ORIGINALISM AND PRECEDENT

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Although originalism has grown in popularity in recent years, the theory continues to face major criticisms. One such criticism is that originalism cannot accommodate precedent. This criticism takes two forms. First, some critics, as well as some advocates of originalism, argue that originalism is inconsistent with precedent and therefore originalist judges must overturn all precedents that conflict with the Constitution's original meaning.[1]

If these scholars are correct, however, originalism becomes far less attractive because it would obligate judges to make a number of radical and unpopular decisions. For example, depending on one's reading of the Constitution's original meaning, an originalist might be required to declare paper money unconstitutional or to reverse *Brown v. Board of Education*.[2]

Second, even if originalists do follow precedent on pragmatic grounds, critics argue that this approach undermines originalism and its distinctive virtues. If judges can simply decide which precedents they want to follow, then originalism is little better than an unprincipled nonoriginalism.

This short Essay, which is based on a longer article,[3] responds to each of these precedent-based challenges to

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1. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805–07 (2009) (citing Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 22 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005)).

2. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 (1997) (arguing that originalism would repudiate *Brown*). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (arguing that *Brown* is supported by originalism.).

3. McGinnis & Rappaport, *supra* note 1.

originalism. First, we argue that there is no fundamental conflict between originalism and precedent. The original meaning of the Constitution allows for precedent because it treats precedent as a matter of federal common law that Congress can override by statute.[4]

Second, we argue that one can articulate a principled doctrine of precedent that is compatible with originalism and that preserves the most important benefits of both originalism and precedent. Our normative approach is consequentialist. A normatively desirable doctrine of precedent would follow precedent when the benefits of doing so are greater than the benefits of returning to the original meaning and would follow the original meaning in the reverse situation.[5]

Turning to this task, we begin by identifying the principal benefits of following the original meaning and the principal benefits of following precedent.[6] We then recommend a few precedent rules.[7] Our theory recommends an intermediate approach to precedent, sometimes following it and sometimes not. Although this theory is less respectful of precedent than the Supreme Court's existing approach,[8] it would avoid the problems created by the wholesale rejection of nonoriginalist precedents while leaving a significant role for originalism in constitutional interpretation.

THE COMPATIBILITY OF ORIGINALISM AND PRECEDENT

We start by explaining why originalism and precedent are compatible. Although many originalists believe that precedent is inconsistent with originalism, they base their claim on political or jurisprudential theory.[9] In their view, originalism as a matter of theory only permits changes in constitutional meaning to occur through amendments. This view, however, is problematic. Whether precedent is consistent with originalism depends on the original meaning of the Constitution, not political theory. If the Constitution clearly said judges should fol-

4. *Id.* at 806, 823–29.
5. *Id.* at 831–34.
6. *Id.*
7. *Id.* at 836–43.
8. *Id.* at 846.
9. *See* Paulsen, *supra* note 1, at 289.

low precedents, then everyone would have to admit that originalism requires adherence to precedent. Thus, the question of the compatibility of originalism and precedent turns on what the Constitution itself says about precedent.

Some originalists have argued that the original meaning of the Constitution actually prohibits judges from following precedent.[10] The Supremacy Clause says that the Constitution, not judicial precedent, is "the supreme law of the land."[11] Thus, when a judge is confronted with a precedent that erroneously interprets the Constitution, the Constitution itself commands the judge to follow the Constitution, not the precedent. Hence, following precedent is unconstitutional.

There are, however, problems with this argument. First, it is inconsistent with the history of precedent in Anglo-American law. That history is complicated, but it reveals that in the two centuries leading up to the ratification of the Constitution judges regularly adhered to precedent. There was never a period when judges entirely ignored precedent.[12]

Given this history, one should not interpret the Supremacy Clause to eliminate the fundamental, time-honored, and valued practice of following precedent, unless there is no alternative way to read the Constitution. But there is. In fact, we believe that the Constitution allows for precedent in two different ways, but here we mention just one of them. [13]

The Constitution treats precedent as a matter of federal common law.[14] When the Constitution was written, it was assumed that there would be situations in which the applicable law would not be the law of a single sovereign, but instead would be common law. One of those situations was precedent, which had been traditionally governed by common law rules. Precedent rules would have been understood as regu-

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10. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

11. *See* U.S. CONST. art. VI, cl. 2.

12. McGinnis & Rappaport, *supra* note 1, at 809–23 (documenting support for precedent in the English legal system, the American colonies, the independent states, during the ratification debates, and in the U.S. Supreme Court under the new Constitution).

13. *Id.* at 823–29.

14. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000).

lating the internal operations of the judiciary.[15] Therefore, following precedent does not displace the higher law of the Constitution but simply governs how the judiciary decides what the law is.

Because precedential rules are a matter of the common law, Congress can displace them by statute.[16] Congress has the authority to pass precedential rules under its power to enact necessary and proper laws for carrying into execution the judicial power.[17] Just as Congress has the authority to legislate rules of procedure for the federal courts, so it has the authority to enact rules of precedent.

NORMATIVE THEORY OF PRECEDENT

Having argued that the Constitution allows for precedent, this Essay now turns to the task of developing a desirable approach to precedent. Although a full explanation is beyond its scope, this short Essay will sketch how one would develop such an approach and give something of its flavor.

