

ORIGINALISM AND STARE DECISIS

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INTRODUCTION

Justice Scalia was the public face of modern originalism. Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable.

The claim that the original public meaning of constitutional text constitutes law is in some tension with the doctrine of stare decisis. Stare decisis is a sensible rule because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court's existing cases. But what happens when precedent conflicts with the original meaning of the text? If Justice Scalia is correct that the original public meaning is authoritative, why is the Court justified in departing from it in the name of a judicial policy like stare decisis? The logic of originalism might lead to some unpalatable results. For example, if the original meaning of the Constitution's Gold Clauses prohibits the use of paper money, is an originalist bound to plunge the economy into ruin? Some constitutional theorists treat precedent as capable of supplementing and even supplanting the text's historical meaning; for them, choosing to follow precedent that diverges from the original meaning is relatively unproblematic. Originalists, in contrast, have difficulty identifying a principled justification for following such precedent, even when the consequences of overruling it would be extraordinarily disruptive.

Faced with this problem, Justice Scalia famously described himself as a "faint-hearted originalist" who would abandon the historical meaning when following it was intolerable.¹ He claimed that "*stare decisis* is not *part of my*

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1 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). Justice Scalia

originalist philosophy; it is a pragmatic *exception* to it.”² That concession left him vulnerable to criticism from both his intellectual opponents and his allies. His opponents argued that Justice Scalia’s willingness to make a pragmatic exception revealed that originalism is unprincipled in theory and unworkable in practice. Some of his allies contended that a principled originalist should not be afraid to depart from even well-settled precedent.

The tension between stare decisis and originalism gave stare decisis a newly significant role in debates about constitutional theory. To be sure, judges and scholars had long grappled with the pragmatic considerations that inform the choice between keeping law settled and getting it right. But for an originalist, the decision whether to follow erroneous precedent can be more than a matter of weighing the costs and benefits of change. At least in cases involving the interpretation of constitutional text, originalists arguably face a choice between following and departing from the law embodied in that text. While the debate about stare decisis is old, modern originalism introduced a new issue: the possibility that following precedent might sometimes be unlawful.

This issue was unexplored before Justice Scalia helped propel originalism to prominence. Since then, the question whether stare decisis is compatible with originalism has occupied both originalists and their critics. In this Essay, I explore what light Justice Scalia’s approach to precedent casts on that question. I argue that while he did treat stare decisis as a pragmatic exception to originalism, that exception was not nearly so gaping as his “faint-hearted” quip suggests. In fact, a survey of his opinions regarding precedent suggests new lines of inquiry for originalists grappling with the role of stare decisis in constitutional adjudication.

I. THE PROBLEM OF PRECEDENT

Before addressing the tension between originalism and stare decisis, it is important to emphasize that precedent itself is not only consistent with, but critical to, originalism. Most discussions of originalism’s relationship to precedent focus on prior Supreme Court opinions. Yet one cannot paint a complete picture of Justice Scalia’s attitude toward precedent without addressing his treatment of nonjudicial precedent. In an important sense, originalism can be understood as a quintessentially precedent-based theory, albeit one that does not look primarily to judicial decisions as its guide.

recanted this statement insofar as it indicated his willingness to hold laws unconstitutional simply because they were unpalatable. See MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013) (reporting a 2011 interview in which Justice Scalia “recanted” being a “faint-hearted” originalist and asserted that, contrary to his 1989 statement, he would uphold a state law imposing a punishment like “notching of ears” because “it’s a stupid idea but it’s not unconstitutional”). He never recanted it, however, insofar as it reflected his pragmatic approach to stare decisis.

2 ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 140 (Amy Gutmann ed., 1997).

Originalists maintain that the decisions of prior generations, cast in ratified text, are controlling until lawfully changed. The contours of those decisions are typically discerned by historical sources. For example, the meaning of the original Constitution may be gleaned from sources like the Constitutional Convention, the ratification debates, the Federalist and Anti-Federalist Papers, actions of the early Congresses and Presidents, and early opinions of the federal courts. Originalism thus places a premium on precedent, and to the extent that originalists reject the possibility of deviating from historically-settled meaning, one could say that their view of precedent is particularly strong, not weak as their critics often contend.

Moreover, Justice Scalia framed some of his most vociferous disagreements with Supreme Court precedent as a defense of a competing form of precedent: the history and traditions of the American people. For example, he characterized the standards of scrutiny as “essential” to determining whether laws violated the Equal Protection Clause but insisted that these standards “cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.”³ When it came to the Free Speech Clause, the Justice said that he would “take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment’s preservation of ‘the freedom of speech,’ and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people.”⁴ Dissenting from the Court’s holding that the Establishment Clause prohibits prayer at commencement ceremonies, Justice Scalia argued that “the Court . . . lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”⁵ And while Justice Scalia would not have interpreted the Due Process Clause to have a substantive component, he did not insist upon cleaning the slate altogether. Instead, he argued that any substantive content should be determined by history and tradition rather than by modern attitudes.⁶ It was what many conceived of as wrong-headed and excessive devotion to this form of precedent—a devotion that made change difficult—that marked the fault line between Justice Scalia and those who take an evolutionary approach to constitutional interpretation.

