

TEXT, PRECEDENT, AND THE  
CONSTITUTION: SOME ORIGINALIST AND  
NORMATIVE ARGUMENTS FOR  
OVERRULING *PLANNED PARENTHOOD  
OF SOUTHEASTERN PENNSYLVANIA* v.  
*CASEY*

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“It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”

President Andrew Jackson, rejecting *McCulloch v. Maryland*, while vetoing the renewal of the Bank of the United States more than 40 years after President Washington had held the Bank constitutional.<sup>1</sup>

INTRODUCTION

One immediate tension that any conservative in the field of law must necessarily feel is between the demands of the text of the Constitution, as it was originally understood, and the demands of precedent. Conservative lawyers typically accept that the Constitution is higher law but disagree about whether that higher law is the enacted constitutional text or the traditions and

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1. Veto Message of July 10, 1832 in 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144–45 (Richardson ed., 1897).

precedents that have grown up over 215 years of governing under that text. Original-meaning textualists like Professors Gary Lawson and Michael Stokes Paulsen argue that the key to constitutional meaning is to be found in the objective public meaning of key words and clauses as they were understood in 1787 or 1868. Professor Akhil Amar makes much the same point, arguing that the Constitutional text is normatively better than the doctrine that the Court has developed to interpret it.<sup>2</sup>

In contrast, certain Burkean law professors like Thomas Merrill,<sup>3</sup> Barry Friedman,<sup>4</sup> and Ernie Young<sup>5</sup> have argued that it is a mistake to elevate the understandings of 1787 or 1868 above the understandings of all of the generations and justices that have lived under and construed the Constitution since its adoption. Some self-professed Burkeans go even further and argue not just for tradition and practice as the well-spring of constitutional law but for Supreme Court doctrine and caselaw as the only valid source of constitutional law, even when that caselaw flies in the face of tradition as it does today with respect to abortion and gay rights. This theory of so-called common law constitutionalism is most ably defended by Professor David Strauss.<sup>6</sup> A sophisticated variant on this theory is propounded by Professor Richard Fallon<sup>7</sup> and, most recently, Charles Fried has written that the Supreme Court is and ought to be controlled by its doctrine.<sup>8</sup>

In this essay, I lay out an argument as to why the Supreme Court ought to follow the text of the Constitution, as originally

2. Akhil Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

3. Thomas W. Merrill, *Burke v. Bork*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

4. Barry Friedman and Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998). Professor Friedman does not describe himself as a Burkean, unlike Professor Merrill, but it seems like an apt label for what he advocates in *The Sedimentary Constitution*. See also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

5. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

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

7. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 582–585 (2001) [hereinafter Fallon, *Stare Decisis and the Constitution*]; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) [hereinafter Fallon, *Constructivist Coherence Theory*].

8. CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* (2004).

understood, rather than its own precedents, where there is clear conflict between the two. I will defend this claim with first, originalist arguments and second, with normative arguments. I conclude by applying my approach to the Supreme Court's decision in *Planned Parenthood of Pennsylvania v. Casey* and argue that that case's discussion of *stare decisis* is fatally flawed and ought itself to be overruled. In my view, the *Casey* discussion of precedent is at odds with both the understanding of the Framers of the Constitution and with good public policy. Far from being a "super-duper precedent," in the notorious words of Senate Judiciary Committee Chairman Arlen Specter, *Casey* is a case that should be swiftly overruled—even without regard to whether *Roe v. Wade* should also be overruled. The *Casey* discussion of *stare decisis* is just plain wrong.

I begin, in Part I below, by asking what the framing generation of our original Constitution thought about the problem of text and precedent. I will argue that the views of the framers are best illustrated in the long fight over the constitutionality of the Bank of the United States, one of our earliest national constitutional controversies. My claim is that the fight over the Bank of the United States ended not with *McCulloch v. Maryland's* famous endorsement of the constitutionality of the Bank, almost three decades after the Bank bill passed Congress, but with the veto by President Andrew Jackson of the effort to renew the Bank in 1832, thirteen years later. Jackson's success in killing the Bank on the grounds of unconstitutionality, some forty years after it was first created, shows that, early on, Americans venerated constitutional text over what Jackson called the "dangerous source of authority" which is "mere precedent."<sup>9</sup>

In Part II below, I consider the sophisticated and thought-provoking normative case that Burkean law Professor Thomas Merrill makes in this symposium issue and elsewhere as to why conservatives and others should favor what he calls Burkeanism or conventionalism in constitutional interpretation over originalism. I consider each normative argument Professor Merrill makes and conclude that textualism, as it is practiced in this country, is more normatively appealing than the strong rule of *stare decisis* and of precedent for which Professor Merrill argues. Professor Merrill's fundamental error is that he uses too short a time frame in concluding that precedent is democratic, that it preserves continuity with the past, and that courts' failing to fol-

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9. Veto Message, *supra* note 1, at 1144.

low precedent is activist. In constitutional law, one's time horizon must be multi-generational. When the correct time horizon is used, I show that *it is actually undemocratic and activist for the Supreme Court to follow precedent* when it ought to follow the constitutional text.

Finally, in Part III below, I will ask whether in cases where there has been substantial reliance, as there was with the Bank, we ought to insist that long-standing precedents be challenged first by the political rather than the judicial branches of government. Here I will make only a limited claim. I will argue that whenever one of the political branches of the national government or a majority of the States challenge the Supreme Court with respect to its precedent, even of long-standing, the Court is duty bound to decide the constitutional question according to the original meaning of the text without regard to precedent or doctrine. If either the President or Congress reach a policy determination that a line of precedent is causing more trouble than will be caused by disrupting the interests of those who relied on that precedent, then the Court ought to defer to the political branches' judgment about the reliance issue and decide the underlying constitutional question according to its original meaning. I argue that the political branches are better than the Court at figuring out when there are reliance interests and when those reliance interests are trumped by the existence of a constitutional error.

I thus contend that the Supreme Court's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>10</sup> got matters exactly backwards when it claimed that the Court should adhere most stringently to precedent when it is challenged by public opinion through the vehicle of the president filing briefs urging the overruling of *Roe v. Wade*.<sup>11</sup> I would claim that once the president files a brief asking the court to overrule, reliance interests are at an end and the Court is bound to decide the case on originalist, textualist grounds without regard to precedent.

My argument in this respect is related to but also is critically different from Professor Michael Stokes Paulsen's argument that Congress ought to be able to abrogate *stare decisis* by statute.<sup>12</sup> Professor Paulsen reaches his conclusion through what is an un-

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10. 505 U.S. 833 (1992).

11. 410 U.S. 133 (1973).

12. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

acceptably broad understanding of congressional power under the Necessary and Proper Clause, which he would allow Congress to use to trump the Vesting Clause of Article III. I reach my conclusion, instead, by emphasizing the limits on the Supreme Court's power of judicial review due to the Constitution's departmentalist system for enforcing itself. That system leads to three-branch enforcement of the Constitution and to an obligation on the part of the Court to defer to the political branches on the political question of when a precedent is causing more harm than good, unless the Court can show that Congress's weighing of the costs and benefits of a given precedent lacks a rational basis.

This three part discussion takes on a vast array of topics concerning text, precedent, and Burkeanism. I have decided to address all of these topics here in one article (rather than in three separate articles) because I think my discussion in each of the three parts below clearly related to the other two, consistently leading back to the same conclusions about our practice, original understanding, and policy concerns. I end up endorsing a modest doctrine of *stare decisis* in cases where, as Andrew Jackson said, "the acquiescence of the people and the States" seems well-settled because all three branches of the federal government have completely accepted a constitutional interpretation that departs from the original understanding. This is the case, for example, as to the constitutionality of paper money, which is unjustifiable on originalist grounds but which is accepted by the American people as a settled precedent. Abortion, unlike paper money, is not an area where the acquiescence of the people and the States in *Roe v. Wade* is well-settled. For this reason, I conclude by urging that the *Casey* plurality opinion's discussion of *stare decisis* be overruled.

#### I. THE ORIGINAL UNDERSTANDING WITH RESPECT TO FOLLOWING PRECEDENT: LESSONS FROM THE 40 YEAR CONTROVERSY OVER THE BANK OF THE UNITED STATES

I want to begin with the question of what the Framers thought about the question of whether precedent trumped constitutional text. Unfortunately, here I must rely on post-enactment legislative history to figure out what the Framers thought about the question of text versus precedent. Since there is absolutely no discussion of *stare decisis* in the text of the Constitution, in the debates at Philadelphia or in the ratification de-

bates, I want to ask what early Americans thought about the force of precedent with respect to the biggest controversy of constitutional interpretation to engulf the Republic during its first forty years. That, of course, is the controversy over the constitutionality of the Bank of the United States.

I want to start by making two points. The first is that the Framers thought the Constitution was going to be enforced not exclusively by the Supreme Court but instead by all three branches of the federal government and by the states, with each entity performing its own distinctive function of legislating, executing, or adjudicating the laws. The second point is that early Americans only accepted precedent as binding where, as Andrew Jackson put it, “the acquiescence of the people and of the States can be considered as well-settled.”<sup>13</sup> It turns out that early Americans had a very stringent notion of just how well settled an issue had to be before it could be deemed to have the acquiescence of the people and the states.