As consequentialists, we believe judges should defer to precedent only in those cases when its benefits exceed those of following the Constitution's original meaning. To develop this theory, one would look to the benefits of following the original meaning and the benefits of following precedent. Once these benefits are determined, the foundation is laid to develop a judicially manageable precedent doctrine.

Here we mention just two of the benefits of following the Constitution's original meaning provides at least two important benefits. The first benefit is that the original meaning of the Constitution is likely to be desirable. The desirability of the Constitution's original meaning derives from the fact that it was enacted pursuant to strict supermajority rules. Such a constitution is likely to have a variety of virtues, including being supported by a consensus and containing desirable provisions.[18]

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15. McGinnis & Rappaport, *supra* note 1, at 828.

16. *See* Harrison, *supra* note 14, at 531.

17. *See* U.S. CONST. art. I, § 8, cl. 18; Harrison, *supra* note 14, at 533–34; *see also*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1589–90 (2000).

18. McGinnis & Rappaport, *supra* note 1, at 830–31.

A second benefit of originalism is that it protects the supermajoritarian constitutional amendment process.[19] To pass a constitutional amendment, it often takes time to develop the necessary consensus.[20] But if the Supreme Court effects constitutional change whenever some significant number of people believe that it is necessary, then the Court will supersede the constitutional amendment process before there is a chance to use it.[21] Thus, nonoriginalism prevents the constitutional amendment process from operating. Under this view, the real problem of the New Deal Supreme Court was not that it expanded the Commerce Clause, but that the Supreme Court prevented the nation from compromising on a constitutional amendment that could have been enacted through the supermajoritarian process.

Against these benefits, one must compare several benefits of precedent, which because of their familiarity I will just list clarity, predictability, protection of reliance, equal treatment, and stability.[22]

With these benefits in mind, the next task would be to develop a doctrine of precedent compatible with originalism. The doctrine would attempt to articulate rules that identify situations where the benefits of following precedent outweigh the benefits of following original meaning. It is essential that the doctrine must employ rules as much as possible to prevent judges from exercising discretion over which precedents to follow. Here we will mention just two of the several rules that we recommend.

The first precedential rule is straightforward: Precedent should be followed when overturning it would result in enormous costs. This means not only that the precedents affirming

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19. *Id.* at 832.

20. *Id.*

21. *See id.* at 833 n.108 ("[H]ad the Court not acted to protect women under the Fourteenth Amendment, an equal rights amendment might have been ratified—either the one with general language passed by Congress or one with more specific limitations that might have been subsequently enacted. In 1971, before the ERA [Equal Rights Amendment] was even passed by Congress, the Supreme Court decided *Reed v. Reed*, in which it invalidated an Idaho law that gave preference to male over female administrators for estates. While that case did not expressly endorse heighted [sic] scrutiny, it effectively provided more substantial scrutiny for sex discrimination than for ordinary economic legislation." (internal citation omitted)).

22. *See id.* at 834. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79, 1185 (1989).

Social Security[23] and paper money[24] should be kept, but also that a complete return to the pre-New Deal Commerce Clause should be avoided. Fully returning to the original meaning would curtail or eliminate a vast number of federal programs, from environmental protection to securities regulation.

But this rule would still allow many precedents to be overturned. For example, it would allow the Court to overturn *Humphrey's Executor*[25] and *Morrison v. Olson*[26] and to hold that independent agencies are unconstitutional.[27] In neither of these cases would overturning the precedent involve enormous costs.

The second precedential rule grows out of our supermajority theory of originalism. The rule protects what we call entrenched precedents: precedents that are supported by a supermajoritarian consensus comparable to that necessary to pass a constitutional amendment.[28] Such significant support suggests that these precedents may be as desirable as any provision in the Constitution. Under this rule, *Brown*[29] would be protected, but not forced busing[30] or affirmative action.[31] *Griswold*[32] would be protected, but not *Roe*.[33] Midlevel scrutiny for gender classifications[34] would be safe, but not the exclusionary rule.[35]

These rules are just two of the several rules[36] that a complete precedent doctrine would include, but they give a glimpse of what such a doctrine would look like. That doctrine would be

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23. *See, e.g.*, Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

24. *See, e.g.*, Julliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. 457 (1870); Hepburn v. Griswold, 75 U.S. 603 (1869).

25. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

26. 487 U.S. 654 (1988).

27. McGinnis & Rappaport, *supra* note 1, at 850.

28. *Id.* at 837.

29. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

30. *See* Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1 (1971) (upholding the constitutionality of busing to end school segregation and dual school systems).

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

32. Griswold v. Connecticut, 381 U.S. 479 (1965).

33. Roe v. Wade, 410 U.S. 113 (1973).

34. Reed v. Reed, 404 U.S. 71, 74–75 (1971).

35. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained by an unconstitutional search and seizure is inadmissible in a criminal trial in a state court); *see also* McGinnis & Rappaport, *supra* note 1, at 837, 850.

36. *See* McGinnis & Rappaport, *supra* note 1, at 843–46.

an intermediate approach, allowing precedent only in those situations when it is most beneficial.

Originalism allows not only for precedent, but for an ideal precedent doctrine. Such a doctrine would recognize that the mistakes of the past cannot all be corrected. Instead, an ideal doctrine of precedent would preserve those precedents that are too costly to overturn, but would otherwise allow the Constitution's original meaning to reign free.