3 United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); *see also id.* at 568–69 (arguing that when a practice is not contradicted by constitutional text and is supported by “a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down” (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting))).

4 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment).

5 *Lee v. Weisman*, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

6 *See infra* notes 63–69 and accompanying text.

Thus originalism does not breed contempt for precedent—quite the opposite. That said, originalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text. When new interpretations deviate from the old, and those deviations become entrenched, this comparatively new precedent and a commitment to the old can be in real tension.⁷

Originalism rests on two basic claims.⁸ First, the meaning of constitutional text is fixed at the time of its ratification.⁹ Second, the original meaning of the text controls because “it and it alone is law.”¹⁰ Nonoriginalists consider the text’s historical meaning to be a relevant factor in interpreting the Constitution, but other factors, like value-based judgments, might overcome it. Originalists, by contrast, treat the original meaning as a relatively hard constraint.

Justice Scalia and his contemporaries did not pull originalism from thin air in the 1980s. On the contrary, Keith Whittington explains that

[a]s a method of constitutional interpretation in the United States, originalism has a long history. It has been prominently advocated from the very first debates over constitutional meaning. At various points in American history, originalism was not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach to understanding constitutional meaning. Originalism, in its modern, self-conscious form, emerged only after traditional approaches had been challenged and, to some degree, displaced.¹¹

7 When considered from the perspective of the Supreme Court, precedent provoking this problem is most often judicial. But deeply entrenched, erroneous nonjudicial precedents can also provoke this problem, particularly for political actors committed to originalism. See Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 24 (2016) (identifying several decisions, including the admission of the state of West Virginia, that some have characterized as inconsistent with the Constitution’s original meaning).

8 See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) (“The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances.”); see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 944–46 (2009) (similarly describing the two core claims of originalism).

9 Whittington, *supra* note 8, at 378.

10 Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (footnote omitted); see also Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 193 (2010) (“[O]riginalism insists . . . that what counts as *law*—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.” (footnote omitted)). But see JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013) (arguing that the original public meaning should control not because it is “the law” but because following it yields the best consequences).

11 Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (footnote omitted).

Justice Scalia was at the forefront of the movement that developed originalism in its “modern, self-conscious form” by defending it as the only democratically legitimate way to interpret and apply the Constitution.

As originalism rose to prominence, its relationship to precedent became an issue.¹² Stare decisis had received scholarly attention throughout the twentieth century. But before originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text’s original meaning constitutes the law and relevant precedent deviates from it. To be sure, many had contended that stare decisis ought to be relatively weak in constitutional cases, both out of respect for the Constitution and because of the difficulty of correcting mistakes by constitutional amendment.¹³ Justice Douglas, for example, famously asserted that “it is the Constitution which [a Justice] swore to support and defend, not the gloss which his predecessors may have put on it.”¹⁴ He did not suggest, however, either that the Court lacked the authority to sometimes adhere to its predecessors’ erroneous gloss or that it was problematic for the Court to follow precedent that conflicted with the original meaning of the text. The latter would have been inconsistent with Justice Douglas’s insistence that “[i]t is better that we make our own history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive forces in the life of our age.”¹⁵ For a living constitutionalist, the point of overruling precedent is to bring the meaning of constitutional law into line with what the Court views as the demands of modernity. It does not involve (and indeed vehemently rejects) a return to the past in ways that could potentially disrupt modernity.

Originalists, in contrast, must grapple with this risk. Although there is dispute about which well-settled precedents depart from the original understanding, many claim that originalism cannot account for important precedents, including the New Deal expansion of federal power, the administrative state, and *Brown v. Board of Education*.¹⁶ Henry Monaghan states the problem

12 Justice Scalia fielded questions about the relationship between originalism and stare decisis during his confirmation hearing before the Senate. See *infra* notes 32–34 and accompanying text. The issue figured even more prominently in the confirmation hearings on the nomination of Robert Bork. THE BORK HEARINGS: HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE IN U.S. HISTORY 54–66 (Ralph E. Shaffer ed., 2005).

13 See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” (footnote omitted)).

14 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

15 *Id.* at 739; see also *id.* at 749 (suggesting that a willingness to overrule precedent is a necessary means of updating the law to keep it in line with our living Constitution).

16 See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–69 (2009) (“A committed historicist could easily conclude that the Court’s privacy and women’s rights decisions are wrong, and that the use of paper money as legal tender, the use of the federal

starkly: the claim that originalism is the “only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order.”¹⁷ No serious person would propose to repudiate the constitutional order, yet some suggest that the logic of originalism requires it. As Michael Gerhardt puts it, “Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law.”¹⁸ Consequently, as originalists John McGinnis and Michael Rappaport admit, “Precedent is often seen as an embarrassment for originalists.”¹⁹

Some originalists have tried to reconcile the tension between originalism and *stare decisis*. For example, Michael McConnell, Michael Paulsen, Steven Calabresi, and Julia Rickert have each tried to blunt the force of the *stare decisis* critique by making an originalist case for some arguably nonoriginalist precedents.²⁰ (While it is an imperfect label, I use the term “nonoriginalist” as shorthand for precedents that conflict with the original meaning.) Kurt Lash has argued that a “popular sovereignty-based originalist” can follow at least some erroneous precedents without sacrificing her normative commitment to popular sovereignty.²¹ John McGinnis and Michael Rappaport have repudiated the proposition that the original public meaning constitutes the law in favor of the claim that judges and public officials should follow the original public meaning because doing so yields good consequences.²² Following deeply rooted nonoriginalist precedents is justified, they say, because when departing from the original public meaning would wreak havoc, follow-

commerce power to establish the welfare state and federal civil rights laws, and the federal administrative state itself are all unconstitutional. Yet all of these doctrinal developments lie beyond any reasonable constitutional objection.” (footnote omitted). I do not address the question whether these cases or any others are in fact inconsistent with the original public meaning.