#### A. THE FIRST BANK OF THE UNITED STATES: 1790-1811

Early American views on precedent are clearly illustrated in the most famous sustained constitutional controversy in the nation’s early history—the forty-year controversy over the constitutionality of the Bank of the United States. This controversy began in 1790 soon after the ratification of the Constitution when Alexander Hamilton “submitted a plan for a national bank to be chartered by Congress and owned jointly by private shareholders and the United States.”<sup>14</sup> James Madison, a Congressman from Virginia, opened the debate over the Bank of the United States in the House of Representatives with a powerful argument as to why the Bank was unconstitutional. Representative Madison’s view on the constitutionality of the Bank was the exact opposite of the one Hamilton had taken in proposing the Bank. Madison argued the federal government was one of limited and enumerated powers and that the word “necessary” in the Necessary and Proper Clause could not be read as synonymous with “convenient,” and he argued that the state ratifying conventions did not think the Necessary and Proper Clause gave any additional powers beyond those enumerated.<sup>15</sup>

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13. Veto Message, *supra* note 1, at 1145.

14. BREST, LEVINSON, BALKIN, AND AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 8 (2000).

15. See *id.* at 8–11 for a quick summary of Madison’s views.

The House ultimately adopted the Bank bill over Madison's protest by a vote of 39 to 20, suggesting that almost two-thirds of the members of the House in 1791 and all the members of the Senate thought the Bank of the United States was constitutional. This was a particularly dramatic conclusion for Congress to reach since many of the members of that Congress had been delegates to the Philadelphia Constitutional Convention where a specific proposal to give the new national government the power to grant charters of incorporation had been defeated. Of the seven Representatives who had attended the Convention, four voted for the Bank Bill and three against it. Madison voted against the Bank Bill, even though at Philadelphia he had been the delegate who had actually proposed the failed resolution to give Congress power to enact charters of incorporation.<sup>16</sup>

The Bank Bill went to President Washington for his signature or veto, and Washington decided to poll the senior members of his Cabinet to ask them for their views on the constitutionality of a federally chartered Bank of the United States. Two Cabinet secretaries, Edmund Randolph, the Attorney General, and Thomas Jefferson, the Secretary of State, took the view that the Bank Bill was unconstitutional. Randolph and Jefferson shared Madison's objections to reading necessary as meaning "convenient" and to seeing the Necessary and Proper Clause as doing more than granting new incidental powers to the national government.<sup>17</sup> Secretary of the Treasury Alexander Hamilton, a co-author (with Madison and John Jay) of the Federalist papers, weighed in on the opposite side of the dispute and argued for a broad political understanding of the word "necessary." He contended that the word meant "needful," "useful," or "conducive to."<sup>18</sup> On February 25, 1791, President Washington sided with Hamilton and signed the Bank Bill into law. The First Bank of the United States was thus created at the very start of our constitutional history with the imprimatur of many of the Founders themselves, including, critically, George Washington, who had served as President of the Philadelphia Constitutional Convention.

When the Bank's twenty-year charter lapsed in 1811, Congress refused by a one-vote margin to renew it.<sup>19</sup> Of the thirty-nine members of Congress who spoke on the issue of renewal,

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16. *Id.* at 7, 11.

17. *Id.* at 11-12.

18. *Id.* at 13-16.

19. *Id.* at 16.

thirty-five addressed the issue of the Bank's constitutionality.<sup>20</sup> Thus, a large number of members of Congress, in 1811, did not regard the question of the constitutionality of the Bank as being off the table then just because the Bank had been around for twenty years and had been signed into law by George Washington himself.

#### B. THE CREATION OF THE SECOND BANK OF THE UNITED STATES

Dispute over the constitutionality of the Bank continued. Four years later, in 1815, after the economic turmoil caused by the War of 1812, Congress had a change of heart and voted to reauthorize the Bank. By 1815, James Madison had become President, and he vetoed the renewal of the Bank *on policy grounds* while saying that he “waiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank, as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution, in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.”<sup>21</sup>

A year later, in 1816, Madison's policy doubts about the Bank were quelled, and he signed a bill creating a Second Bank of the United States for another twenty years until 1836. Strikingly, Madison accepted the constitutionality of the Bank in 1816 because he recognized the force of precedent, but the precedent he recognized was not that of the Supreme Court, but rather the simultaneous expression of views by all three branches of the federal government to the effect that the Bank was constitutional—views he took as showing “a concurrence of the general will of the nation”. Professor Fallon thus notes that Madison's “more general view appears to have been that the meaning of vague constitutional language both could be and should be fixed by the construction put on it by the American people, acting through relevant political institutions, including Congress as well as the courts.”<sup>22</sup>

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20. *Id.*

21. *Id.* at 17.

22. Fallon, *Stare Decisis and the Constitution*, *supra* note 7, at 580 n.42 (citing DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 79–80 (1989)).

Madison's theory of constitutional precedent is discussed elegantly by Professor Gerard N. Maglioca in an important recent article "Veto! The Jacksonian Revolution in Constitutional Law."<sup>23</sup> Maglioca accurately describes Madison's approach as Burkean rather than originalist, and he notes that for Madison precedent was not made by the Supreme Court alone but by the general will of the public, as expressed through the views of all three branches of the federal government acting together, and by the states. "Madison's system argued for the equivalence of legislative, executive, and judicial precedent in discerning constitutional meaning."<sup>24</sup> Maglioca shows that for Madison the statutory enactments of Congress were the key in establishing precedent, and he notes that Madison's view had a profound impact on legal debate up until the Civil War, with Justice McLean citing Madison's bank veto as support for the precedential legislative authority of the 1820 Missouri Compromise in his dissent in the *Dred Scott* case, which struck down the Compromise as unconstitutional.<sup>25</sup>

Years after his bank veto, Madison expanded on his interpretative view in letters to C.E. Haynes and General LaFayette saying no "abstract opinion of the text" could defeat "a construction put on the Constitution by the nation, which having made it, had the supreme right to declare its meaning,"<sup>26</sup> a sentiment Madison later echoed in an 1831 letter to Charles Ingersoll.<sup>27</sup> Not surprisingly, given these views, Madison opposed Andrew Jackson's 1832 Bank veto on constitutional grounds because he thought the constitutionality of the Bank was absolutely settled as a matter of precedent.<sup>28</sup> Madison's view on early practice being binding precedent is reflected in the Supreme Court's 1803 opinion in *Stuart v. Laird* where Chief Justice John Marshall said that the constitutionality of circuit riding by Supreme Court justices had been settled by early practice.<sup>29</sup>

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23. Gerard N. Maglioca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205 (1999).

24. *Id.* at 217.

25. *Id.* at 217 n.65 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 546 (McLean, J., dissenting)).

26. *Id.* at 217 n.62 (citing Letter from James Madison to General LaFayette (Nov. 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 538, 542 (Philadelphia, J.B. Lippincott & Co. 1867)).

27. *Id.* at 218 n.69 (quoting from Letter from James Madison to Ingersoll, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 186, *supra* note 26).

28. *Id.* at 218.

29. 5 U.S. (1 Cranch) 299 (1803). In that case, the Court, after upholding the repeal of the Federalist Judiciary Act of 1801, considered the controversial restoration of the

As David Currie points out in his magisterial book on *The Constitution in Congress*,<sup>30</sup> the first Congresses to sit under the Constitution set forth many binding precedents as to constitutional meaning, so Madison's view that statutory enactments, unquestioned in the other two branches, might fix a construction according to the general will of the nation is not surprising. What is perhaps more surprising to modern sensibilities is Madison's legalistic idea that the president could be constrained from exercising his veto power for constitutional reasons by the force of statutory precedent. This idea seems strange to us because Andrew Jackson so completely and successfully repudiated it that it is hard for us to recall that pre-Jackson there even was a point of view such as Madison's.

### C. *MCCULLOCH V. MARYLAND*

In 1819, some twenty-eight years after President Washington first signed the Bank Bill into law, the question of the Bank's constitutionality finally reached the Supreme Court, in *McCulloch v. Maryland*.<sup>31</sup> Chief Justice Marshall, in his opinion for the Court, made an initial reference to precedent by acknowledging that many successive legislatures and lower courts had accepted the constitutionality of the Bank, but he then went on to address in detailed and sweeping terms all the merits of the constitutional issue. It is critically important to emphasize that Marshall did *not* decide *McCulloch* on the basis of congressional statutory precedent or practice alone (as Madison would have done), but rather he decided it after an exhaustive *de novo* textual, structural, historical, functional, and consequentialist analysis of the constitutional issue as it appeared to the Supreme Court. Marshall clearly did not buy the Madison view that the question of the constitutionality of the bank was settled by statutory congressional precedent alone. Rather, Marshall wrote with astonishing breadth about the scope of congressional power under the Necessary and Proper Clause. He seemed to regard questions of necessity under the clause as being peculiarly committed to the political branches, although he held out the possi-

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practice of circuit riding by Supreme Court justices—a practice which some thought unconstitutional. The Court upheld the constitutionality of requiring the justices to ride circuit saying “practice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.”

