⁰ See James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4 ("The amendments [banning same-sex marriage] . . . passed overwhelmingly in all 11 states")

³²¹ Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1383 (1994) (book review).

Viewing constitutional law from the perspective of non-judicial authorities illuminates, most importantly, the vastness of the realm of constitutional activity outside the Court. Indeed, it dwarfs the output of the Court. The Supreme Court's output consists altogether of almost 600 volumes of reports, each of which contain at least a few constitutional decisions. But constitutional activity outside the Court requires considerably more space to document. Constitutional actors besides the Court, including the Congress, the President, executive branch officials, and state executive and legislative authorities, have each made at least hundreds of constitutional judgments each year, only a fraction of which the courts ever subject to review or overturn.

In fact, judicial review is not nearly as extensive and consequential as many constitutional scholars bemoan. As any student of constitutional law knows, the Supreme Court cannot, and does not reach out to, decide every conceivable question of constitutional law, even those that the Justices might be eager to review. By design, the Supreme Court must wait for constitutional questions to be brought before it. (Indeed, throughout the Court's history, it has never had jurisdiction to hear all possible constitutional claims.³²²) Not all constitutional questions are litigated. Of the constitutional questions that are litigated in the federal system, only some are appealed to the nation's highest Court. Even then, the Court has never agreed to decide the merits of every constitutional question brought to it. Of the constitutional questions that the Court does decide on the merits, many involve reviewing the constitutional judgments of non-judicial authorities. Even in an era of judicial supremacy, this means that *every question of constitutional law that comes before the Court has already been considered elsewhere and often by more than one non-judicial authority*. Far more often than not, the Court leaves the constitutional judgments of other institutions intact. Thus, it would be wrong to both identify judicial review with judicial supremacy over constitutional law and to assume that judicial review is necessarily at odds with relatively extensive final constitutional decision making by non-judicial authorities.

Moreover, the constitutional judgments of non-judicial authorities survive judicial review in many ways. First, the Court may take few if any cases in which the lower courts have already upheld the constitutional judgments of non-judicial institutions. Indeed, for a significant

³²² See generally HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320-23 (Richard H. Fallon, Jr. et al., eds., 5th ed. 2003) (describing the various congressional restrictions on the Supreme Court's jurisdiction, including one, from 1789 to 1914, under which the Court could not review state court decisions of federal questions unless the state court had denied a claim of federal right).

portion of the Court's history, Congress had not authorized the Court to review every case involving a federal question.³²³

Second, the Supreme Court employs extremely deferential review in a wide variety of areas of constitutional law. Indeed, most of the constitutional activity subject to judicial review is subject only to satisfying the rational basis test—the most deferential standard of review the Court employs—in assessing the constitutionality of governmental action. It is extremely rare for the Court to strike down governmental action for violating the rational basis test.³²⁴

Third, both the standing and political question doctrines have insulated several areas of constitutional law from judicial review altogether. Standing doctrine restricts who may litigate certain constitutional claims in Article III courts. For instance, the Court recently decided on standing grounds not to address the constitutionality of public schools' daily recitation of the Pledge of Allegiance.³²⁵ By overturning the Ninth Circuit on standing grounds, the Court left intact the congressional decision made at the outset of the Cold War to revise the Pledge of Allegiance to include the words "under God." Hence, the congressional judgment to insert the latter words into the Pledge of Allegiance (by means of a statute) has stood intact for more than fifty years and counting. Moreover, the Court in *Allen v. Wright*³²⁶ refused on standing grounds to adjudicate claims that the Internal Revenue Service had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. The Court stressed that political checks, rather than judicial review, provided the appropriate constraints on the Internal Revenue Service's obligations regarding the tax-exempt status of private schools.³²⁷ The Court thus deferred to the discretion of non-judicial authorities in resolving questions about the tax-exempt status of racially discriminatory private schools.

Through its political question doctrine, the Court has avoided reaching the merits of some constitutional questions involving the powers of non-judicial authorities. For instance, the Court has rec-

³²³ *Id.*; see also Daniel S. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990) (examining the traditional view that Congress has plenary power over federal court jurisdiction).

³²⁴ For a few notable exceptions, see *Romer v. Evans*, 517 U.S. 620 (1996) (declaring unconstitutional a state amendment that denied special protections based on sexual orientation); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding unconstitutional an ordinance leading to the denial of a building permit for a home for the mentally retarded).

³²⁵ See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004). Three Justices reached the merits of the constitutional claim and defended the constitutionality of the Pledge of Allegiance as amended by Congress.

³²⁶ 468 U.S. 737 (1984).

