THE INTRINSICALLY CORRUPTING INFLUENCE OF PRECEDENT

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Whatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory.* If one is an originalist—that is, if one believes that the Constitution should be understood and applied in accordance with the objective meaning the words and phrases would have had to an informed general public at the time of their adoption[1]—then *stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism. *Stare decisis* contradicts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation. To whatever extent precedents inconsistent with original meaning are accepted as controlling (whether sometimes and to some extent, or always and absolutely), such acceptance undermines—even refutes—the premises that are supposed to justify originalism.[2]

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1. *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124–33 (2003) (explaining and defending original-public-meaning textualism as the single correct approach to constitutional interpretation); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 398 (2002) (explaining and employing this methodology to ascertain the original public meaning of a semicolon in Article IV of the Constitution).

2. Some notable would-be originalists accept *stare decisis* as a limitation on, or qualification of, their originalist interpretive premises, without recognizing that such acceptance fundamentally undermines their entire interpretive justification. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155–59 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–40 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation . . . . [S]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."). Others, the few and the proud, are more pure. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Non-originalists of various stripes recognize the conflict between originalism and stare decisis, as well illustrated by

If one is a non-originalist, pragmatist, or otherwise outcome-driven "interpreter" of the Constitution—that is, if one believes that the Constitution should be interpreted in such a manner as to produce justice, good outcomes, or workable and fair solutions to social and political problems, and not be inhibited by the constraints of constitutional text, structure, and history—*stare decisis* corrupts and undermines such an interpretive theory, too. After all, why should an interpreter be bound by precedents that stand in the way of one's conception of justice if one is not bound by the language and original meaning of the Constitution itself? It would be silly to let errant (on these criteria), unjust precedents block the way, especially if the Constitution itself is not allowed to do so.

One can, I submit, play this parlor game with any and every theory of constitutional interpretation. If one has a theory of stare decisis that permits precedent decisions to have genuine decision-altering weight[3]—that is, if precedents dictate different results than the interpreter otherwise would reach in the absence of such precedents—then *stare decisis* corrupts the otherwise "pure" constitutional decision-making process. This rule (may I call it "Paulsen's Rule"?) cuts across all different interpretive methodologies. Posit an approach to constitutional interpretation that yields what, on that theory, is the correct interpretation of the Constitution.[4] Then, add a theory of *stare decisis* that accords decision-altering force to precedents that would otherwise

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the contributions of Professor Merrill and Professor Strauss in this issue. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274 (2005) (preferring to tilt toward precedent and away from originalism for "conservative" policy reasons of promoting a style of judging that produces "fewest surprises"); David Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299 (2005) (preferring precedent to originalism for "liberal" policy reasons (but probably preferring liberal policy to precedent, too)).

3. I concede the possibility—and believe it often to be the reality—that invocation of precedent is merely a ruse, intentionally or unintentionally, and never exerts genuine restraining effect on an interpreter in a subsequent case. *See* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 ALB. L. REV. 671, 679–81 (1995) (noting that invocation of stare decisis is often "a hoax designed to provide cover for a particular outcome, not a genuine, principled ground of decision."). My argument in the text assumes (at least for the sake of argument) the situation where precedent is honestly invoked and has real decision-altering weight. In such a case, I argue that stare decisis corrupts whatever other interpretive theory it modifies. In any other case, "stare decisis is simply irrelevant, or deceptive: a court that invokes the doctrine to justify a decision it was prepared to reach on other grounds is adding a makeweight, or using the doctrine as a cover for its judgment on the merits." Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2732 (2003) [hereinafter *Marbury*].

4. I address presently the "but-there-are-no-right-answers-to-constitutional-questions" canard/objection. *See infra* text accompanying note 18.

be thought wrong under that approach to constitutional interpretation. The result is a deviation from the (by hypothesis) correct interpretation of the Constitution.