30. DAVID CURRIE, *THE CONSTITUTION IN CONGRESS* (1997).

31. 17 U.S. (4 Wheat.) 316 (1819).

bility of judicial invalidations in cases of clear congressional excess.<sup>32</sup> Marshall's opinion is not primarily driven by precedent or practice but by the text, structure, history, purposes, and consequences of ruling one way or the other on the issue. Thus, if we look at who in the Framing generation adheres to precedent or practice on the issue of the Bank, the only leading figure who seems to take that view is James Madison and not John Marshall.

#### D. JACKSON VETOES THE BANK IN 1832 AS UNCONSTITUTIONAL

In most constitutional law casebooks, discussion of the constitutionality of the Bank begins and ends with Marshall's opinion in *McCulloch*, but, of course, that is not how the story of the fight over the Bank of the United States actually ended. The fight over the constitutionality of the Bank ended in 1832 when Congress passed a bill rechartering the Bank some four years before the Bank's charter was due to expire. On July 10, 1832, President Andrew Jackson vetoed the bill rechartering the Bank, and the Bank was killed not to reappear as an institution until the Federal Reserve Board was created during the Administration of President Woodrow Wilson. The Jackson veto killed the Bank<sup>33</sup> for more than eighty years, and even when the institution

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32. 17 U.S. at 423 ("Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.")

33. Jackson's message vetoing the Bank was foreshadowed by another famous Jackson veto message disapproving the Maysville Road internal improvements bill in 1830. The Maysville Road veto message is important because, as Maglioca points out, in it Jackson began to articulate his rejection of Madison's Burkean notion that statutory precedent bound the president in his exercises of the veto power on constitutional grounds. In that veto message, Jackson first laid out the pure Jeffersonian position of opposition to internal improvements and then showed how Jefferson's view had been totally disregarded in practice. Jackson then points out "the difficulty, if not impracticability, of bringing back the operations of the Government to the construction of the [original] Constitution." Then comes the veto's key message which claims that this whole sorry experience gave:

an admonitory proof of the force of implication and the necessity of guarding the Constitution with sleepless vigilance against the authority of precedents which have not the sanction of its most plainly defined powers; for although it is the duty of all to look to that sacred instrument instead of the statute book, to repudiate at all times encroachments upon its spirit, . . . it is not less true that the public good and the nature of our political institutions require that individual differences should yield to a well-settled acquiescence of the people and confederated authorities in particular constructions of the Constitution on doubtful points.

re-emerged in the form of the Federal Reserve Board it re-emerged in a noticeably different form.

Since it was Jackson and not Marshall who had the last word on the constitutionality of the Bank, we should attend just as carefully to Jackson's veto message as we do to Marshall's opinion in *McCulloch*, at least as far as the issue of the Founding Generation's understanding of precedent is concerned. Here is the totality of what Jackson said about precedent at the start of his veto message:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791 decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank, another, in 1816, decided in its favor. . . . Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have probably been to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.<sup>34</sup>

After this discussion of precedent, Jackson went on famously to talk of the co-equal role of each of the three branches of the federal government in the enforcement of the Constitution, insisting that he, as president, possessed a totally independent right to interpret the document without being bound in his judgment by either the opinion of the Supreme Court or by the earlier presidential and congressional practice upholding the constitutionality of the Bank. Jackson weighed the necessity of a bank and found it not necessary, and he condemned the bill establishing the bank as invading the proper prerogatives of the States. Jackson's veto message is written as if the "mere precedent" of *McCulloch*, and the more than forty years since Washington signed the bank bill into law, were of no moment. Strikingly, in his discussion of legislative precedents he never so much

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Veto Message of May 27, 1830, in *supra* note 1, at 1050.

34. Veto Message, *supra* note 1, at 1144-45.

as mentioned James Madison's opinion as president that the question of the constitutionality of the Bank had been settled by practice!<sup>35</sup>

Jackson revolutionized the practice of presidential vetoes by completely rejecting Madison's Burkean conception of constitutional construction and of precedent. Thus, Daniel Webster complained on the floor of the Senate that "[t]he legislative precedents all assert and maintain the power [to set up a Bank]; and these legislative precedents have been the law of the land for almost forty years. They settle the construction of the constitution, and sanction the exercise of the power in question so far as these ends can ever be accomplished by any legislative precedents whatever. But the President does not admit the authority of precedent."<sup>36</sup>

Without belaboring the story of Jackson's successful war against the Bank here, suffice it to say that Jackson completely prevailed over his Whig opposition, and he succeeded in increasing the size of the Supreme Court from 7 to 9 members, allowing him and his successor, Vice President Martin Van Buren, to pack the Supreme Court with the "paramount doctrinal goal" of getting *McCulloch v. Maryland* overruled in the U.S. Supreme Court.<sup>37</sup> Jackson's chief Senate ally, Senator Benton, said on the floor of the Senate that with his Bank veto Jackson "has vindicated the constitution from an unjust imputation, and knocked from under the decision of the Supreme Court the assumed fact on which it rested. He has prepared the way for a reversal of that decision . . . ."<sup>38</sup>

#### E. JACKSON'S SUCCESSORS RATIFY THE KILLING OF THE BANK ON CONSTITUTIONAL GROUNDS

So why was *McCulloch* never overruled? The answer is, had William Henry Harrison lived and signed a new Bank bill into law, the Jacksonians on the Supreme Court almost certainly would have gotten a case that would have allowed them to overturn *McCulloch*. Indeed, Harrison said in his Inaugural Address that "I believe with Mr. Madison that 'repeated recognitions under varied circumstances in acts of the legislative, executive, and

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35. Maglioca, *supra* note 23, at 233.

36. *Id.* at 234-35 (quoting 8 Cong. Deb. at 1231 (statement of Sen. Webster) (emphasis added)).

37. *Id.* at 248-49.

38. *Id.* at 249 (quoting 13 Cong. Deb. 502-04 (1837)).

judicial branches of the Government, accompanied by indications in different modes of the concurrence of the general will of the nation” settled the constitutional question of the Bank’s constitutionality.<sup>39</sup> By this statement, Harrison indicated his support for a new Bank bill on both constitutional and policy grounds.

Unfortunately, for the advocates of the Bank, Harrison died a month after taking office and his anti-Bank, pro-states rights Vice President, John Tyler, became president. Tyler vetoed two bills passed by the Whig majority in Congress to recreate the Bank, citing Jacksonian enumerated powers grounds for his vetoes.<sup>40</sup> As a result of Tyler’s vetoes, the Bank was never recreated and there was never a test case to challenge *McCulloch* and enshrine Jacksonian constitutional theory into Supreme Court doctrine. Ultimately, the fight between Tyler and the Whig Congress ended in a stunning defeat of the Whigs in the mid-term elections of 1842, in which they soundly lost their majority in the House of Representatives.<sup>41</sup> In 1844, Jacksonian Democrat James K. Polk was elected president and by that time the Bank was truly dead—killed by Jackson on originalist grounds. With the death of the Bank came the death of Madison’s Burkean idea that the three branches of the national government could permanently settle constitutional questions as a matter of precedent. Madisonian Burkeanism lost in the great constitutional fight over the Bank and that fight was resolved on originalist and not Burkean grounds.

#### F. LESSONS FROM THE CONTROVERSY OVER THE BANK

We can draw two conclusions from Jackson’s veto of the bank bill in 1832 and the fact that his veto stuck for more than eighty years. First, early Americans were simply not persuaded in 1832 that the question of the constitutionality of the bank had yet been settled as a matter of precedent even though the Court had famously ruled in favor of the bank in *McCulloch* and even though the bank had been sanctified by practice for more than forty years. If an institution that had been around for that long, and which had the blessing of Presidents Washington and Madison, and which had engendered very substantial economic reliance interests, is not protected by precedent, then it is hard to

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39. *Id.* at 251.

40. *Id.* at 252–60.

41. *Id.* at 260.

conclude that early Americans had a very expansive notion of the authority of precedent. I submit that Jackson's politically successful attack on the constitutionality of the bank and on *McCulloch* proves that early Americans had a very limited conception of the situations where precedent trumped the text of the Constitution.

Second, for precedent to trump the constitutional text, popular opinion on the question would have to be so well settled that all three branches of the federal government were and had been in agreement on the question for a very long time. Jackson arguably thought the issue of the president's removal power had been so settled by the famous Decision of 1789 and the practice of his six predecessors as president.<sup>42</sup> Controversy over the bank issue on the other hand had never entirely gone away. Accordingly, that was not an issue that, in Jackson's view, could be regarded as being settled by precedent. Jackson's view of constitutional precedent might thus suggest in modern terms that perhaps the decision in *Knox v. Lee*<sup>43</sup> sanctioning paper money or the decision in *Wickard v. Filburn*<sup>44</sup> upholding limits on the crops a farmer can grow on his own land might be examples of precedents that, even if wrong as an original matter, are nonetheless settled precedents since they clearly have long had the acquiescence of the whole people expressed in the views of all three branches of the national government.