³²⁷ *Id.* at 754 ("[A]n asserted right to have the government act in accordance with law is not sufficient . . . to confer jurisdiction on a federal court.").

ognized as nonjusticiable judicial challenges to the process for ratifying constitutional amendments,⁵²⁸ using Senate trial committees to gather evidence and take testimony for judicial impeachment trials,⁵²⁹ and the enforcement of the Constitution's Republican Guarantee Clause.⁵³⁰

Fourth, the Court expressly defers to various sets of non-judicial precedent. Such precedent has gone by different names, including tradition, historical practices, and customs. These categories have been loosely defined. In particular, tradition usually refers to long-standing understandings or assumptions, particularly within the states, regarding state authority to regulate certain interests, such as marriage or sexual autonomy. Historical practices often refer to repeated or longstanding presidential or congressional exercises of powers within their respective spheres. Custom refers to habitual ways of doing things, particularly in localities or nations. While the Court treats none of these categories as sacrosanct (or immune to judicial review), it routinely acknowledges its respect for each of these and almost routinely rules in favor of them. It is extremely rare for the Court to overturn a particular tradition, historical practice, or custom.⁵³¹

Fifth, there are many other areas that the Court has not subjected and will likely not subject to judicial review (or at least anything but deferential judicial review). For instance, the federal impeachment process is rife with final congressional judgments on constitutional questions, such as which kinds of misconduct qualify as impeachable misconduct and whether "censure" (or condemning a public official in a congressional resolution) is constitutional. Another field in which national authorities essentially make decisive constitutional judgments is the federal appointments process, including setting or applying criteria for nominating or confirming judges or Justices. Other areas in which non-judicial precedents have developed include the respective decisions of the House and Senate on disciplining their respective members for ethical improprieties, including holding them in contempt, censuring them, and expelling them; procedural

⁵²⁸ See *Coleman v. Miller*, 307 U.S. 433, 450 (1939) ("[T]he question of the efficacy of ratifications by state legislatures . . . should be regarded as a political question . . . with the ultimate authority in the Congress.").

⁵²⁹ See *Nixon v. United States*, 506 U.S. 224, 233 (1993) (determining that the text of the Constitution in various places, historical practices, and original understanding supported its treating judicial challenges to Senate trial committees as nonjusticiable).

⁵³⁰ See *Luther v. Borden*, 48 U.S. 1, 44 (1849) (holding that for resolving Guarantee Clause disputes, "it rests with Congress to decide what government is the established one in a State").

⁵³¹ For a few notable exceptions, see *Loving v. Virginia*, 388 U.S. 1 (1967) (holding, despite the prevalence and history of anti-miscegenation laws, that such a law was unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 873 (1954) (holding, in the face of a long history of segregation, that discrimination in public education was unconstitutional).

rule-making in the House and the Senate;³³² the various arrangements employed to conduct presidential transitions; how the Congress and the president have worked out conflicts over presidential claims of executive privilege;³³³ and the evolution of the powers of congressional leadership, committees and their respective jurisdictions and chairs. These informal arrangements further include the relatively robust norm of senatorial courtesy, which entails presidents' deferring to the recommendations of senators from their parties for nominations to federal offices in their respective states.³³⁴

Still other examples of non-judicial precedents are the Congress's powers to increase or decrease the numbers of seats on the Supreme Court and to abolish and create Article III judgeships. In 1869 the Congress expanded the Court to nine seats, but it has never ex-

³³² Generally, activities within the House and Senate may become precedent in several possible forms. These include, but are not limited to, formal rules, actions taken or judgments made pursuant to the formal rules of each chamber (including both successful and unsuccessful efforts to amend particular rules), norms (or informal arrangements the deviation from which trigger sanctions within each chamber), and traditions or customary practices. Among these activities, the one that has provoked the most controversy in recent years has been the deployment in the Senate of the filibuster—protracted debate that precludes a floor vote that Senate Rule XXII provides may be ended only by a supermajority vote to invoke cloture. SENATE COMM. ON RULES AND ADMIN., *STANDING RULES OF THE SENATE*, RULE XXII, S. DOC. NO. 106-15, at 15 (2d. Sess. 2000), available at <http://rules.senate.gov/senaterules/standingrules.txt>. In all likelihood, the filibuster will survive judicial review. One reason is that the courts tend to examine the constitutionality of a challenged procedural rule in the House or Senate under a very deferential standard. See, e.g., *United States v. Ballin*, 144 U.S. 1, 5 (1892) (upholding the constitutionality of a challenged rule under the rational basis test). Moreover, a federal district judge recently dismissed on standing grounds a legal challenge to the Senate rule allowing filibusters against judicial nominations. See *Judicial Watch v. United States Senate*, 340 F. Supp. 2d 26, 31–38 (D.D.C. 2004) (dismissing *Judicial Watch*'s lawsuit challenging the constitutionality of judicial filibusters on the ground that the organization did not have standing under Article III). Consequently, the fate of the filibuster will depend for all practical purposes on the extent to which the Senate abides by its rules and pertinent precedents. Though many Republicans publicly denounce the filibuster of judicial nominations as unconstitutional, the Senate has never previously declared a longstanding practice or procedure to be unconstitutional. Indeed, the Senate has always amended its rules in accordance with its rules. Republicans do not, however, have the requisite votes to break a filibuster of a motion to amend Senate Rule XXII as provided in Rule XXII. Under such circumstances, the only option for those interested in dismantling the filibuster, besides begrudgingly accepting the filibuster, is to circumvent the rules or to declare Rule XXII unconstitutional. See Michael J. Gerhardt & Erwin Chemerinsky, *Commentary, Senate's Nuclear Option*, L.A. TIMES, Dec. 5, 2004, at M5 (discussing the problems with eliminating the filibuster). The difficulty with circumventing Senate rules or declaring the longstanding practice of the filibuster to be unconstitutional is unprecedented. So, the future of the filibuster depends on senators' willingness to follow Senate precedent or dare to set an entirely new one.

³³³ See generally LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2004) (tracing the history of the conflicts between the legislative and executive branches over legislators' access to executive information).