17 Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988).

18 Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1224 (2006). This is not to say, of course, that other constitutional theories do not face similar challenges. The concern is especially acute, however, with respect to originalism.

19 MCGINNIS & RAPPAPORT, *supra* note 10, at 195.

20 See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (advancing an originalist argument for the proposition that the Constitution rules out sex discrimination); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are each consistent with an originalist understanding of the Constitution).

21 See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1473–77, 1480 n.126 (2007).

22 *Id.*

ing precedent yields better consequences than following the original meaning.²³

Other originalists, by contrast, have concluded that a principled originalist cannot follow nonoriginalist precedent.²⁴ Consider Gary Lawson's provocative argument that departures from the original public meaning can never be justified.²⁵ Grounding his argument in *Marbury v. Madison's* justification for judicial review, Lawson claims that because the Constitution is hierarchically superior to all other sources of law, a statute in conflict with the Constitution is void.²⁶ The same principle applies, he says, to judicial opinions. Judicial opinions, like statutes, are hierarchically inferior to the Constitution itself, and if they conflict with the Constitution, they are, properly understood, no law at all.²⁷ "If a statute," Lawson argues, "enacted with all of the majestic formalities for lawmaking prescribed by the Constitution, and stamped with the imprimatur of representative democracy, cannot legiti-

23 See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–38 (2009) (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination); see also MCGINNIS & RAPPAPORT, *supra* note 10, at 154–74 (arguing that Article III incorporates a minimal notion of precedent and empowers judges to develop it further; because the Constitution itself authorizes precedent, it authorizes judges to adhere to the precedent in preference to the original meaning; the question for the judge is simply how to measure the tradeoff so that he knows when to follow precedent and when to follow the original public meaning).

24 See, e.g., Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (insisting that while "faint-hearted originalists" are willing to make a pragmatic exception to stare decisis to avoid political suicide, "[o]ther originalists like Mike Paulsen, Gary Lawson, and myself—call us 'fearless originalists,' . . .—reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices." (footnotes omitted)); see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005) (arguing that originalism is inconsistent with precedent because "[o]riginalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed," and the Constitution authorizes change only by constitutional amendment).

25 See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Lawson was the first to argue that enforcing precedent in conflict with the Constitution is unconstitutional. See *id.* at 28 n.16 (noting that "[p]rior critics of precedent have stopped short of actually declaring the practice unconstitutional," and that "I know of no judge who expressly renounced the use of precedent on constitutional grounds" (citations omitted)).

26 See *id.* at 26; see also *id.* at 27 (maintaining that *Marbury's* rationale for judicial review means that "legislative or executive interpretations of the Constitution are no substitute for the Constitution itself. The court's job is to figure out the true meaning of the Constitution, not the meaning ascribed to the Constitution by the legislative or executive departments." (footnote omitted)).

27 See *id.* at 26–27.

mately be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status?"²⁸ Thus, he claims, "If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."²⁹

Justice Scalia took neither tack: he neither articulated a theory attempting to reconcile adherence to nonoriginalist precedent with originalism nor argued that the original public meaning must always control. Instead, he treated *stare decisis* as a "pragmatic exception to [his originalist theory]."³⁰ In his well-known essay, *Originalism: The Lesser Evil*, he described his position this way:

I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.³¹

This is consistent with the views he expressed at his confirmation hearing. Pressed by Senator Edward Kennedy to describe his position on *stare decisis*, Justice Scalia responded that "[t]o some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on."³² While he allowed that there were some mistakes he would be willing to correct,³³ he characterized others as "so woven in the fabric of law" that he would not touch them.³⁴

Justice Scalia's pragmatism earned him criticism from both allies and intellectual opponents. Some of the former expressed regret that Justice

28 *Id.* at 27; *see also id.* at 28 ("[T]he case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action. What's sauce for the legislative or executive goose is also sauce for the judicial gander.").

29 *See id.* at 27–28. Justice Scalia, by contrast, accepted *stare decisis*, while admitting that its "whole function . . . is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability." SCALIA, *supra* note 2, at 139.

30 SCALIA, *supra* note 2, at 140 (emphasis omitted).

31 Scalia, *supra* note 1, at 861.

32 13 ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1986*, at 132 (1989).

33 He stated, "I will not say that I will never overrule prior Supreme Court precedent." *Id.* at 131. He characterized some precedents as weaker and others stronger under the doctrine of *stare decisis*, *see id.*, and said that the weight a precedent carries "depends on the nature of the precedent, the nature of the issue," *id.*

34 *Id.* at 132. He did not specify, however, where any actual Supreme Court precedent fell. *Id.* ("Now, which of those you think are so woven in the fabric of the law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think that I should answer anything in the context of a particular case.")