This should be a source of considerable concern to the defender of the interpretive theory in question (whatever it is). *Stare decisis* not only impairs or corrupts proper constitutional interpretation. *Stare decisis* is *unconstitutional*, precisely to the extent that it yields deviations from the correct interpretation of the Constitution! It would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution. That violates the premise on which judicial review rests, as set forth in *Marbury*. If one accepts the argument for judicial review in *Marbury* as being grounded, correctly, in the supremacy of the Constitution (correctly interpreted) over anything inconsistent with it, and as binding the judiciary to enforce and apply the Constitution (correctly interpreted) in preference to anything inconsistent with it, then courts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation. It follows, then, that if *Marbury* is right (and it is), *stare decisis* is unconstitutional.[5]

There is one possible exception to this conclusion, and a few possible variations on it. You've probably been thinking of one or another of them already, loading up to refute Paulsen's Rule. The exception is a theory of constitutional interpretation that purports to regard judicial precedents as themselves constitutive of constitutional meaning. That is, past judicial decisions actually *do define* the meaning of the Constitution. Under such a theory, our written Constitution operates much like an unwritten constitution would. (Such an interpretive theory for a written constitution is deeply problematic on other grounds, but I pass over those deeper problems for present purposes.[6]) The Constitution's meaning is determined by judicial precedents interpreting it, in kind of a "common law"-ish sense. The most prominent (and best) academic theorist of such a "common law" method of constitutional interpretation is Professor David Strauss.[7] (This is

5. This is a generalization of an argument earlier sketched by Professor Gary Lawson. Lawson, *supra* note 2. For a thorough defense, see Paulsen, *Marbury*, *supra* note 3, at 2731–34. *Marbury* is right (on this point) not because it is a revered precedent, but because it is right on uncorrupted originalist interpretive principles. *See id.* at 2733 n.78.

6. For a discussion, see Kesavan & Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, *supra* note 1, at 1127–33; *see also* Paulsen, *Marbury*, *supra* note 3, at 2739–42.

7. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

not quite an accurate description of the common law method, either, which does not, at least not in its pure form, treat judicial decisions as creating the law, but as evidence of the accepted understanding of the law.[8] But this too is largely beside the main point here, and so I pass this point quickly too. My main point here is to show that such a theory is self-defeating—an illustration of Paulsen's Rule rather than a true exception to it.)

The chief variation on this supposed exception to Paulsen's Rule is where one posits an interpretive theory under which precedent is *part of*, or allied with, one or another (or many) approaches to constitutional interpretation. Precedent is still constitutive of constitutional meaning. But so are other things. And everything qualifies everything else. The most prominent (and best) academic theorist of such a "Common Law Plus" method of constitutional interpretation is Professor Richard Fallon.[9]

Let me start with the more unalloyed version of the argument (closer to David Strauss's). At the root of any argument that judicial precedent is constitutive of constitutional meaning is the notion that the power of the judiciary "to say what the law is"[10] implies that the law is (in Charles Evans Hughes's oft-quoted words) "what the judges say it is." That is, that judges, by dint of their office, have the power to *invest* the Constitution with meaning, through their decisions and written opinions explaining those decisions. That is a slippery inference to be sure.[11] But let's accept it for a moment for the sake of argument: *Judges' decisions infuse the Constitution with determinative meaning* (at least to some unspecified extent).

Here's my problem: Why *last year's* judges and not *this year's*? If the premise that supports a theory of stare decisis is that the judges have the power to bring meaning to the Constitution, then why don't today's judges have the *same* power to bring or give meaning to the Constitution? Surely the answer cannot be (or cannot be and remain principled) that the judicial power to vest the Constitution with meaning is a progressively diminishing power over the years. That would mean that the "judicial

8. For fuller discussion, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Weight of* Roe *and* Casey*?* 109 YALE L.J. 1535, 1570–82 (2000); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 665–66 (1999).

9. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

11. Paulsen, *Marbury*, *supra* note 3, at 2711–25, 2739–42 (explaining this slippery error).

power" meant one thing at time X and something less at time X + 1. More than that, it is hard to discern a principled *a priori* reason why dead judges' power to invest the Constitution with meaning should be greater than live ones'.[12] And if the answer is that today's judges *do* have the same power to bring meaning to the Constitution but should "consider" or give some degree of "deference" to prior decisions, we are essentially back where we started. "Consider" precedent decisions *with respect to what*? Any answer to the "what" brings back in some other theory of constitutional interpretation that the theory of *stare decisis* is to some unclear degree corrupting. And how much "deference"? May today's judges judge the correctness of yesterday's judges decisions, and if so on what criteria? If they can do it at all, we're back to square one. A genuine theory of *stare decisis* requires giving decision-altering weight to a prior judicial decision just because it was a prior judicial decision, and not because of its merit as judged by any independent criteria extrinsic to the decision itself.[13]

The conclusion seems hard to escape: A theory of constitutional interpretation under which judges' decisions are themselves constitutive of constitutional meaning saws off the very limb on which it is sitting. If judges have power to invest the Constitution with meaning, a theory of *stare decisis* that accords dispositive or meaningful decision-altering force to a *prior* decision at variance with the meaning with which a judge today would invest the Constitution (according to some other criteria) corrupts the interpretive theory of judicial power to give the Constitution meaning by virtue of judges' decisions. If there is an escape from this dilemma that does not involve circularity or sleight-of-hand, I have yet to see it. David?[14]

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12. If the retort to this query consists to any substantial degree of an argument that such an arrangement of diminishing judicial power of precedent is indicated by the original meaning of the term "the judicial power" or by the original intent or original understanding of the framers, the retorter is in danger of giving away the game. For this would mean that there is another turtle underneath the theory of common law interpretation—a yet-more-fundamental interpretive theory that accords primacy to something that looks an awful lot like a species of Originalism.

13. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987); Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 8, at 1538 & n.8.

14. It is no answer to say that *stare decisis* is not absolute, and so last year's judges don't *absolutely* bind this year's (and, moreover, that this year's judges still have the power to non-absolutely bind next year's). That simply means that a non-absolute doctrine of *stare decisis* corrupts its own interpretive justification non-absolutely: it undermines its own justification only to the extent it has true decision-altering effect.

Of course, the true "common law" method does not really treat prior decisions as literally binding, but as strongly persuasive and informative—a guide to future reasoning.

Professor Richard Fallon's theory is similar—"Strauss Lite," if you will, with respect to the interpretive force of precedent. Professor Fallon's theory of constitutional interpretation is subtle and nifty: a number of constitutional interpretive modalities may legitimately be employed in the interpretive enterprise. Arguments in one category might revise conclusions tentatively reached in other categories on uncertain evidence.[15]

Up to a point, even most originalists accept a good deal of Fallon's approach. When I teach Constitutional Law to first year students, I explain the various interpretive methodologies of Text, Structure, History/Intent (or Purpose), Precedent, and Policy (or Pragmatism) and point out that one of the fundamental issues of constitutional law is which of these types of argument are legitimate and, if several of them are, whether there is a hierarchy among them and a set of implicit rules for when an interpreter should go "down" the hierarchy to a second- or third-best source in order to resolve ambiguity that remains after considering the most legitimate source(s).[16]

But the problem for Fallon, and for any theorist of using multiple sources of interpretive meaning *including* stare decisis, is to *justify the inclusion* of precedent in the mix. What makes it a proper interpretive method? The answer to this question, I submit, will invariably replicate the problem that I identified with Professor Strauss's variation on the "common law" force of precedent in interpreting a written Constitution. For the answer necessarily will entail some version of the argument that judges have the power to invest the Constitution with meaning simply by virtue of their decisions and opinions and necessarily will run into the problem of justifying why last year's judges' decisions

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But that is not a theory of *stare decisis* in the stronger sense of deciding a case differently at time X+1 solely by virtue of the fact that a decision was made, whether rightly or wrongly, at time X. Thus, it may well be that so-called common law methods of constitutional interpretation really mean that judges may decide cases independently of what precedent decisions had held; they just should look at the prior decisions and consider them seriously. *See* Paulsen, *Abrogating Stare Decisis by Statute*, supra note 8, at 1544–45 (distinguishing between the "information" function of precedents and the "disposition" function of precedents). But as noted in the text, if that is the case, we are back to the question of what interpretive criteria the judge is to apply in the first place, with *stare decisis* not truly having any decision-altering weight.