³³⁴ See generally Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L.J. 1687 (2001) (examining the inter-branch practices established in federal appointments).

panded or contracted the size since. The closest the Congress came to doing so was in 1937, but it did not sanction the Court-packing plan then proposed by President Roosevelt.³³⁵ The choices made in 1869 and 1937 constitute an important set of authority that continues to guide the Congress. Still other fields in which non-judicial authorities make final constitutional judgments are formal rulemaking within the House and the Senate, and reorganizing the federal government (as occurred recently with the creation of the Department of Homeland Security, which overtook the responsibility of coordinating a number of offices and agencies that had been located in other federal departments). In addition, no court has ever reviewed, much less overturned, any presidential veto, pardon,³³⁶ or judicial nomination.

Even when the Court employs heightened scrutiny, it is not always fatal. For instance, the Court reviewed the constitutionality of the University of Michigan Law School's admissions program under strict scrutiny, but upheld it nevertheless.³³⁷ Indeed, it did so on the same ground (and subject to similar heightened scrutiny) as Justice Lewis Powell had urged in casting the pivotal vote in *Regents of the University of California v. Bakke*,³³⁸ to uphold for the first time a race-conscious admissions program for graduate or professional school. In addition, the Supreme Court closely scrutinized both the Bipartisan Campaign Finance Reform Bill³³⁹ and the Family and Medical Leave Act,³⁴⁰ but upheld both laws. The Court employed heightened scrutiny to ensure the former law's compliance with First Amendment interests while it upheld the latter law only after ensuring it met the stringent requirements for lawful enactments pursuant to Section Five of the Fourteenth Amendment.

When the Court overturns the constitutional judgments of other authorities, it does so infrequently. Indeed, the Supreme Court has thus far overturned fewer than 200 federal laws in American history.³⁴¹ This rate of overturning comes out to an average of less than one

³³⁵ GERHARDT, *supra* note 211, at 154-55.

³³⁶ Cf. *United States v. Klein*, 80 U.S. 128 (1872) (striking down a congressional enactment attempting to limit the effects of presidential pardons of some Southern soldiers who fought in the Civil War).

³³⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³³⁸ 438 U.S. 265 (1978).

³³⁹ See *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). The Court upheld the constitutionality of the law on its face, and a federal district judge upheld a challenge to some portions of the law as applied.

³⁴⁰ See *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003) (holding that the FMLA was a constitutional abrogation of the states' sovereign immunity).

³⁴¹ See THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS 144-45 (Lee Epstein et al. eds., 3d ed. 2003) (listing all decisions holding acts of Congress unconstitutional 1789-1995).

federal law per year that the Court has been operating. While the Rehnquist Court has struck down more than forty federal laws,³⁴² this total exceeds that of any other Court in history. More importantly, the number of laws the Rehnquist Court overturned constitutes only a tiny fraction of the several thousand federal laws enacted during the same period. The Court has also overturned only a fraction of states' constitutional judgments. From 1789 to the present, the Court has struck down less than 1300 state laws on constitutional grounds.³⁴³ Each of the fifty states produces a much larger number of such judgments than that each year. Over the past half-century, the Court has overturned presidents' constitutional judgments much less frequently than either those of Congress or those of the states.³⁴⁴ Almost every other question of constitutional law considered by presidents over the past quarter century has been left to their final discretion.

V. THE FUTURE OF PRECEDENT

This final Part suggests two important paths for future research on precedent. The first is shifting the vantage point from which to understand constitutional law from the votes of individual Justices to the patterns in the Court's operations and output. Once this shift is made, it leads to a series of specific inquiries, whose answers are important to understanding the role of precedent in constitutional law.

³⁴² In 2003, veteran Supreme Court reporter Linda Greenhouse of the New York Times found that "[h]eading into seventeen years, the Rehnquist Court has overturned forty-one [federal] laws, 2.55 per year." Linda Greenhouse, *Because We Are Final: Judicial Review Two Hundred Years After Marbury*, 56 S.M.U. L. REV. 781, 786 (2003). As compared with the Rehnquist Court, the Warren and Burger Courts overturned both a lower number of federal laws and a lower number of laws per year. *Id.*

³⁴³ See THE SUPREME COURT COMPENDIUM, *supra* note 341, at 148–74.

³⁴⁴ For notable exceptions see for example, *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding unconstitutional the Line Item Veto Act that allowed the president to veto only part of an act of Congress); *Clinton v. Jones*, 520 U.S. 681 (1996) (denying presidents temporary immunity from civil lawsuits based on their unofficial misconduct); *United States v. Nixon*, 418 U.S. 683 (1974) (denying absolute executive privilege in complying with a subpoena duces tecum); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding unconstitutional an executive order directing the government takeover of steel mills). At the end of the 2003 Term, the Rehnquist Court overturned three different efforts by Defense Department and military officials to restrict access to the judicial system by people detained in the war on terrorism. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (holding that a citizen-detainee was entitled to receive notice of the factual basis for his enemy combatant classification); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (holding that the military detainee's habeas corpus petition should have been brought in the place of his confinement); *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding the Fourteenth Amendment only protects resident aliens when they come within the United States and develop substantial connections in the country).