Scalia was willing to make any sacrifice of principle,³⁵ and the latter seized upon his willingness to compromise as evidence that originalism is itself unprincipled.³⁶ In the remainder of this Essay, I will consider whether Justice Scalia's approach to stare decisis was as unprincipled as these criticisms suggest.

II. ORIGINALISM IN PRACTICE

The thrust of the stare decisis-based critique of originalism is that “if [originalists] were to vote their principles, their preferred approach would produce instability, chaos, and havoc in constitutional law.”³⁷ This threat is vastly overstated, because no originalist Justice will have to choose between his principles and the kind of chaos critics predict. Justice Scalia was never forced to make any of the decisions that critics cast as deal-breakers for originalism. He was never required, for example, to decide whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided. The validity of these cases—and, for that matter, most of the cases printed in the United States Reports—is never challenged because the rules of adjudication keep the question of their validity off the table.

As I have explained elsewhere, “other features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable.”³⁸ A combination of rules—some constitutional, some statutory, and some judicially adopted—keep most challenges to precedent off the Court's agenda. The Justices not only lack any

35 See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (arguing that Justice Scalia is “unfaithful to the original meaning of the text” because, *inter alia*, “he is willing to avoid objectionable outcomes that would result from originalism by invoking [nonoriginalist] precedents”); Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism* 14 (George Mason Univ. Legal Studies Research Paper Series, Paper No. LS16-36, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880578 (arguing that Justice Thomas's approach to stare decisis, not Justice Scalia's, is “what one would expect from a committed originalist,” because Justice Thomas, unlike Justice Scalia, is willing to “repudiate[]” constitutional doctrine inconsistent with the Constitution).

36 Laurence Tribe's critique of Justice Scalia's position is representative: “That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*.” Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 2, at 65, 82. Justice Scalia resented the suggestion that originalists were uniquely unprincipled, because, as he put it, stare decisis is a “compromise of all philosophies of interpretation.” SCALIA, *supra* note 2, at 139.

The demand that originalists alone “be true to their lights” and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.

Id.

37 MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 192 (2008).

38 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013). For a fuller discussion of the relationship between originalism, stare decisis, and agenda control, see *id.* at 1730–37; see also Barrett & Nagle, *supra* note 7.

obligation to work systematically through the United States Reports looking for errors; the “case or controversy” requirement prevents them from doing so. Not only are they limited to answering questions presented by litigants seeking resolution of a live dispute, the Court’s discretionary jurisdiction generally permits it to choose which questions it wants to answer. This in and of itself keeps the most potentially disruptive challenges to precedent off the Court’s docket. Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.³⁹

To be sure, erroneous precedents may lie in the background of cases that the Court has agreed to decide. Assume that a Justice has doubts about whether *Marbury v. Madison* was wrongly decided. The Justice will implicitly rely upon *Marbury* in every exercise of judicial review. But the Justice, whatever her theoretical doubts, has no obligation to open an inquiry into whether *Marbury* (and, for that matter, every other decision lying in the background of the case before her) is right. Indeed, the rule that the Court will decide only those questions presented in the petition for certiorari constrains Justices from deciding the merits of every legal issue that lurks in a case.⁴⁰ That rule is not hard and fast, and the Justices sometimes raise additional issues, like the matter of precedent’s validity, on their own.⁴¹ But doing so happens when a Justice *wants* to address the merits of precedent. If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny.

Taken together, these features of the judicial system function like a hidden avoidance mechanism: they keep the question whether precedent should be overruled off the table altogether.⁴² The doctrine of stare decisis is often credited with keeping precedent stable, but the force of that doctrine only kicks in when the question whether to overrule precedent is called. The

39 See *Helvering v. Davis*, 301 U.S. 619 (1937) (holding that the Social Security Act is constitutional).

40 See SUP. CT. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

41 See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), after calling for supplemental briefing on the question whether it should be overruled); *Payne v. Tennessee*, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 396 (2010) (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is “unusual and inadvisable for a court” (footnote omitted)). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice that is also criticized. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 673–74 (1961) (Harlan, J., dissenting) (criticizing the Court for having “reached out” to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties).

42 Cf. GERHARDT, *supra* note 37, at 45 (“The justices’ respect for the Court’s precedents is evident in their choices of which matters not to hear. Thus, in the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.”).

overwhelming majority of Supreme Court cases remain stable because the Court never faces the question. Stability, therefore, is less attributable to the doctrine of stare decisis than to the fact that the Constitution does not require the Court to identify, much less rectify, every constitutional mistake. Justices focus their attention on the contested question in front of them and are permitted to operate on the assumption that surrounding but unchallenged law is correct. The system could not operate otherwise; it would grind to a halt if the Justices were obliged to identify and address every single legal issue contained within a case.