In contrast, the abortion question is clearly not settled as a matter of precedent in this same deep-seated way because in the thirty-two years since *Roe v. Wade*<sup>45</sup> was decided it has been at least as much a source of agitation and disagreement as was the Bank of the United States between 1791 and 1832. I therefore submit that the great early fight over the Bank of the United States tells us that whenever the political branches of government—motivated as they are by public opinion—contest a constitutional issue, it cannot be regarded as being settled as a matter of precedent. There is simply no way one could conclude that the whole people of the United States acting through the medium of all three branches of the federal government and of the States have accepted *Roe v. Wade* as binding precedent.

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42. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half Century*, 47 CASE W. RES. L. REV. 1451, 1526–59 (1997).

43. 79 U.S. 457 (1870).

44. 317 U.S. 111.

45. 410 U.S. 113.

## II. PROFESSOR MERRILL'S NORMATIVE CASE FOR FOLLOWING PRECEDENT OVER TEXT

I have now discussed the original understanding and practice of Americans during the first fifty years of our history in following text or precedent in Part I. Both areas of practice counsel against a strong doctrine of judicial *stare decisis* in the U.S. Supreme Court's constitutional cases. I want now to turn to Professor Merrill's very substantial policy arguments in defense of what he calls conventionalism, so I can explain why I do not find them to be persuasive. I am focusing here on Professor Merrill's policy arguments in particular because Professor Merrill has laid out the normative case for the Supreme Court being bound by its precedents more clearly and more directly than any other scholar. In *Burke v. Bork* and in his article for this symposium issue, Professor Merrill mentions five policies that he says are promoted by forcing the Supreme Court to follow its constitutional precedents. These policies are: 1) that following precedent promotes Rule of Law values; 2) that following precedent better promotes the conservative goal of maintaining continuity with the past than does Borkean originalism; 3) that following precedent better comports with the inherent skepticism conservatives have and should have about the power of human reason to reorder society; 4) that following precedent is more democratic than would be following the Constitution's original meaning; and 5) that following precedent leads to less judicial activism than would result from the Court following the original meaning of the Constitution. I will discuss each of these five policies, in turn, and show why Professor Merrill is wrong on all five arguments as to why the Court should follow the doctrine over the document.

### A. RULE OF LAW CONSIDERATIONS

First, Professor Merrill says a strong rule of *stare decisis* promotes rule of law values such as equal treatment of similarly situated litigants and predictability in the law. He claims that conventionalist sources of judicial decision-making, like precedent, are thicker than are the originalist sources where the documentary record is often thin and contested. Accordingly, he calls for the Court "to enforce the current consensus view about the meaning of legal provisions, as reflected in precedent, the views of other branches, existing practice, and so forth."<sup>46</sup>

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46. Merrill, *Burke v. Bork*, *supra* note 3, at 516; see generally *id.* at 515–18.

I disagree with Professor Merrill that following precedent rather than text better protects Rule of Law values. First of all, there is an underlying disagreement between Professor Merrill and me about what the law is in constitutional cases. He thinks the caselaw is the law and I think the text of the Constitution is the law. At one level then, saying that *stare decisis* promotes the rule of law is self-justifying because it is just another way of saying that it is the caselaw that is the law and not the text. Textualists think the constitutional text is the “touchstone” of constitutional meaning, to quote Justice Frankfurter,<sup>47</sup> so a good textualist will feel the Rule of Law is disserved in abortion cases if the Supreme Court follows *Roe v. Wade* rather than the original meaning of Section 1 of the Fourteenth Amendment.

Professor Merrill’s claim that precedent is thicker than text and original history is provocative, but I think several responses might be made. First, Professor Merrill’s view reflects deeply the training and biases of a lawyer trained in the common law English or American systems. Civil law lawyers in countries like Germany, France, Italy, Spain, or Japan follow the texts of those countries’ civil law codes, and they do not follow precedent. No one would suggest that there is an absence of Rule of Law values like “equal treatment of similarly situated litigants” or “predictability” in Germany, France, Italy, Spain, or Japan. As an empirical matter, it is thus clearly possible to have a legal regime that gives no weight to precedent without losing anything in terms of Rule of Law values. Indeed, there are many more countries with civil law code systems around the world than there are common law countries. Most people in the developed world where the Rule of Law prevails live under systems of code, not systems of common law.

Professor Merrill might object that the U.S. Constitution, in Chief Justice Marshall’s famous words in *McCulloch*, “lacks the prolixity of a legal code” and so he might say there is not enough constitutional text in the United States to justify an analogy between American constitutional textualism and civil law practice. This is a fair point, and it is certainly the case that many parts of our constitutional text are worded at a high level of generality and the caselaw construing the text is thus of critical importance. This is certainly true, for example, with respect to the First Amendment where one cannot make sense of the law in the field without reference to caselaw.

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47. *Graves v. New York*, 306 U.S.466, 491 (1939) (Frankfurter, J., concurring).

Unlike Professor Paulsen and Professor Lawson,<sup>48</sup> however, I am not of the view that it is always unconstitutional for the Court to give precedent determinative weight. Where the text is vague and all three branches of the federal government are content with the doctrine, I think the grant of “judicial” power to the Supreme Court probably does permit it to follow, for example, its First Amendment precedent. Where I disagree with the argument that we should follow *stare decisis* is in situations like *Roe v. Wade* where the caselaw and the text and history clearly conflict, the doctrine has stirred up a political hornet’s nest, and the political branches are openly taking steps to try to get the Court to cut back on or overrule its doctrine. In those situations, even our brief, abstractly worded Constitution clearly conflicts with precedent, and we have to make a fundamental choice between following the Constitution or following what past Supreme Courts have said about the Constitution. Because I think and the American people also think it is the document and not the doctrine that is the law, I submit that in those situations when the political branches ask the Court to follow the document and not the doctrine, the Court ought to do so.

There is one final sense in which the doctrine could be said to be thicker than the document and that is in the sense that there is literally more of it: it is bulkier, wordier, and takes longer to read. Thus, Professors Merrill and Strauss are fond of pointing out that the number of paragraphs in Supreme Court opinions and briefs discussing caselaw is greater than the number of paragraphs discussing text or original history. The first thing to be said in response to this argument is that the fact that the doctrine is bulkier than the document does not mean that the doctrine is more constraining of judicial discretion. In fact, I suspect the exact opposite is true. The greater bulk of the doctrine means that it is easier for result-oriented judges to manipulate doctrinal arguments by “picking their friends out from among the crowd” as judges have been accused of doing with legislative history or with foreign sources of constitutional law.<sup>49</sup> The doc-

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48. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005) and Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731–33 (2003).

49. I first remember this point having been made by former Chief Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit. The point has subsequently been made by Justice Scalia and by many others in criticizing the use of legislative history. The same point was most recently made by Supreme Court nominee John Roberts, in his confirmation hearings to be Chief Justice, as a reason why the justices ought not to rely on

trine is certainly bulkier than the document since there are more than 500 volumes of the U.S. Reports, while the Constitution is a few thousand words long, but that does not prove that the doctrine is more constraining. In fact, one can find caselaw support on both sides of almost any constitutional issue. Doctrine lends an air of lawyerly authenticity (and, for laypersons, of impenetrability) to judicial decisions, but this does not mean doctrine restrains judicial discretion. To the contrary, I suspect doctrine gives judges more wiggle room to make policy both because it can be cited for any side of any proposition and because it can be used to pull the wool over the eyes of non-lawyers. I am thus unpersuaded by Professor Merrill's intuition that the doctrine is thicker than the document and original history.

Second, the mere fact that discussions in the U.S. reports of caselaw take up more paragraphs than the discussions of textual arguments does not change the fact that, as the Supreme Court has said itself, the text of the Constitution is the touchstone of constitutionality. The Court almost always leads with its textual arguments and only then discusses doctrine because it recognizes that the text is the bone and skeleton of any judicial decision while the discussion of doctrine is merely the fat. It is the textual arguments that really shape outcomes while doctrinal arguments are there to make a pleasant appearance. That is why the Court usually leads with textual arguments and only follows up with doctrinal ones. And that is why when the Supreme Court begins a sentence with "We hold . . ." that sentence usually ends referring to the constitutional text and not to one of the Courts precedents. I thus do not deny Professor Merrill's and Strauss's contention that doctrinal discussions are bulkier in most Supreme Court opinions than are textual or originalist discussions. I do, however, deny that doctrinal discussions are as important as discussions of the document.

There are two final things to say in response to Professor Merrill's claim that conventionalism promotes the Rule of Law. First, while predictability of constitutional law is an important value, another important value is getting the right answer to critical questions of constitutional meaning. If one thinks, as I do, that it is the text of the Constitution that is the law, faithful-

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foreign sources of law in constitutional decision-making. Roberts noted that there is so much foreign constitutional law out there that it would be too easy for judges to use it politically by "picking out their friends from among the crowd."

ness to that text may be more important than the value of predictability.