A. *The Appeal of Institutional Analysis*

The new institutionalism is a promising alternative to rational choice theory and attitudinalism for understanding the operations or dynamics of constitutional adjudication. It entails, *inter alia*, studying the patterns and practices of political institutions over time.³⁴⁵ Examining these patterns and practices as well as the external and internal forces that have helped to shape the Court's operations and rulings is likely to illuminate the relationship between the institutional design of the Court and its performance, the multiple functions of precedent, and the relationship of the Court to other institutions and to society generally.

The relative advantages of historical institutionalism over other methodologies are readily apparent. First, it calls attention to the Court's unique mission as an institution. Neither behavioralists nor attitudinalists conceive of the Court as having a mission separate from the fulfillment of the individual Justices' personal or policy preferences. Yet "[i]nstitutions have a mission to the extent that they possess 'an identifiable purpose or a shared normative goal that, at a particular historical moment in a particular context, becomes routinized within an identifiable corporate form.'"³⁴⁶ Further, [t]he development and maintenance of this shared normative goal distinguishes those within the institution from those outside of it and imposes a distinctive set of responsibilities and motivations on those who are integrated into the institution. Institutions socialize and constitute, as well as reward, their members."³⁴⁷ As Rogers Smith explains, institutions "influence the self-conception of those who occupy roles defined by them"³⁴⁸ both by defining a set of values that individuals come to adopt and by creating a set of routines that individuals may follow.

The Justices of the Supreme Court may well conceive of their role as being different from that of a legislator, and construct precedent accordingly. Historical institutionalism posits at least the possibility that judicial doctrine, opinion craftsmanship, and intellectual coherence may be worthwhile goals and not simply means in pursuit of favored public policies or personal wealth or adulation. The faithful

³⁴⁵ See generally GERHARDT, *supra* note 211, at xviii–xix, 2–12 (explaining the techniques and advantages of employing institutional analysis).

³⁴⁶ Whittington, *supra* note 50, at 623 (2000) (citing Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra* note 12, at 79).

³⁴⁷ Whittington, *supra* note 50, at 623 (citation omitted).

³⁴⁸ Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 95 (1988).

interpretation and application of the law, the duty of courts to protect individuals and minorities, the desire to provide guidance to lower courts and other constitutional actors, or the goal of allowing the democratic process to flourish may be important motivations of the Justices that are inadequately captured in attitudinal or behavioral explanations of judicial behavior. More basically, thinking within the law may become the unconscious background within which Justices determine particular judicial decisions.

Recognizing law, or precedent, as a conceptual system facilitates recognition of the authority of the law and its potentially coercive power. Supreme Court Justices may adhere to precedent because they conclude that it is part of their job. "For legislators, judicial doctrine may be an important definitional backdrop . . . or a strategic constraint that has to be respected . . . [to avoid a confrontation with the Court] but is relatively unlikely to have independent normative force or intellectual appeal."³⁴⁹ For judges and Justices, the call to follow precedent carries weight and they may take positive action to heed that call. Rational choice theory and attitudinalism cannot explain why precedent has this function or force in constitutional adjudication; nor does either approach offer any explanation as to why the careful application of precedent is often simply accepted as the appropriate way for judges (if not other lawmakers) to make decisions.

Furthermore, institutional analysis takes into account a wider range of activities than either attitudinalism or rational choice theory. These other methodologies focus on outcomes, whereas historical institutionalism seeks to clarify the relationship between outcomes and institutional operations and norms. Institutionalism seeks to explain the indeterminacy of the law over time. Historical institutionalism also has the virtue of approaching the new institutionalism in sociology in noting the extent to which rational action is defined partly in institutional terms. Institutions help establish the meaning of individual action and provide a framework for how individuals should react, or respond, to internal and external events and pressures. Institutionalism purports to clarify how the law maintains itself over time and the preconditions for legal change.

In addition, historical institutionalism differs from attitudinalism and rational choice theory in emphasizing the distinctiveness and particularity of the judiciary. As Cornell Clayton notes, "[a]t the heart of the new institutionalism is a challenge to the reductionist and instrumentalist conception of politics that characterized behavioralism, and a renewed appreciation of the constitutive and norma-

³⁴⁹ Whittington, *supra* note 50, at 624.

tive conceptions of politics and the role that institutions played in the latter.³⁵⁰ Historical institutionalism makes its most radical break from these other approaches by historicizing political or judicial actors. Individuals cannot be conceptualized as autonomous, free choosers who just happen to find themselves in a particular institutional context. Institutions do not merely impose constraints on choices; they constitute preferences. Institutions become an important site of preference formation and the construction of a normative order. Justices are thus likely to think and act on public problems differently than other constitutional actors as a consequence of their experiences and expectations on the Court. Thus, Robert Jackson took different positions on the constitutionality of the internment of Japanese Americans during World War II as a high-ranking Justice Department official and as a Supreme Court Justice.³⁵¹

Historical institutionalism has two other features that have not been sufficiently integrated into studies of judicial decision making on precedent. First, from its origins, historical institutionalism has been concerned with the inequities in power relations that are associated with institutions. Institutions convey power to those who lead them or who are better situated to exploit them. Thus, historical institutionalism calls attention to why some social actors and groups wield more power than others over judicial appointments and the course of constitutional law.³⁵²

Second, historical institutionalism focuses on path dependency in a different way than rational choice theory or attitudinalism. While these other approaches focus on the path dependency of the Court's choices or decisions in particular cases, historical institutionalism illuminates the importance of institutional path dependency—how and why institutions survive over time. Historical institutionalism suggests that institutions are relatively persistent, and thus carry forward in time past choices about the allocation of power within society.³⁵³ The creation of institutions closes off options by making it more costly to reverse course, by differentially distributing resources, and by tying interests and identities to the status quo. Institutional leaders occupy their positions in part because of their commitments to the preservation or perpetuation of the institutions they oversee. They are likely to work towards the preservation or enhancement of

³⁵⁰ Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, *supra* note 12, at 15, 30.