15. *See* PHILIP BOBBIT, CONSTITUTIONAL FATE 3–8 (1982); Fallon, *supra* note 9. Philip Bobbitt's excellent book describes several interpretive "modalities," and obviously influenced Fallon's approach.

16. For a fuller defense of my own interpretive methodology, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, *supra* note 1; Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* *supra* note 1, at 398–99.

should have a greater meaning-investing power than this year's judges' decisions.

Fallon's interpretive method, and his inclusion of precedent, is beguiling, in substantial part because it captures reasonably well the realities of actual constitutional interpretive practice by the courts. But what Fallon so charitably (if jargonistically) denominates "constructivist coherence" is, in the reality of judicial practice, "anything goes"—something closer to (if Professor Fallon will forgive me) "deconstructionist incoherence." For any constitutional theory that acknowledges the legitimacy of consideration of multiple and potentially inconsistent sources of constitutional meaning there is an urgent corollary need for coherent and principled rules about what takes priority and when one can repair to less-favored modalities to resolve unclarity. Otherwise, if everything counts and there are no rules for what counts more, the wonderfully attractive portrayal of judges carefully using arguments in one category to revise tentative understandings arrived at by virtue of arguments in another category collapses into the image of an interpretive circular firing squad. And there is still the problem, for Fallon's theory as with any other, of the need to justify the inclusion of *stare decisis* as an interpretive method *at all*. Does it have a legitimate claim to participate in the circular firing squad, or is it simply a corruption of the "pure" interpretive theory (and set of decision rules) that it purports to qualify?[17]

While we're on the subject of deconstructionist incoherence, let me address one more variation on the variation of the false exception to Paulsen's Rule—the "but-there-are-no-right-answers-to-constitutional-questions" canard. It is commonly claimed by many otherwise-intelligent people that constitutional questions (or at least a good many of them) have no right answers (or at least no "*clearly*" right answers), so that, as to such questions, any answer is essentially as good as any other, and that *stare decisis* might be appropriate as to such issues, where there has been a prior judicial determination.

With all due respect, this is an intellectually slovenly proposition, for a number of reasons—most of which are beside the point here. It is sufficient here to note that such a view, even if accepted, provides no justification for a doctrine *stare decisis*. It

17. For Professor Fallon's arguments that *stare decisis* is constitutive of constitutional meaning, see Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

merely says that, *within the range of asserted indeterminacy*, "anything goes"—which is itself an interpretive theory, after a fashion. But if "anything goes" is your theory (for any range of issues), "something went before" surely corrupts and contradicts *that* theory. If textual indeterminacy implies judicial *carte blanche* (within any range), a doctrine of *stare decisis* says that earlier judges get a bigger *carte* than their successors, a view inconsistent with the premise that indeterminacy implies judicial *carte blanche* (within that range). Thus, the "stare-decisis-may-be-appropriate-with-respect-to-cases-of-textual-indeterminacy" view is not an exception to Paulsen's Rule, but another illustration of it.[18]

Another sophisticated variation of the "no right answers" view is that judges either are not skilled enough to identify "right" answers with any degree of reliability, or that judges in fact frequently disagree as to what the right answers are. *Stare decisis*, on this view, helps to mitigate deficiencies in competence and to moderate extremes. It is better to reduce variations in decisions than to seek right answers, which, if they exist at all, are too hard to find. This, or something very close to it, is Professor Merrill's position.[19]

Merrill's view is a variation of other policy-driven approaches to constitutional law. His favored policies—stability and predictability—are simply more "conservative" (in an incrementalist sense) and nonsubstantive than those animating