Second, and of critical importance, there is a time frame issue with respect to predictability that Professor Merrill overlooks. Following Supreme Court precedent may make our constitutional law predictable over a short presentist time frame by minimizing overrulings. But there is also a longer time frame within which one wants to be consistent, which is relevant in constitutional cases. We have some core constitutional traditions that go back 215 years to 1789 and some even more ancient constitutional privileges that have their roots in 800 years of English constitutional law.

I submit that the Rule of Law in constitutional cases requires faithfulness not to present day conceptions of what is right but faithfulness to the ideas that have been fundamental over the grand sweep of our constitutional history. Thus, I would not evaluate the current President Bush's use of military commissions simply by looking at the Supreme Court's overly enthusiastic endorsement of military commissions in the leading precedent in this area: *Ex Parte Quirin*.<sup>50</sup> I would look at the whole English and American tradition of the right to jury trial and to habeas corpus relief because I think consistency with 800 years of English and American history is more important than consistency with a precedent handed down during a time of emergency 50 years ago. Admittedly, there may be questions where new technologies or new social circumstances make it impossible to have an 800 year time frame as is the case for example in considering the legality of the administrative state. But, I still think that whenever possible we should strive for longer term time horizons than the ten to twenty year time horizons that often seem to satisfy Professor Merrill.

Finally, Professor Merrill may be right that the body of caselaw at the moment is thicker and more confining than is the body of text and originalist source material. We are coming out of a period when the Court cited precedents more than textual and originalist sources in justifying its decisions, and so lawyers arguing before the Court and law professors writing articles to persuade the Court have mainly made arguments to the Court from caselaw. However, as the Court has become more originalist with the appointments of Justices Scalia and Thomas, brief writers and law review article writers have turned more and

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50. 317 U.S. 1 (1942).

more to textualism and originalism as a methodology of constitutional interpretation. The justices in turn take some of these textual and originalist arguments from the briefs and put them in Supreme Court opinions. My prediction is that as more originalists get appointed to the Supreme Court, the body of textualist and originalist materials for the Court to draw on will necessarily grow thicker because everyone will have an incentive to produce textualist and originalist arguments. I thus think Merrill's point about the current thinness of historical materials reflects only a transition problem as we move toward a more originalist Court.

#### B. PRESERVING CONTINUITY WITH THE PAST

Professor Merrill's second policy argument in *Burke v. Bork* in favor of *stare decisis* is that following precedent serves the fundamental conservative policy goal of "preserving continuity with the past."<sup>51</sup> Basically, this is an argument against a legal system that takes sudden lurches in new directions, displacing settled precedent and practice along the way. My response here is to reiterate the same time framing issue I raised with respect to the Rule of Law above. On military commissions, for example, is it more important to maintain continuity with the Court's *Ex Parte Quirin* precedent from the 1940's or with the fundamental sweep of 800 years of English and American history? On abortion, is it more important to follow a bitterly contested precedent from thirty years ago or is it more important to repudiate that precedent so as to tame a line of substantive due process disasters that begins with *Dred Scott* and goes on to include *Lochner*? Sometimes preserving continuity with our fundamental values means displacing wayward practices and precedents that have grown up like barnacles on the pristine language of the constitutional text. I thus have the same time framing quarrel with Professor Merrill on preserving continuity with the past that I have with him on preserving Rule of Law values.

#### C. SKEPTICISM ABOUT THE POWERS OF HUMAN REASON

Third, Professor Merrill argues in *Burke v. Bork* that conventionalism comports with a general skepticism that conservatives share about the powers of human reason to reorder society.<sup>52</sup> I agree that conservatives share such a general skepticism.

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51. Merrill, *Burke v. Bork*, *supra* note 3, at 518–19.

52. Merrill, *Burke v. Bork*, *supra* note 3, at 519–21.

That is why, for example, the English Glorious Revolution of 1688 was celebrated as being a conservative revolution because it meant a restoration of timeless medieval values of English constitutional law. It was a revolution, or coming full circle and returning to the past: it was not like the French Revolution, a full-fledged break with the past. I think textualism and originalism don't call upon Supreme Court justices to remake society anew in the manner of the French Revolution. Rather, I think textualism and originalism call for emphasizing timeless, fundamental American constitutional values over contemporary practice. I thus think the kinds of revolutions originalism leads to are fundamentally conservative comings full circle rather than radical breaks with the past.

For example, in *Apprendi*, *Blakely*, and *United States v. Booker*, the U.S. Supreme Court recently revived the notion that mandatory sentencing guidelines could not give judges the power to adjust upward a prisoner's sentence unless the facts justifying the upward adjustment are proved to a jury. Under Professor Merrill's conventionalism, these cases are certainly wrongly decided because for about 20 years, since the adoption of the Federal Sentencing Guidelines, we have grown quite used to a reduced role for the jury in finding all the critical facts leading to a sentence. For Merrill, I assume, the fact that thousands of cases have been decided this way for twenty years means the Court's *Apprendi* line of cases is clearly a violation of conventionalism.

I think, of course, that the Court in the *Apprendi* line of cases rejected twenty years of wayward practice and restored an 800-year-old fundamental right to jury trial under English and American law. Was this "revolutionary" decision consistent with a general skepticism about the powers of human reason? You bet it was. The innovation of the last twenty years in cutting back on the right to jury trials was the effort of the Sentencing Commission to give us a more rational world, and it was that effort that smacked of the French Revolution. In rejecting the practice of the last 20 years and restoring the practice of the previous 800 years, the *Apprendi* Court was leading a conservative "restorative revolution," a coming full circle if you will and returning to the point where we started.

#### D. PROMOTING DEMOCRATICALLY ACCOUNTABLE LAW-MAKING

Fourth, Professor Merrill praises conventionalism because he thinks it will encourage democratically accountable decision-making.<sup>53</sup> He argues that this is the case first because conventionalism “establishes a background understanding that allows legislatures (as agents of the people) to be more effective in pinpointing the changes they want to effect”<sup>54</sup> and second because it shuts off the courts as avenues of social change. There are several responses to this argument. First, as Merrill notes, textualism is faithful to the people’s original democratic will in establishing the Constitution, and it reduces judges to being a mere transmission belt of the people’s original desires when they decide cases faithfully to the text rather than by following precedent.

Second, there is again a critical, indeed dispositive, time framing issue that is raised by Merrill’s argument. For example, did the Supreme Court in the *Apprendi* line of cases or in *Brown v. Board of Education* impose social change on the country? The answer is “yes” if we mean that current wayward practice was changed dramatically, but the answer is no if one believes with me that the *Apprendi* line of cases and *Brown v. Board of Education* were justifiable as a matter of originalism. The displacement of wayward practices that have grown up in violation of a fundamental constitutional right ought not to be analogized to the creation of new, historically unrooted constitutional rights like the so-called rights to an abortion or to engage in sodomy. Displacing wayward practices and heresies may look like the imposition of social change if one has a short, presentist time horizon, but if one has an 800-year constitutionalist’s time horizon these displacements are “restorations,” not impositions of social change.

#### E. PROMOTING JUDICIAL RESTRAINT

Finally, in his symposium piece in this issue, Professor Merrill argues that conventionalism leads to judicial restraint more than textualism and thus that conservatives, as advocates of judicial restraint, ought to be conventionalists.<sup>55</sup> He argues: 1)

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53. Merrill, *Burke v. Bork*, *supra* note 3, at 521–23.

54. *Id.* at 521.

55. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, *supra* note 3, at 274.

that in a democracy, innovation ought to come from elected politicians not unelected judges and 2) that it may help prevent judges from bending the rules to disfavor unpopular claimants or minorities. He goes on to argue that originalism is more compatible with the skill set of the average lawyer or judge in this country. Finally, he claims that the lower federal courts tend faithfully to follow Supreme Court precedent whereas the U.S. Supreme Court does not so faithfully follow its own precedents. Merrill then observes that few constitutional innovations emerge from the lower federal courts, and so he claims that this proves his point that following precedent leads to judicial restraint.

There are several responses to be made to these points. First, describing following precedent as being restrained simply begs the question of whether it is the document or the doctrine that is the law. Obviously, a documentarian will think that following *Roe v. Wade* rather than the text of the Fourteenth Amendment is not judicially restrained, but activist. More fundamentally, the fact that courts produce some social change when they sweep away wayward practices that have grown up does not make those courts activist over the grand sweep of American history. The sweeping away of wayward practices and the restoration of fundamental constitutional traditions is a form of conservative revolutionary change, not French revolutionary change. It is actually Merrill's privileging of the present and of the status quo that is radically unBurkean and activist. A true Burkean would look not only at what people think now or have thought in the last 15 years about a constitutional issue but at what all Americans who have ever lived under the Constitution have thought about that issue. Thus Merrill's presentism opens the door to the jettisoning of many of our fundamental rights. It is unBurkean for that very reason.