³⁵¹ See Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 455–59 (discussing Jackson's differing positions on executive power).

³⁵² See Whittington, *supra* note 50, at 616 (discussing the uneven distribution of power).

³⁵³ See *id.* (discussing the "path dependence" of political development).

the powers of their respective institutions. On the other hand, the persistence of institutions across time can foster political crises and change as they enter radically changed social environments or abrade discordant institutions. Howard Gillman's examination of the political crisis provoked by the Court's maintenance of the federalist constitution into the era of industrialization suggests the utility of this dimension of historical institutionalism.³⁵⁴

B. *The Lessons of Institutional Analysis*

The historical institutionalist perspective leads to several important insights on precedent and poses enormous implications for the future of constitutional theory. One insight is the remarkable resilience of precedent as a source of constitutional meaning. For more than a century, constitutional scholars have developed ingenious theories for improving the Court's performance.³⁵⁵ Yet, these theories have had virtually no impact on the Court whatsoever. Legal realism, legal positivism, legal process, and critical legal studies are just a few of the movements aimed at changing the ways in which lawyers and others understand the Court. As these theories have come and gone, however, none has deflected the Court from employing the language of the law.³⁵⁶ Throughout American history, Supreme Court Justices (and everyone else in the legal community) have spoken in terms of, and about, precedent. No matter how radical or arguably insightful theory has gotten, the Court has steered a relatively stable course in formulating its decisions in classic legal rhetoric and packaging them as precedent.³⁵⁷

Only within the past decade have legal scholars earnestly and systematically tried to explain the resilience and persistence of how lawyers, judges, and Justices talk about or approach constitutional law. These scholars have proposed that the Court is in effect a conservative institution, that is, it does not lead, but rather tracks, public or

³⁵⁴ See Howard Gillman, *Reconnecting the Modern Supreme Court to the Historical Evolution of American Capitalism*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS*, *supra* note 50, 235, 241–43 (discussing the transformation of federalism and the separation of powers in industrial capitalism and the rise of the central regulatory state).

³⁵⁵ See generally MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* (2d ed. 2000) (surveying and providing commentaries on theories of constitutional interpretation).

³⁵⁶ See *supra* note 346 and accompanying text.

³⁵⁷ On the persistence of traditional legal reasoning in constitutional adjudication and commentary, see, for example, J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *TEX. L. REV.* 1771 (1994); J.M. Balkin & Sanford Levinson, *Getting Serious About "Taking Legal Reasoning Seriously,"* 74 *CHI.-KENT L. REV.* 543 (1999). On the steadfastness and significance of the Court's institutional commitment to particular modes of argumentation, see CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 3–10 (2004).

majoritarian sentiments.³⁵⁸ Yet, none have yet employed institutional analysis as the means by which to substantiate the extent to which such tracking occurs.³⁵⁹ At the very least, it should be possible to confirm empirically the precise number of constitutional cases that have deviated from popular opinion on the same subject. Once these cases have been comprehensively identified, one can then track their fate, including subsequent overruling or severe narrowing by the Court.

A second insight has to do with the important relationship between constitutional adjudication and interpretation ignored by most legal scholars. The preoccupation of constitutional theorists with developing the better mouse trap, that is, with trying to find a superior method for deciding cases than any used by the Court, has come at the cost of ignoring the question of how if at all such a method might ever be adopted by the Court.³⁶⁰ A common mistake made by constitutional theorists is to confuse a theory of interpretation with a theory of adjudication.³⁶¹ Advising the Justices on how they may better decide cases is different from figuring out what advice if any are the Justices amenable to taking.

The latter is the critical question of how a constitutional methodology or vision is actually implemented on or by the Court. This is a

³⁵⁸ For the classic social science study asserting that the Supreme Court tracks majoritarian sentiments, see Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957).

³⁵⁹ The closest any legal scholar has come to undertaking such tracking systematically is Barry Friedman. In a series of articles, he has written extensively about the countermajoritarian difficulty as a genuine dilemma in American history. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (chronicling the history and growth of judicial supremacy and attempts to curtail the Court). Though significant, Friedman makes no pretense that his work is empirical, whereas several social scientists have undertaken empirical inquiries into the Court's countermajoritarian capacity. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 110 (1956) (observing, in the face of the countermajoritarian view, that there is "no case on record where a persistent law-making majority has not, sooner or later, achieved its purposes"); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 154-63 (1967) (calling into question, using statistical data of decisions, the notion of the Court as defender of minority views); see also Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961) (identifying a statistical correlation between judges' political affiliations and their likelihood of deciding an issue in one manner or another in a study of the relationship between the part compositions of the Court and of the Congress).

³⁶⁰ See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L.J. 153 (2002) (arguing that the academic obsession with the countermajoritarian difficulty was born from historical circumstances present in the mid-twentieth century).