Justice Scalia operated within this system. Stephen Sachs jokes that originalists are often viewed as “followers, allegedly, of a nefarious ‘Constitution in Exile,’ waiting in their subterranean lairs to subdue the populace and abolish the New Deal.”⁴³ But Justice Scalia had no desire to exhume all errors from the United States Reports. On the contrary, he observed:

Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.⁴⁴

And that, indeed, is the field on which Justice Scalia played. He faced some conflicts between the Constitution’s original meaning and contrary precedent, but his commitment to originalism did not put him at continual risk of upending settled law. Originalism does not obligate a justice to reconsider nonoriginalist precedent *sua sponte*, and if reversal would cause harm, a Justice would be foolhardy to go looking for trouble. Justice Scalia didn’t. As he once quipped, “I am a textualist. I am an originalist. I am not a nut.”⁴⁵

The precedents that Justice Scalia voted to overrule were not in the category that constitutional scholars sometimes call “super precedent”—cases so deeply embedded that their overruling is off the table.⁴⁶ For example, Justice Scalia rejected precedent asserting the power to give newly decided civil cases only prospective application on the ground that this is not a feature of the “judicial Power”⁴⁷ as it was understood at the Founding,⁴⁸ and he argued

43 Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254 (2014).

44 SCALIA, *supra* note 2, at 138–39.

45 COYLE, *supra* note 1, at 163 (quoting Justice Antonin Scalia) (emphasis omitted).

46 See Gerhard, *supra* note 18, at 1207–17 (identifying several “constitutional decisions whose correctness is no longer a viable issue for courts to decide,” including *Marbury v. Madison*, *Mapp v. Ohio*, the *Legal Tender Cases*, *Brown v. Board of Education*, and the *Civil Rights Cases*); see also Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (identifying the constitutionality of social security, paper money, school segregation, independent agencies, federal economic regulation, and the incorporation of the Bill of Rights as “bedrock precedents” that “cannot be undone”).

47 U.S. CONST. art. III, § 1.

that *Miranda v. Arizona* should be discarded for its lack of support in “history, precedent, or common sense.”⁴⁹ He was persistent in his view that “the Double Jeopardy Clause prohibits successive prosecution, not successive punishment,”⁵⁰ and he refused to join opinions using the *Lemon* test to enforce the Establishment Clause.⁵¹ He repeatedly argued that the Court should overrule its cases holding that a woman has a substantive due process right to terminate her pregnancy,⁵² and he consistently declined to apply the cases

48 See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 200–05 (1990) (Scalia, J., concurring in the judgment) (similar). He also maintained, despite contrary precedent, that the separation-of-powers principle prohibits Congress from assigning cases to an Article I court on the theory that they involve “public rights” if the federal government is not a party to the suit. See *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (Scalia, J., concurring) (“I adhere to my view . . . that—our contrary precedents notwithstanding—a matter of public rights . . . must at a minimum arise between the government and others.” (second alteration in original) (citations omitted)); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68–69 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the traditional “public rights” exception was grounded in the original understanding of the concepts of sovereign immunity and “the judicial power,” but the modern, pragmatic balancing test extending that exception was unmoored from both text and history (emphasis omitted)).

49 *Dickerson v. United States*, 530 U.S. 428, 450, 461–65 (2000) (Scalia, J., dissenting).

50 *Witte v. United States*, 515 U.S. 389, 407 (1994) (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting)); see also *id.* at 406 (“This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect.”).

51 *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399–400 (1993) (Scalia, J., concurring in the judgment) (“I will decline to apply *Lemon*—whether it validates or invalidates the government action in question—and therefore cannot join the opinion of the Court today.”).

52 He repeatedly urged the overruling of *Roe v. Wade*. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (urging an explicit overruling of *Roe*). Once *Casey* superseded *Roe*, he urged its overruling as well. See *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (insisting that “*Casey* must be overruled”). While some have characterized *Roe v. Wade* as a “superprecedent[],” see Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES (July 24, 2005), <http://www.nytimes.com/2005/07/24/opinion/24specter.html>, scholars do not put *Roe* on the super precedent list because the public controversy about *Roe* has never abated. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008) (“[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed.”); Gerhardt, *supra* note 18, at 1220 (asserting that *Roe* cannot be considered a super precedent in part because calls for its demise by national political leaders have never retreated).

holding that the Due Process Clause imposes a “fairness” cap on punitive damages.⁵³

He was willing to overrule precedent outright in the above cases because he thought that the error was clear and that traditional stare decisis factors like reliance or workability counseled it. There were other cases, however, in which he thought that precedent was wrong but did not advocate outright overruling. The following four areas illustrate Justice Scalia’s pragmatism in handling conflicts between his commitment to the original public meaning and the pull of settled precedent: (1) the dormant Commerce Clause; (2) substantive due process; (3) the Eighth Amendment; and (4) Congress’s power under Section 5 of the Fourteenth Amendment.

A. *Dormant Commerce Clause*

Justice Scalia attacked the Court’s dormant Commerce Clause jurisprudence in his very first term. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, he concluded a lengthy explanation of his disagreement with those cases with the assertion that

the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.⁵⁴

Tyler Pipe, however, did not require him to decide whether he would vote to overrule the dormant Commerce Clause doctrine; he could decide the case by refusing to extend it. When he faced the former question in his second term, Justice Scalia articulated the following approach: he would adhere to the line of cases invalidating state laws that discriminated against interstate commerce despite his belief that those cases were wrong,⁵⁵ but he refused to apply the line of cases that required the Court to balance the state law’s burden on interstate commerce against its benefit unless the challenged law was

53 See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (“[T]he punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (“When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so.”).