As to judges and American lawyers not having the skill sets needed to practice textualism and originalism, as opposed to doctrinal analysis, that is a condition that would rapidly change if more originalists like Scalia and Thomas were appointed to the Supreme Court. Lawyers will learn, and law schools will teach, the skills that the Supreme Court determines are relevant to practicing law before it. In civil law countries, millions of lawyers are well trained in textual analysis and know nothing of doctrinal argument because that is what their legal system expects of them. I have no doubt the same situation could be made to occur here.

In sum, I am not persuaded by any of Professor Merrill's normative arguments that we should be conventionalists rather than textualists or originalists in constitutional interpretation. I think a true Burkean in this country ought to be an originalist and ought not to worship at the altar of the present day status quo. A preference for text over precedent may be inconvenient for professional lawyers who practice before the Supreme Court because textualism can produce surprises and professional lawyers hate to be surprised. The professional interest, however, of those lawyers in being able to predict what the Court will do is less important than the interest ordinary American citizens have in preserving our deepest traditions and values even in the face of a contemporary wayward practice or heresy.

### III. WHY THE DISCUSSION OF *STARE DECISIS* IN THE CASEY OPINION SHOULD BE OVERRULED

In Part I above, I showed that in the first great constitutional controversy in American history, the fight over the constitutionality of the Bank of the United States, early Americans resolved the controversy based on the text of the Constitution and did not follow precedent, thus suggesting that the first generation of Americans living under the Constitution thought that text trumps precedent. In Part II above, I showed that Professor Merrill's policy arguments for following precedent over text in constitutional cases do not hold water. In this Part want to conclude by asking whether in cases like *Planned Parenthood v. Casey*,<sup>56</sup> where one of the political branches of the federal government or a majority of the states challenges a precedent, the Supreme Court ought to be obligated to decide such a case based on the original meaning of the Constitution.

#### A. WHEN SHOULD THE CURRENT SUPREME COURT FOLLOW PRECEDENT

In criticizing the Supreme Court's decision in *Casey* to follow precedent when the executive branch in its brief had challenged that precedent based in part on the original understanding, I mean to set aside and not address the question of whether the Supreme Court can follow precedent in other areas of doctrine where, as Madison or Andrew Jackson might have put it, the sense of the nation is that the construction of the text has

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56. 505 U.S. 833 (1992).

been settled by the whole people as a matter of precedent. I thus do not want to challenge the Supreme Court's reliance on precedent in First Amendment cases, where a large body of nonoriginalist doctrine has grown up, or in cases involving the constitutionality of paper money or of the New Deal where arguably *Wickard v. Filburn* is unjustifiable on originalist grounds.<sup>57</sup> The current practice in the Supreme Court has been to sometimes revisit such precedents on originalist grounds, even when the Court has not been asked to do so by the President or Congress, but I want to focus here solely on the question of whether the Court has the power to fall back on *stare decisis* when the President or a majority of the Senate or House of Representatives is asking the Court to render a decision based on the original meaning of the constitutional text.

I submit that in such cases the Court is obligated to decide cases based on the text of the Constitution and that it cannot invoke *stare decisis* when the political branches of the federal government are asking for a ruling based on the text. I thus conclude that the *Casey* plurality has matters exactly backwards when it complains about the fact that the executive branch had repeatedly come into Court to challenge the constitutionality of *Roe v. Wade*. The Court said that in such cases, where it is under fire, it is especially bound by *stare decisis* to stand firm and not reconsider its precedent. I think the exact opposite is the case. It is in cases where the President, the Senate or the House of Representatives claim in a brief before the Court that a precedent is doing more harm than good that a Court ought to be most disposed to decide a case based on text and original understanding.

#### B. THE MICHAEL STOKES PAULSEN ARTICLE

Discussion of this problem must necessarily begin with Professor Michael Stokes Paulsen's brilliant law review article arguing that Congress has the power, legislating under the Necessary and Proper Clause, to abrogate *stare decisis* in abortion and all other cases by passing a statute.<sup>58</sup> A brief summary of Professor Paulsen's extremely clever argument is in order. First, Paulsen

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57. I have no problems with other leading New Deal cases on originalist grounds. *United States v. Darby*, 312 U.S. 657 (1941); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), all seem to me to be correctly decided as a matter of the original understanding. *Wickard*, however, does not seem to me to be rightly decided under originalism, although it may now be protected by *stare decisis*.

58. Paulsen, *supra* note 12.

notes that the Supreme Court has repeatedly described its rule of *stare decisis* as being a doctrine of policy, like a prudential standing rule or a decision of federal common law, and that the Court has not said *stare decisis* is constitutionally based.<sup>59</sup> Thus, Paulsen quotes the Court in *Casey* as saying that “it is common wisdom that *stare decisis* is not an ‘inexorable command’” and that “when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”<sup>60</sup> Paulsen quotes many similar statements by the Court to the effect that *stare decisis* is a doctrine of policy and not constitutional mandate from cases such as *Agostini v. Felton*,<sup>61</sup> *Seminole Tribe*,<sup>62</sup> and *Adarand Constructors v. Pena*,<sup>63</sup>

Having shown that *stare decisis* is a doctrine of policy and is not constitutionally based, Professor Paulsen then goes through the five policies of precedent listed in *Casey*: workability, reliance, “remnant of abandoned doctrine,” changed facts, and judicial integrity, and he shows that Congress is institutionally better situated than is the Supreme Court to legislate or pronounce a policy as to those matters under the Necessary and Proper Clause.<sup>64</sup> Paulsen discusses Congress’s sweeping powers under the Necessary and Proper Clause, and he asks whether anything in the constitutional text, history, structure or practice gives the federal judiciary an autonomous constitutional power to prescribe a doctrine of *stare decisis*.<sup>65</sup>

Paulsen concludes that no such autonomous federal judicial power exists, and he insightfully points to numerous early acts of Congress in tension with the notion that there is such an autonomous power. Among the Acts mentioned by Paulsen as

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59. *Id.* at 1543–51.

60. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

61. 521 U.S. 203, 235 (1997) (“As we have often noted ‘*stare decisis* is not an inexorable command’, but it instead reflects a policy judgment that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right.’ That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”).

62. 517 U.S. 44, 63 (1996) (the Court has “‘always . . . treated *stare decisis* as a principle of policy . . . and not as an inexorable command”).

63. 515 U.S. 200, 231–35 (1995) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable”).

64. Paulsen, *supra* note 12, at 1551–67.

65. *Id.* at 1570–82.

showing broad congressional power to direct the courts in their deciding of cases are: the Rules of Decision Act,<sup>66</sup> the Full Faith and Credit Act,<sup>67</sup> the Anti-Injunction Act,<sup>68</sup> laws abrogating the Court's prudential standing rules,<sup>69</sup> the Rules Enabling Act of 1934 creating the Federal Rules of Evidence, Civil Procedure, Appellate Procedure, and Criminal Procedure,<sup>70</sup> and finally the legislatively mandated rules for the disqualification of federal judges from sitting on and deciding certain matters.<sup>71</sup> He establishes that as a matter of practice, since the earliest days of our history, Congress has passed statutes pursuant to the Necessary and Proper Clause that constrain the judiciary substantially in their deciding of cases or controversies.

Professor Paulsen's argument is extremely clever, and, if I thought with him and with Professor Lawson that it was unconstitutional for the Supreme Court to follow precedent rather than the original meaning of the Constitution, I would then conclude that perhaps Congress could under the Necessary and Proper Clause direct the Court to do what it ought to do anyway. I am not persuaded by Paulsen and Lawson, however, that it is unconstitutional for the Court under some circumstances to choose to follow precedent. While I cannot in this article respond fully or adequately to all of Professor Paulsen's arguments as to why there is no autonomous constitutional power of courts to follow *stare decisis*, I remain unpersuaded. To mention just a few of the arguments against Professor Paulsen's position, one should consider the following pieces of evidence. First, it is surely noteworthy (as Professor Paulsen acknowledges) that Alexander Hamilton made the following statement in *Federalist Number 78*, the essay in which Hamilton derives and justifies the power of judicial review:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the wickedness and folly of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a

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66. *Id.* at 1584.

67. *Id.*

68. *Id.* at 1585

69. *Id.* at 1585-86.

70. *Id.* at 1587-89.

71. *Id.*, at 1589-1590.

competent knowledge of them.<sup>72</sup>

To this statement by Hamilton in *The Federalist* must be added James Madison's statement in his 1831 letter to Jared Ingersoll, arguing for the precedential effect of legislation like the Bank Bill by analogizing such legislation to the practice of judges in "solemnly repeated and regularly observed" judicial precedents of following precedents with which they disagree. Joseph Story picks up on this theme and makes the same point in his 1833 *Commentaries on the Constitution of the United States* where he asserts, without support, that "this conclusive effect of judicial adjudications, was in the full view of the framers of the Constitution."<sup>73</sup> To this, it might be added that Marshall Court opinions like *Ogden v. Saunders*<sup>74</sup> and early Taney Court opinions like *Mayor of the City of New York v. Miln*<sup>75</sup> discuss precedents at some length and in a way that suggests they have weight of their own.