³⁶¹ See David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 652 (1994) (stating that "[c]riticizing balancing for failing to identify neutral principles confuses the substantive problem of value identification in constitutional interpretation with the process problem of integrating some identified values into factual contexts for purposes of adjudication").

question that has only recently begun to be addressed by some scholars.³⁶² In examining this question, it might be useful to employ psychological methods as some political scientists have done. Indeed, some studies have implications for both understanding the Court and the relevance of precedent in constitutional decision making. For example, Deborah Gruenfeld examined the "integrative complexity" of the Justices in majority and minority opinions, that is, she studied the extent to which being in the majority or dissent pressured Justices to modify their opinions to include some discussion of opposing viewpoints.³⁶³ Her findings supported a "status-contingency model, which predicts higher levels of [integrative] complexity among members of majority factions [on the Court] than among members of either minority factions or unanimous groups independent[] of the ideological contents of their views."³⁶⁴ In another study, Gruenfeld examined the extent to which a Justice's status, in the majority or dissent, shaped her integrative complexity in decisions to uphold or overturn precedent. Gruenfeld and Preston found that "Justices writing on behalf of decisions to uphold precedent exhibited greater integrative complexity than did Justices writing on behalf of decisions to overturn precedent, but this effect was stronger for the authors of majority than minority opinions."³⁶⁵ These findings support the legal rather than the attitudinal model.

A third insight relates to the importance of under-theorizing on the Supreme Court. I share the normative hope of Cass Sunstein³⁶⁶ to resist the temptation to put the onus on the Court to explain its decisions to the satisfaction of theorists. Theorists are obliged, *inter alia*, to make sense of the Court's reasons for maintaining fidelity (or not) to precedent, but it is unclear why the Court ought to do anything more than what it is already doing. The Court has never felt the need, much less the pressure, to appease constitutional theorists. Its principal institutional concern³⁶⁷ has been to decide cases or controversies.

³⁶² See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 1-12 (2001) (arguing, contrary to Ronald Dworkin, that the actual practices of the Supreme Court belie the idea of the Court as a "forum of principle"); Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115 (2002) (defending his framework of judicial review as not a constraint on democracy but as a factor of self-governance).

³⁶³ See Deborah H. Gruenfeld, *Status, Ideology, and Integrative Complexity on the U.S. Supreme Court: Rethinking the Politics of Political Decision Making*, 68 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1995).

³⁶⁴ *Id.*

³⁶⁵ Deborah H. Gruenfeld & Jared Preston, *Upending the Status Quo: Cognitive Complexity in U.S. Supreme Court Justices Who Overturn Legal Precedent*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1013, 1013 (2000).

³⁶⁶ See Sunstein, *supra* note 300, at 3-6 (supporting a minimalist conception of the Court).

³⁶⁷ See *supra* note 153 and accompanying text.

A fourth insight to which institutional analysis gives rise is Keith Whittington's recognition of the significance of non-judicial precedent. He demonstrates, *inter alia*, that presidents and Congress each view their own past practices as functionally the equivalent of precedents and therefore give them some weight in their decisions.³⁶⁸ Understanding how the other branches make decisions about constitutional meaning necessitates analyzing how they conceive of precedent, the extent to which precedent guides their actions or decisions, and how they coordinate their precedents with those of the other branches, including the Supreme Court.

C. Future Research on Precedent

The attitudinal and rational choice models of the Court are based in part on the presumption of a coherent distinction between internal and external factors influencing the Court. There is, however, no such neat distinction. In the real world of the law, judicial decisions are not made in a vacuum. Justices operate not only with formal strictures (such as laws forbidding bribery), procedural requirements, and norms, but also within a conceptual framework. Legal scholars and social scientists have only begun to examine the relationship between the special institutional environment with which Justices decide cases and the Justices' choices and decisions. Below, I suggest several new lines of inquiry for measuring how the law, particularly in the form of precedent, shapes judicial decision making.

1. Supreme Court Selection

One lingering question involves the relationship between Justices' backgrounds and their decisions. For example, Richard Lazarus examined the correlation between Justices' votes in cases involving environmental law and their love of the outdoors or personal involvement in activities that familiarize them with the importance of environmental protection (such as hiking, fishing, and hunting).³⁶⁹ More recently, Tracey George suggested that former academics show

³⁶⁸ See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANINGS* (1999) (using four instances in American history to illustrate how the executive and legislative branches provide their own constitutional constructions and then use these constructions to guide future decisions).

³⁶⁹ See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 764-66 (2000) ("The extent to which a person, including a Supreme Court Justice, cares about environmental protection seems especially susceptible to being defined by their own personal experiences with the natural environment.").

the greatest skepticism about or willingness to question doctrine.³⁷⁰ Hence, she proposes that a president who wants to appoint a Justice inclined to challenge accepted doctrine should consider leading academics as possible appointees. In addition, Lee Epstein, Jack Knight, and Andrew Martin suggested that over the past two decades, prior judicial experience has become a norm in Supreme Court selection.³⁷¹ On their view, this norm has evolved at the expense of greater diversity in the backgrounds and experiences of the Justices, which could improve the quality of the Court's decisions.³⁷² These studies should spur inquiries into why some Justices vote consistently with their backgrounds and why some do not.