54 483 U.S. 232, 265 (1987) (Scalia, J., dissenting). In *American Trucking Ass’n v. Scheiner*, 483 U.S. 266 (1987), a case handed down the very same day, Justice Scalia asserted, “For the reasons given in my dissent in [*Tyler Pipe*], I do not believe that test can be derived from the Constitution or is compelled by our past decisions.” *Id.* at 304 (Scalia, J., dissenting) (citation omitted).

55 See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring in the judgment) (“In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose.”).

indistinguishable from a law previously held unconstitutional by the Court.⁵⁶ In that event, he “would normally suppress [his] earlier view of the matter and acquiesce in the Court’s opinion that it is unconstitutional.”⁵⁷ He thus drew a line between “decisional theory,” which he felt free to reject, and application of that theory to particular facts, which he felt constrained to follow.⁵⁸ He remained constant in this approach to dormant Commerce Clause cases throughout his entire tenure on the Court.⁵⁹

It is worth paying attention to the careful distinction that Justice Scalia drew between “decisional theory” and results. In some circumstances, he felt obligated to adhere to nonoriginalist *decisional theory*. He adhered to the “discrimination” test in dormant Commerce Clause doctrine because it established a clear line that was relatively easy for courts to apply. By contrast, he thought the “balancing” test was unpredictable and that it therefore did not offend reliance or stability interests to abandon it.⁶⁰ His judgment [about

56 *Id.* at 897 (“I would therefore abandon the ‘balancing’ approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike v. Bruce Church, Inc.*, and leave essentially legislative judgments to the Congress.” (citation omitted)); *see also id.* (“Issues already decided I would leave untouched.”).

57 *Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment). He refused to do so, however, if the law at issue predated the Court’s decision holding unconstitutional a similar law and would have been consistent with the Court’s then-existing jurisprudence. *Id.* at 204–05. In that event, protecting settled expectations cut the opposite way. *See id.*

58 *See id.* at 204 (“Although I will not apply ‘negative’ Commerce Clause decisional theories to new matters coming before us, *stare decisis*—that is to say, a respect for the needs of stability in our legal system—would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law.”). *Crawford v. Washington* also illustrates this commitment to the preservation of results, albeit from a different angle. 541 U.S. 36 (2004). There, Justice Scalia wrote the opinion for the Court rejecting the decisional theory of *Ohio v. Roberts* in favor of what he believed to be the original meaning of the Confrontation Clause. *Id.* at 60. The Justice was at pains to emphasize, however, that the new theory left the past results, if not their methodology, intact. *Id.* (“Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.”).

59 *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1809–10 (2015) (Scalia, J., dissenting) (reiterating the illegitimacy of the Court’s negative Commerce Clause jurisprudence and identifying the two circumstances in which he would nonetheless adhere to it); *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) (same); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (same); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (same); *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring in part and concurring in the judgment) (joining the Court’s opinion insofar as it held a Connecticut statute facially discriminatory).

60 In *Bendix Autolite*, 486 U.S. at 897–98, he asserted that abandoning the “balancing” prong of negative Commerce Clause analysis does not upset reliance interests because “the outcome of any particular still-undecided issue under the current methodology is in my view not predictable . . . no expectations can possibly be upset.” At the same time, “[b]ecause the outcome of the [discrimination] test I would apply is considerably more clear, confident expectations will more readily be able to be entertained.” *Id.* at 898.

when to challenge and when to acquiesce in decisional theory thus reflected a traditional application of stare decisis.⁶¹

Even when he rejected a nonoriginalist decisional theory, however, he considered whether to treat the nonoriginalist *results* reached under that theory differently. Because reliance interests in the Court's view about specific laws (as opposed to the Court's view about more general doctrines) are particularly high, he stuck with those results even in the "balancing" cases whose decisional theory he rejected. He felt particularly strongly about the reliance interests at stake in that situation. While he did not think that specific dispositions were set in stone, he thought that the Court should "retain [its] ability . . . sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict."⁶²

B. *Substantive Due Process*

Justice Scalia had "misgivings about Substantive Due Process as an original matter."⁶³ Nonetheless, he acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited."⁶⁴ He refused, however, to accept the body of precedent standing for the "proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."⁶⁵ Despite this belief, he did occasionally acquiesce in the line of due process opinions maintaining that the liberty interest in the Due Process Clause protected those rights deemed fundamental by history and tradition.⁶⁶ He thus did not entirely distance

61 See *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (describing his approach to negative Commerce Clause cases as "serv[ing] the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law").

62 *Quill Corp. v. North Dakota*, 504 U.S. 298, 320–21 (1992) (Scalia, J., concurring in part and concurring in the judgment).

63 *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

64 *Id.* (internal quotation marks omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

65 *Albright*, 510 U.S. at 275 (Scalia, J., concurring); see also *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 470–71 (1993) (Scalia, J., concurring) (asserting that while he was willing to accept incorporation, he was unwilling to accept that the Due Process Clause "is the secret repository of all sorts of other, unenumerated, substantive rights"); SCALIA, *supra* note 2, at 24 ("[I]t may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process.").