More recently, in cases like *United States v. Klein*,<sup>76</sup> in *Plaut v. Spendthrift Farm, Inc.*,<sup>77</sup> in *City of Boerne v. Flores*,<sup>78</sup> and in *Dickerson v. United States*,<sup>79</sup> the Supreme Court has found unconstitutional federal statutes that seemed to try to direct the Court to decide a particular case in a particular way. Given the Court's reaction to the federal statutes struck down in *Klein*, in *Plaut*, in *City of Boerne*, and in *Dickerson*, I find it hard to believe that the Court would uphold a federal statute abrogating *stare decisis* in abortion cases. My prediction in fact is that such a statute would meet almost precisely the same fate as did Congress's effort in *Dickerson* to overturn *Miranda* by statute. In *Dickerson*, Congress tried to legislate to overturn a doctrine (the *Miranda* Warning) that the Court had previously said was not constitutionally based. The Court's predictable reaction was to dig in its heels and say that the doctrine in question was constitutionally based after all. Outside the strange world of the Dor-

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72. THE FEDERALIST NO. 78, at 398-99 (Alexander Hamilton) (Gary Wills ed., 1982). For Professor Paulsen's lengthy, though to me unpersuasive, attempt to explain away this passage, see Paulsen, *supra* note 12, at 1572-78.

73. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 378 (Fred B. Rothman & Co. 1991) (1883). For Professor Paulsen's response to Story, see Paulsen, *supra* note 12, at 1578.

74. 25 U.S. (12 Wheat.) 213 (1827).

75. 36 U.S. 102 (1837).

76. 80 U.S. 128 (1872).

77. 514 U.S. 211 (1995).

78. 521 U.S. 507 (1997).

79. 530 U.S. 428 (2000).

mant Commerce Clause, the Supreme Court has been very unwilling to allow Congress to overturn its constitutional rulings by statute.

Finally, and of critical if not decisive importance for me, to these points it might be added that since very early on in our history the Supreme Court has as a matter of practice cited, discussed, and relied on precedent in at least some bodies of law, and Congress and the President have for a century and one-half raised no objection to this long-settled judicial practice! In 216 years, Congress has never even discussed impeaching a justice for following precedent rather than the text of the Constitution. One might therefore argue that even under Andrew Jackson's view of precedent expressed in the Bank of the United States controversy, that it has been settled by the whole people of the United States probably since before the Civil War that "the judicial Power" vested by Article III at least sometimes gives the Supreme Court the autonomous power to follow precedent rather than constitutional text. My conclusion is therefore that practice has settled the matter such that the Court does have an autonomous, implied power to sometimes follow precedent, just as the president has an implied power to remove executive branch subordinates, and that neither of these implied powers can be restricted by Congress legislating under the Necessary and Proper Clause. I therefore must regretfully disagree with Professor Paulsen.<sup>80</sup>

### C. RESCUING THE PAULSEN ARGUMENT WITH DEPARTMENTALISM

Despite the disagreements I have with Professor Paulsen as described above, I have to say that I think his fundamental intuition is sound that there is something very odd about the Supreme Court being the institution that gets to determine when the costs of retaining a precedent outweigh the reliance interests the precedent has generated. Assessing the costs to society associated with retaining a precedent and weighing those costs against the reliance interests of society that a precedent may have generated is fundamentally an empirical and a political task. It is the sort of task that would seem, as Paulsen correctly intuits, to be much more within the competence of the political branches of the federal government than it is within the competence of the Supreme Court.

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80. See Lawson, *supra* note 48; Fallon, *supra* note 7.

First, the political branches of the federal governments have much better institutional tools for assessing the twin empirical questions of: 1) what costs is a precedent currently imposing on society and 2) to what extent have reliance interests grown up around a precedent suggesting it ought to be retained. The House and Senate can investigate these empirical questions by holding hearings, by talking to constituents in an *ex parte* manner, and by commissioning national studies by such agencies as the General Accounting Office. The President can investigate these matters by appointing commissions to study and investigate them, by asking his millions of subordinates in the executive branch to gather information for his perusal, and by conducting other traditional investigations.

The Supreme Court's sources of empirical information, on the other hand, are limited to the information presented to it in briefs and amicus briefs and to what it can glean from oral argument. The justices lead isolated and sheltered lives in a kind of a cocoon protected by hundreds of police officers, and they are forbidden from discussing the empirical issues that arise in their cases with anyone other than each other and their law clerks. The justices have no home state offices to return to, no town meetings at which to gather information, no constituents with whom they can correspond, and no expert committee or investigatory personnel upon whom they can rely. In short, the justices are far less able than the President, the Senate, or the House to gather empirical information on: 1) what costs a precedent is currently imposing on society and 2) to what extent reliance interests have grown up around a precedent, suggesting it should be retained.

Ironically, Justice Souter himself, reputedly the author of the *Casey* plurality opinion's paean to *stare decisis*, has stated that Congress's "institutional capacity for gathering evidence and taking testimony far exceeds" the Court's.<sup>81</sup> For that reason, in Commerce Clause cases, Justice Souter believes that "[b]y passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power" and, Souter argues, that the congressional judgment on the existence of jurisdictional facts in Commerce Clause cases should be reviewed *only for rationality*.<sup>82</sup> There is no reason to believe that Congress's superiority, as a factfinder, is any greater

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81. *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting).

82. *Id.*

in Commerce Clause cases than it is in cases where Congress is weighing the cost of retaining a precedent against the reliance interests that precedent has engendered. Therefore, applying Justice Souter's standard of review of congressional factfinding in Commerce Clause cases to *stare decisis* suggests that, under the Souter approach, the Supreme Court ought to defer to Congress's cost/benefit analysis as to whether to retain a precedent, unless it is clearly irrational.

Beyond the difficulty of obtaining empirical information in cases where *stare decisis* might be invoked, there is the separate, equally difficult problem of weighing the costs a precedent is currently imposing on society against the reliance interests that have grown up around a precedent suggesting that it should be retained. This can involve a weighing of policies that is uniquely political and inappropriate for the Supreme Court to undertake. How can a Court possibly weigh the harms caused to society by legalized abortions against the reliance interest of women in having *Roe v. Wade* retained? This type of weighing of incommensurables is quintessentially the function of the policy-making branches of the federal government and not of the Supreme Court. Maybe the President, elected indirectly by the people of the nation as a whole or a majority of the Senate and House can weigh the loss of fetal life against the reliance interest of women, but how can a court of law possibly do such a thing? Such a weighing of incommensurables is surely far removed from the weighing common law courts traditionally did in England before 1787 in cases in law or equity.

A skeptic might respond by saying that "the judicial Power" conferred by Article III comprehends the power to define and enforce constitutional guarantees, but the Court has only claimed such a power for itself since *Cooper v. Aaron*.<sup>83</sup> For most of our history, it has been understood that all three branches of the federal government play a role in constitutional interpretation: Congress when it exercises its Article I powers, the President when he signs bills into law and executes the laws that result, and the courts when they decide cases or controversies.<sup>84</sup> As *Marbury v. Madison* famously shows, the Constitution does not

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83. *Cooper v. Aaron*, 358 U.S. 1 (1958).

84. Ironically and amusingly, some of the best writing about departmental or coordinate constitutional review is by none other than Professor Paulsen. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). Professor Paulsen probably intuits the force of such argument in this context of judicial scrutiny of precedent, but he never squarely addresses the question.

have a “judicial review clause” or a “power of constitutional interpretation clause” in it. The Supreme Court’s power to decide constitutional cases and controversies in accordance with the Constitution is part of a coordinate system of three-branch enforcement of the Constitution. It was for this reason that James Bradley Thayer argued more than a century ago that when cases reach the Supreme Court they arrive with so strong a presumption of constitutionality that the Court ought only to strike those laws down when it concludes the political branches of the federal government have made “a clear mistake.”<sup>85</sup> Thayer’s Rule of a Clear Mistake was adopted by no less an authority than the elder Justice Harlan in his dissent in *Lochner v. New York* where Harlan said that only if the legislature’s view that a law was an unreasonable exercise of the police power was clearly mistaken should that law be struck down.<sup>86</sup> Harlan’s view became governing law once the Court in *United States v. Caroline Products*<sup>87</sup> and in *Williamson v. Lee Optical*<sup>88</sup> replaced judicial review of the reasonableness of laws with judicial review under a rational basis test pursuant to which laws are upheld as reasonable exercises of the police power if they are supported by a rational basis.