Moreover, presidential selection criteria merit a much closer look. David Yalof's study of Supreme Court selection shows that presidents generally have very specific selection criteria in mind when choosing Supreme Court nominees.³⁷³ This has been particularly true for Republican presidents over the past two decades. President George W. Bush, who has not yet had the opportunity to nominate someone to the Supreme Court, has chosen lower court nominees thus far pursuant to careful ideological screening.³⁷⁴ While each president's selection criteria might not explain senators' conceptions of or reactions to particular nominations,³⁷⁵ they represent the keenest insights on

³⁷⁰ See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 42 (2001) ("[Law professors] would be more likely to use cases as an opportunity to argue original positions or force the law in certain directions.").

³⁷¹ Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 905 (2003) ("For at least three decades now, those charged with nominations and confirming Justices to the Supreme Court seem to be following a norm of prior judicial experience . . .").

³⁷² See *id.* at 954-56 (describing the benefits of career diversity among the Justices for judicial decision making). This research is hardly without problems. For instance, Supreme Court selection is rarely based on a single factor, such as background, while persons with backgrounds unlike those on the Court might still share the Justices' methodological commitments and attitudes.

³⁷³ See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* *passim* (1999) (analyzing the numerous issues behind a president's nomination of someone to the Supreme Court).

³⁷⁴ See, e.g., Kris Axtman, *The Case of Judges v. Ideology: A Texas Judge Fuels Debate over Whether Appointees Will Interpret Law, or Make It*, CHRISTIAN SCI. MONITOR, Jan. 23, 2003, at 2 (describing the debate over the nomination of Priscilla Owen, a controversial conservative, to a federal circuit court); Hans S. Nichols, *White House Wishes*, INSIGHT ON THE NEWS, Dec. 24, 2002-Jan. 6, 2003, 18, at 20 ("Old ideological battles over judicial nominees also will resurface to threaten the president's wish list.").

³⁷⁵ Other research suggests that in times of divided government, institutional considerations (such as consulting with congressional leaders) have been more important in Supreme Court selection than they have when the president's party controls the Senate. See, e.g., Christine L. Nemacheck & Rachel Paine Caufield, *Congressional Endorsements and Supreme Court Selection Politics from 1930-1992*, presented at the Annual Meeting of the Midwest Political Science Association, Chicago (2003) (manuscript on file with authors). In the latter circumstances, presidents have been relatively free to make choices based primarily on their preferred criteria.

Justices' likely ideologies at the outset of their respective tenures.³⁷⁶ Rather than look for proxies for Justices' ideologies based on presidents' and senators' attitudes, scholars should consider testing Justices' and judges' votes against selection criteria. A correlating pattern would support the attitudinal model, but the absence of such a pattern would require explanation.

2. Institutional Patterns

Social scientists have only recently begun to measure patterns in the Court's decisions over time. These patterns hold the promise of reflecting the extent to which internal and external factors influence the Court's decision making. First, one could determine how each Justice has prioritized major sources of constitutional meaning, including text, structure, original intent, and precedent.³⁷⁷ Such research would clarify whether these priorities hold true across different cases and the conditions under which they change.

Second, no data have been collected on the areas in which the Court has achieved closure or stability. It would be interesting to know how many areas of constitutional law have been firmly settled, how many have not been, and what the impediments are to calculating either of these figures.

Third, researchers have yet to comprehensively document the kinds and ranges of non-judicial precedents, including but not limited to such areas as rule-making within each chamber of the Congress, international trade, impeachment, the scope of executive orders (extending to such diverse matters as the desegregation of the armed forces and restricting the use of federally funded research on stem cells), judicial appointments (including the recess appointments of judges and other officials), presidential vetoes, and presidential use of military force in the absence of formal declarations of war.

Fourth, scholars should explore whether some models explain some votes or decisions better than others.³⁷⁸ This research would clarify the utility of each model.

Moreover, more research needs to be done on the relationship between legal reasoning and motivated reasoning.³⁷⁹ Legal scholars

³⁷⁶ Additional work requires clarifying what lawmakers (and others) mean by judicial ideology. For a promising beginning, see Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. (forthcoming 2005).

³⁷⁷ See, e.g., Michael Stokes Paulsen, *The Many Faces of "Judicial Restraint"*, 1993 PUB. INT. L. REV. 3 (differentiating conservative Justices based on their respective prioritizing of different sources).

³⁷⁸ See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 572-73 (2003) (suggesting four models to explain different Justices' votes).

often dodge the possibility that it might be a coincidence that outcomes track the purported ideological preferences of the Justices by insisting that they do not need to construct a falsifiable model of legal reasoning. As long as this pattern holds, the burden shifts to legal scholars to demonstrate how the law, rather than ideological preferences, explains the outcomes of the cases that come before the Supreme Court.