66 In *Michael H. v. Gerald D.*, Justice Scalia wrote for the Court that "[i]n an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." 491 U.S. 110, 122 (1989) (footnote omitted). He joined the Court's opinion in *Washington v. Glucksberg*, which described substantive due process analysis as recognizing "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"

himself from a decisional theory he thought unsupported by the Constitution. At the same time, he found that history and tradition were reason to refuse rather than to recognize the existence of the urged right; the result in these cases, if not the analysis, was the same as it would have been under his preferred approach.⁶⁷

Like the dormant Commerce Clause cases, the substantive due process cases draw a line between “decisional theory” and “results.” In *Troxel v. Granville*, Justice Scalia dissented from the Court’s holding that a Washington statute permitting the children’s paternal grandparents to gain court-ordered visitation against the mother’s wishes violated the Due Process Clause. He conceded that older opinions of the Court had recognized a substantive due process right of parents to direct the upbringing of their children, but he characterized their “claim to *stare decisis* protection” as “small” given that their application did not yield predictable results.⁶⁸ Consistent with his approach in dormant Commerce Clause cases, he did not propose disturbing the results of the two cases on which the Court relied (especially because that had not been urged), but he did propose abandoning the theory of decision upon which they rested by refusing to apply it in new contexts.⁶⁹

C. Eighth Amendment

Justice Scalia thought that the Court’s Eighth Amendment cases were flawed in at least two respects. First, he thought that the Court should look

and requiring that the right at stake be carefully described. 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)). He joined Chief Justice Robert’s dissent in *Obergefell v. Hodges* acknowledging the validity of substantive due process so long as the rights it found implied were rooted in history and tradition. 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting); see also *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“It is my position that the term ‘fundamental rights’ should be limited to ‘interest[s] traditionally protected by our society.’” (alteration in original) (quoting *Michael H.*, 491 U.S. at 122)).

⁶⁷ See also *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 161 (2011) (Scalia, J., concurring in the judgment) (insisting that the Due Process Clause had no substantive component but that even under the history-and-tradition formula applied to identify these “faux” rights, respondent’s claim to a right to informational privacy would fail). As he once put it in an extrajudicial context, “[t]he vast majority of my dissents from nonoriginalist thinking . . . will, I am sure, be able to be framed in the terms that, *even if* the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred.” Scalia, *supra* note 1, at 864 (emphasis added) (footnote omitted).

⁶⁸ *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (“The sheer diversity of today’s opinions persuades me that the theory of unenumerated parental rights underlying [*Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)] has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.”).

⁶⁹ See *id.* (“While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”).

to the original application of the Eighth Amendment, not evolving standards of decency, to determine whether a punishment was “cruel and unusual.”⁷⁰ Second, he rejected the proposition that the Eighth Amendment requires that a punishment be proportionate to the offense.⁷¹ He applied the former decision theory, but not the latter, on grounds of stare decisis.⁷² He justified the latter departure on the ground that the precedent was not only inconsistent with the Eighth Amendment, but one he could not “intelligently apply.”⁷³

His concession to “evolving standards of decency” might be taken as some evidence of faint-hearted originalism because, as in the substantive due process context, he acceded to a decisional theory that he thought at odds with the original public meaning of the Constitution’s text. As in the case of substantive due process, however, the results in the cases were the same as those he would have reached under his preferred reasoning.⁷⁴

Two other death penalty cases are revealing of Justice Scalia’s approach to potential conflicts between original meaning and erroneous precedent. He expressed doubts about *Furman v. Georgia*’s holding that it was “cruel and unusual” to give the sentencer unfettered discretion to decide whether to impose the death penalty because it rendered the penalty a “random and infrequent event.”⁷⁵ But because *Furman* did not clearly contradict the text, he was willing to adhere to it on grounds of stare decisis. Indeed, because of stare decisis, he explicitly refrained from even undertaking to examine

70 In *Stanford v. Kentucky*, Justice Scalia described the “evolving standards” test as “cast loose from the historical moorings consisting of the original application of the Eighth Amendment.” 492 U.S. 361, 378–79 (1989) (opinion of Scalia, J.), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005). He nonetheless applied it on behalf of a plurality of Justices to conclude that the execution of minors does not violate the Eighth or Fourteenth Amendments. *Id.* at 369–73 (opinion of Scalia, J.) (plurality opinion).

71 He thought that the text squarely foreclosed the proportionality requirement because, while it forbids “excessive” bail, it says nothing about “excessive” punishment. *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment). On the contrary, the only express limitation on punishment is that it not be “cruel and unusual.” *Id.*; *see also* *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that the proportionality rule “has no place in our Eighth Amendment jurisprudence” and that “[t]he punishment is either ‘cruel and unusual’ (*i.e.*, society has set its face against it) or it is not” (alteration in original) (quoting *Stanford*, 492 U.S. at 378 (internal quotation marks omitted)), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002)).

72 *See supra* note 60.

73 *See* *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) (asserting that he would not apply the proportionality requirement on grounds of stare decisis because the requirement was not one he could “intelligently apply”).