18. The correct answer to the "indeterminacy" gambit, at least for a good originalist-textualist, is that indeterminacy implies broader *political*, democratic discretion, not broader *judicial* discretion. Judicial invalidation of legislative or executive action requires the existence of a sufficiently determinate constitutional rule of law, so that it can fairly be said that the legislative or executive action violates a rule supplied by the Constitution. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J.217, 333–37 (1994). That is *Marbury*'s (correct) justification for judicial review. *See generally* Paulsen, *Marbury*, *supra* note 3. Thus, a decision invalidating political action where the constitutional text is vague or ambiguous (in the sense of failing to yield a determinate rule of law) is simply an incorrect constitutional decision. Adherence to such a precedent is adherence to a decision that is incorrect on originalist grounds, and thus corrupts the interpretive theory of originalism. I thus disagree with Randy Barnett as to the consequences of asserted indeterminacy, under an originalist-textualist interpretive approach, and thus also disagree as to whether it creates a genuine exception to the principle he correctly identifies: that original meaning should always trump precedent where they conflict. Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257 (2005).

19. *See* Merrill, *supra* note 2. Steve Calabresi offers a thorough, devastating refutation of Merrill's position in his contribution to this issue. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005).

other policy-driven approaches. But aside from its merits or demerits as a theory of constitutional interpretation, Merrill's view of precedent as a stabilizing force has its own problems. One problem is the overconfident assumption that precedents need less interpreting, or require less legal competence faithfully to interpret (aren't we still reading words, just more of them, and ones that sometimes contradict each other?), or are less subject to manipulation or evasion, or provide greater clarity, than direct interpretation of the Constitution through some interpretive methodology or another. A second problem with this view is that it is usually alloyed with some (or many) other methodology (or methodologies) of constitutional interpretation, combining the problems and imprecisions of both, with an unclear but certainly nonabsolute degree of "tilt"[20] in the direction of precedent and away from the other interpretive approach(es). That is still a corruption of the other method(s) of constitutional interpretation, just corruption to some uncertain lesser degree.

A third problem with this view is that it does not really provide a justification for *stare decisis*, in the definitional sense of adhering to a precedent decision even where one would otherwise think it wrong (on other criteria). It only provides a justification for reading *and considering* precedent decisions, in order to assist the present interpreter in figuring out the right answer, not for *binding* the present interpreter to a result that he or she otherwise is fully persuaded is incorrect, on other interpretive grounds. And if precedent is not binding, we are not really talking about a doctrine of stare decisis. (And we are also undermining the claim that precedent produces stability.)[21]

The final problem with the Merrill view, and others like it, is the one common to all precedent-based theories of constitutional adjudication. The turtle underneath it is, at some level, the premise that judges' interpretations create, fix, or "liquidate" constitutional meaning, after the fashion of the common law, at least to some (unclear) degree. On that premise, however, Paulsen's Rule still holds: if judges' decisions have the power to establish constitutional meaning, a doctrine of stare decisis corrupts that theory by vesting earlier judges with the power to usurp, to some degree (usually unspecified), later judges' power to establish constitutional meaning.

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20. *See* Merrill, *supra* note 2, at 272, 282.

21. *See* Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 8, at 1544–48 (addressing a version of the precedent-mitigates-competency-limits argument presented by the Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

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The correct answer to all of this, of course, is that *stare decisis* in constitutional law—the practice of giving some degree of decision-altering force to prior judicial interpretations simply because they are prior judicial interpretations and in contradiction of what one otherwise would conclude are correct principles of constitutional interpretation and correct interpretive results produced by such principles—is utterly unjustifiable. *Stare decisis* corrupts whatever interpretive method it touches. It corrupts fundamentally correct interpretive principles—original public meaning textualism. It corrupts fundamentally incorrect interpretive principles—policy-driven interpretive theories of every kind. And it corrupts every interpretive theory that tries to craft an "in-between" approach, including, rather ironically, every theory that accords some measure of interpretive force to precedents solely by virtue of being precedents.

In short, whatever theory one concludes is the correct approach to interpreting and applying the Constitution, a theory of *stare decisis* will inevitably contradict its core justifying premise(s). A doctrine of *stare decisis* always works in opposition to correct interpretation of the Constitution.

Is there anything at all that can be said in defense of such a doctrine?