Last but not least, it would be useful to compare the development of judicial doctrine in Article III and state courts in areas in which state constitutions provide identical guarantees. In state jurisdictions with the same constitutional commitments, their respective highest judicial tribunals start at the same place relative to each other (if not as well to the United States Supreme Court). One thing that measuring the paths of judicial doctrine in each of these states might illuminate is the extent of path dependency of their respective constitutional commitments. Do states, for instance, with identical commitments with respect to freedom of speech or religion end up with the same doctrine? If the state courts end up following the same or different paths from each other, we would of course want to know why and particularly whether this is because of the development of, and adherence to, different judicial decisions in each of the different jurisdictions. At the same time, we would want to know about the extent of path dependency of precedent in each of the different jurisdictions. Other intriguing questions are whether the jurisdictions experience, for instance, similar or different rates of overruling of

³⁷⁹ The theory of motivated reasoning suggests although a Justice may adopt a "neutral" method of constitutional adjudication, such as an adherence to original understanding or a reliance upon precedent, her personal preferences will nevertheless influence arguments she finds persuasive. This implies that a Justice will subconsciously reach her "desired result" through facially neutral reasoning. See Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 356–58 (2001). Schroeder writes:

The theory of motivated reasoning, though, suggests that there is [an alternate] explanation for how judges think: judges may be successful, at least some of the time, in preventing their policy preferences from serving as the conscious objective of their decisionmaking, and yet those 'private' preferences can provide directional goals that affect the arguments and evidence judges find persuasive.

Id. at 356 (citations omitted); see also Howard & Segal, *supra* note 7, at 113 (2002). Howard and Segal note:

[W]e know from social psychology that the ability to convince oneself of the propriety of what one prefers to believe—motivated reasoning—psychologically approximates the human reflex. This is particularly true when plausible arguments support one's position. Since originalism is not inherently conservative, our findings do not necessarily discredit the notion that Justices sincerely believe they are following originalist principles. Nevertheless, our results do suggest, to no one's surprise we hope, that originalist dreams of a neutral method of constitutional interpretation that can remove judicial bias remain illusory. Instead, the results show that ideological predispositions to vote a particular way overwhelm Supreme Court decision making, regardless of whether or not one premises it on an originalist interpretive method or on some vague notion of Justice.

Id. at 133–34 (internal citation omitted).

precedent, whether the state courts consult each other's doctrine or federal constitutional law in formulating their respective doctrines, and the extent to which and the areas in which the state courts develop rules and standards in the course of interpreting the identical constitutional commitments. The data would improve our understanding of the path dependency of precedent across jurisdictions and over time.

CONCLUSION

This Article attempts to clarify the limited path dependency of precedent in American constitutional law. A number of factors, generally ignored by legal scholars, support the limited rather than the robust path dependency of precedent in constitutional adjudication. These factors include the nature of constitutional adjudication in which constitutional precedents lack the essential prerequisites for path dependency (such as sequentialism, consistency, and compulsion); the indeterminacy of the constitutional text (whose open-ended language invites multiple interpretations); constitutional design (which fails to specify rules for interpreting ambiguous constitutional text); the nature of constitutional adjudication (which does not require consensus within the Court on its mission); whether the Court frames its judgments as rules or standards; the absence (and practical impossibility of the Court's adoption) of rules for construing precedent; political and other pressure keeping some constitutional issues politically salient and unresolved; and changes in the composition of the Court. Moreover, legal scholars have yet to engage with the findings or implications of several significant social science studies demonstrating the absence of the path dependency of precedent in constitutional adjudication.

While social scientists have raised legitimate concerns about the extent of meaningful path dependency of precedent in constitutional adjudication, Supreme Court precedent is not irrelevant to the development or content of constitutional law. To appreciate the multiple functions of precedent in constitutional law (besides merely constraining outcomes), a shift in perspective on the Court is in order. The shift requires moving from trying to understand precedent solely from the vantage point of the votes of individual Justices to understanding precedent by studying the patterns of the Court's decisions and operations over time. This shift illuminates the multiple functions of precedent long taken for granted, including but not limited to, resolving particular disputes over constitutional meaning, providing a modality of constitutional argumentation, providing a conceptual framework for understanding constitutional law, legitimizing other sources of constitutional argumentation and meaning, facilitating a public dialogue about constitutional meaning, chronicling and

shaping constitutional history, and implementing constitutional values (within and outside of the courts). Empirical analysis of the impact of precedent on constitutional law has thus far failed to catalogue the extent or significance of these functions, and better understanding of the role of precedent in constitutional law requires empirically analyzing these functions of precedents.

Further research on the role of precedent in constitutional law has important implications for clarifying the connection between constitutional theory and constitutional adjudication. While some scholars (and judges) favor minimalist reasoning in constitutional opinions, it is possible to acknowledge the limited path dependency of precedent without expecting elaborate discussion from the Justices on why they treat precedent in all the ways that they do. The important point is that greater appreciation for the limited path dependency does not put so much of an onus on the Court to explain everything it does to the satisfaction of theorists but, rather, on theorists to break with their attachment to the myth of the path dependency of precedent in constitutional law. At a minimum, constitutional theorists ought to engage more fully with the implications of all the factors endemic to the legal process, including the absence of rules for construing precedent, that lead to incoherence, inconsistency, and unpredictability in a number of areas of constitutional law in any given era.

Further work on precedent also will help to illuminate how it functions not only descriptively but also normatively. In one form or another, precedent refers to some past experience(s). Just as the past does not necessarily constrain decision making in the present or make subsequent decision making perfectly predictable, it informs our decisions. The past is nothing more, or less, than our history; it is simply the record of human experience. It is naive to think that the Court, or any other institution, ought to operate without a knowledge, or awareness, of its own history. We learn from our past. We build on it. Sometimes we repeat it. And we ignore whatever lessons it has to teach us at our peril.