Thayer’s Rule of Clear Mistake overstates the deference the Supreme Court is bound to pay to the judgments of Congress about a law’s constitutionality, and I have previously written in opposition to that degree of deference by the Court to the political branches.<sup>89</sup> I do, however, think that decisions of the policy-making branches of government are implicitly both policy and constitutionality judgments and that those decisions therefore arrive at the Court with a presumption of constitutionality. When Congress and the President adopt a law barring partial birth abortions they are in my judgment not only making policy but are also expressing their view as coordinate and co-equal branches to the Supreme Court that the regulation of partial birth abortion is permissible, notwithstanding the court’s contrary view expressed in *Stenberg v. Carhart*.<sup>90</sup> That judgment by the political branches is entitled to a presumption of constitutionality in a case or controversy before the Supreme Court.

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85. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151 (1893)

86. *Lochner v. New York*, 198 U.S. 45, 72-73 (1905) (Harlan, J., dissenting). See generally Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 NW. L. REV. 269 (1993).

87. *United States v. Caroline Products*, 344 U.S. 144 (1938).

88. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

89. See Calabresi, *supra* note 86.

90. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Only if a preponderance of the evidence shows that the political branches are wrong in their judgment on the constitutional question does the Constitution empower the Court to hold a law unconstitutional in a case or controversy.

I submit that on the empirical and policy question of whether the benefits of overturning a precedent outweigh the reliance interests engendered by that precedent the Supreme Court ought always to defer to the judgment of politically elected officials like the President, a majority of the Senate or the House, or a majority of the States, unless those democratically accountable officials can be shown to have acted irrationally. If these powerful democratically accountable factfinders and policy-makers think that the costs of following precedent outweigh the benefits of overruling it, the Supreme Court ought always to disregard *stare decisis* and decide the case before it on its merits according to the text of the Constitution. This does not mean the political branches should automatically win. It means only that the coordinate, coequal, political branches of government are constitutionally entitled to force the Supreme Court to rule on the merits and not to fall back on the policy of *stare decisis*.

There are a number of issues of American constitutional law that the Constitution textually commits to the political branches of government. Thus, the President has broad power over constitutional foreign policy issues, the Senate has the last word on the trial of impeachments,<sup>91</sup> and the Congress has the last word on the ratification of constitutional amendments.<sup>92</sup> These cases are said to be nonjusticiable because they raise political questions—i.e. constitutional issues over which the Constitution has delegated enforcement power to one of the nonjudicial branches. I think the power to empirically assess: 1) the costs a precedent is imposing on society and to weigh those costs against 2) the reliance interests that have grown up around that precedent is quintessentially a power that under our Constitution ought to belong to the elected, political branches of the government, both because of their superior fact-finding capacity and because of their greater legitimacy and greater ability to weigh incommensurables. I therefore submit that the presumption of constitutionality that attaches to all actions of the political branches of the government ought to force the Supreme Court to decide any constitutional issue those branches choose to raise

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91. *Nixon v. United States*, 506 U.S. 224, 232-33 (1993).

92. *Id.* at 241 (citing *Coleman v. Miller*, 307 U.S. 433, 457-60 (1939)).

on their textual merits and without regard to the “policy” of *stare decisis*.

Some good Burkeans might respond at this point that the judicial restraint that three-branch coordinate enforcement of the Constitution leads to may comport with the original understanding of the Constitution, but for a long time now we have lived in a regime where the Supreme Court is “supreme in the exposition of the law of the Constitution.”<sup>93</sup> I would dispute that claim. In times of emergency, Presidents and Congresses have traditionally challenged the Supreme Court in this country by insisting on their textually granted co-equal powers as constitutional interpreters. Jefferson did this in challenging the Alien and Sedition Acts, Jackson did it in challenging the constitutionality of the Bank of the United States, Lincoln did it in challenging the constitutionality of *Dred Scott*, Franklin Roosevelt did it in challenging the nine old men, and Ronald Reagan did it in challenging *Roe v. Wade*. There may be a tradition in ordinary times of deferring to the Supreme Court on many constitutional issues like the meaning of the First Amendment, but there is also a tradition, on big occasions, of the political branches reasserting their roles as constitutional interpreters and demanding that the Court back down. When the President of the United States shows up in the Supreme Court five times in a decade demanding that the Court reverse *Roe v. Wade*, the least that the presumption of constitutionality entitles him to is that the Court rule on the merits and not hide behind a phony policy of invoking phony reliance interests. The Court thus got it exactly backwards in *Casey*. Rather than responding to repeated presidential requests that *Roe* be overruled by digging in its heels, the Court ought to have recognized the conversation it had gotten itself into with the political branches and addressed the abortion issue on its textual, constitutional merits. That that ought to have led to an overruling of *Roe* on the ground that the abortion right is not deeply rooted in our history and tradition is to me, at least, self-evident.

## CONCLUSION

In conclusion, a good Burkean living in the American constitutional culture should be a textualist and should follow the

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93. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Tom Merrill, however, is a good Burkean who endorses Departmentalism. See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

document, not the doctrine. Our actual practice in this country, since 1937, is one of repeated overrulings and disregardings of precedent on every single major constitutional issue, except abortion. We do not, in fact, live in a common law constitutionalist or a conventionalist nation, although some distinguished and eminent lawyers who have worked in the Solicitor General's office may be under the mistaken impression that we do. This distinctively American focus on the document over the doctrine is evident in our early constitutional history in the first big fight we had over a constitutional issue—the fight over the constitutionality of the Bank of the United States. That fight shows that one of the founders, James Madison, believed in a very limited theory of legislative precedent whereby prior Congresses could bind subsequent Congresses on constitutional issues. Madison never, however, endorsed anything like *Planned Parenthood v. Casey's* imperialistic doctrine of judicial *stare decisis*, and, in any event, Madison's view of legislative precedent was considered and decisively rejected in the 1830's by the Jacksonians. The Jacksonian vision of the primacy of the document over the doctrine led to the successful annihilation of the Bank, which was not to reappear in its modern Federal Reserve Board form until the Woodrow Wilson administration. It is hard, thus, to speak of an original understanding as to precedent, but it is fair to say that when the question of following precedent first seriously emerged forty years into our history, in 1832, early Americans decided to follow the document, not the doctrine. The tradition in the United States is thus a tradition of the written Constitution, which is why all good American Burkeans ought to be textualists and not conventionalists or common law constitutionalists.

Policy considerations support this conclusion that the Supreme Court ought to follow the constitutional text over precedent. Rule of law concerns, enhancement of democracy concerns, and arguments from judicial restraint all point in this direction, contrary to the distinguished scholarship of my former colleague Thomas Merrill. The problem with conventionalism or common law constitutionalism is that it prevents the people from checking the Court by appealing from the doctrine to the document through the medium of the President, the Senate or the House. Moreover, a common problem with all of Professor Merrill's policy arguments for conventionalism is that he uses too short a time frame in claiming that conventionalism is, for example, more faithful to the rule of law than is originalism. If one uses the multi-generational time frame that is obviously ap-

appropriate in constitutional cases, then it is originalism and not conventionalism that best serves rule of law, democracy, and judicial restraint-enhancing values. It is thus conventionalism and common law constitutionalism that are undemocratic and activist, not textualism.

It is probably fair to assume that, under our traditions, the Supreme Court can choose to follow precedent over text and original meaning on some occasions—as the important work of Charles Fried shows to be the case with First Amendment case-law.<sup>94</sup> It is probably also fair to assume that Professor Michael Stokes Paulsen is wrong that congressional power under the Necessary and Proper Clause is broad enough to allow the congressional abrogation of *stare decisis*, given our tradition of judicial decisional independence and of occasionally allowing judges to choose to follow precedent over original meaning. But it is also probably fair to assume that the Supreme Court does not have the unique power under the Constitution to interpret the Constitution. The Court shares the power of constitutional review with Congress and the President, and it is for that reason that all their actions arrive at the Court with a presumption of constitutionality.

Some constitutional issues like the issue of whether a precedent is causing more harm than it is worth, given reliance interests, are uniquely within the capability of the political branches alone to assess. This is the case both because they raise empirical issues the political branches can better ascertain and because they involve a comparing of incommensurables, which the political branches are better suited to make. What this means, at a bare minimum, is that when the President, a majority of the Senate or House, or a majority of the States show up in the Supreme Court claiming that a precedent is causing more harm than it is worth, given reliance interests, the presumption of constitutionality ought to force the Court to defer to the political branches' judgment on the reliance issue (unless it is irrational) and ought to force the Court to decide the case based on its best understanding of the constitutional text. This is so because the political branches have greater institutional capacity to do a cost/benefit analysis on a precedent in much the same way as the President has greater institutional capacity to decide foreign policy questions.

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94. Fried, *supra* note 8, at 80.

The Supreme Court in *Planned Parenthood v. Casey* was thus 180 degrees wrong to say that the Court should try the hardest to stand its ground when its precedents are being challenged with the most verve. When the President of the United States, who is sworn to preserve, protect, and defend the Constitution, appears in the Supreme Court five times in a decade asking the Court to overrule *Roe v. Wade* the very least the Court ought to do is decide the case on its textual merits and not on the basis of *stare decisis*. To the extent the *Casey* plurality opinion in its discussion of *stare decisis* says otherwise, that opinion ought now to be swiftly and ignominiously overruled.