74 *See Stanford*, 492 U.S. at 368 (noting that the execution of minors was permitted when the Bill of Rights was adopted); *see also Roper*, 543 U.S. at 608–15 (Scalia, J., dissenting) (describing the “evolving standards” test as in accordance with our modern (though I think mistaken) jurisprudence and demonstrating why that test did not justify the majority’s conclusion); *Atkins*, 536 U.S. at 341–48 (Scalia, J., dissenting) (similar).

75 *Walton*, 497 U.S. at 670 (Scalia, J., concurring in part and concurring in the judgment).

whether *Furman*'s interpretation was consistent with the historical meaning of "unusual punishment."⁷⁶

He was not willing, however, to follow a line of cases holding that the mandatory imposition of death (i.e., a scheme that gives the sentencer no discretion) was cruel and unusual punishment.⁷⁷ In contrast to *Furman*, which rested on the ground that the randomness and infrequency of capital punishment in discretionary capital sentencing rendered that punishment "cruel and unusual," Justice Scalia thought that mandatory capital sentencing "cannot possibly violate the Eighth Amendment, because it will not be 'cruel' (neither absolutely nor for the particular crime) and it will not be 'unusual' (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or 'freakishly' imposed)."⁷⁸ He refused to follow these cases on grounds of *stare decisis* not only because they had "no proper basis in the Constitution," but also because he found them in irreconcilable tension with *Furman*.⁷⁹ He announced, moreover, that he had no intention of acquiescing in those cases in the future: "I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."⁸⁰

D. Section 5

Despite "misgiving[s]," Justice Scalia joined *City of Boerne v. Flores*,⁸¹ which announced that Congress's exercise of its power under Section 5 of the Fourteenth Amendment must be "congruen[t] and proportional[]" to the constitutional violation it was designed to remedy.⁸² By the time *Tennessee v. Lane* arrived at the Court, the Justice had reconsidered his view. He concluded that the limit on Congress's power was set by the language of Section 5: Congress had the power "to enforce" the Fourteenth Amendment but not to enact prophylactic measures going beyond what the Constitution itself requires.⁸³ Yet as he acknowledged, "The major impediment to the approach I have suggested is *stare decisis*."⁸⁴ Major statutes like the Voting

76 *Id.* at 671.

77 *Id.*

78 *Id.*

79 *Id.* at 672-73.

80 *Id.* at 673.

81 521 U.S. 507 (1997).

82 *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (describing *City of Boerne* and listing its progeny, which he had joined).

83 *Id.* at 560 ("[W]hat § 5 does not authorize is so-called 'prophylactic' measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment." (emphasis omitted)).

84 *Id.*; see also *id.* ("Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." (quoting Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 110-11 (1966) (internal quotation marks omitted))).

Rights Act assumed the validity of the Court's earliest Section 5 cases, which held that Section 5 conferred prophylactic power on Congress.⁸⁵ The long-standing cases endorsing prophylactic power were almost exclusively in the area of racial discrimination, which was the principal concern of the Fourteenth Amendment. He decided, therefore, to preserve both the results and the decisional theory of the Section 5 cases in the context of racial discrimination. "[P]rincipally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States."⁸⁶ Outside the context of race, he would not accept assertions of prophylactic power, and if the legislation truly "enforced" the amendment, he would give it full effect without considering whether it was congruent and proportional.⁸⁷

III. PRAGMATISM AND PRINCIPLE

Justice Scalia's opinions in the cases are consistent with the approach he described in extrajudicial writing: he was willing to treat *stare decisis* as a limited, pragmatic exception to originalism. The careful explanations he gave, however, open up potential lines of inquiry for those exploring whether the tension between originalism and *stare decisis* can be resolved as a matter of principle.

First, it is worth paying attention to Justice Scalia's distinction between decisional theory and results. Discussions of *stare decisis* tend not to differentiate between the two. Adhering to a nonoriginalist decisional theory poses a different and more theoretically difficult issue for the originalist than does simply leaving the result of a decision in place. Perpetuating a decisional theory might function as a "virtual amendment" of the Constitution's text, substituting a new legal standard for the one originally imposed by the text. For example, Laurence Tribe levies this charge: "That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*."⁸⁸ But there is a difference between leaving the result of precedent in place (for instance, the holding that certain state laws violate the dormant Commerce Clause) and accepting its decisional theory as governing new contexts (as he would have done had he applied the dormant Commerce Clause "balancing test" to new state laws).⁸⁹ Originalist scholars have raised the pos-

85 *Id.*

86 *Id.* at 564.

87 *Id.* at 565.

88 Tribe, *supra* note 36, at 82 (footnote omitted).

89 See *supra* notes 54–62 and accompanying text. He also drew a distinction between results and decisional theory in the context of substantive due process. See *supra* notes 68–69 and accompanying text. And *Mitchell v. United States* provides yet another example. 526 U.S. 314 (1999). There, he expressed doubt about the soundness of precedent holding that prosecutorial or judicial comment on the defendant's refusal to testify violates the Fifth Amendment. *Id.* at 332 (Scalia, J., dissenting). Because he thought that this rule may well have "become 'an essential feature of our legal tradition,'" he did not propose overrul-

sibility that a principle of equity might be able to justify giving stare decisis effect to nonoriginalist decisions.⁹⁰ If that theory were developed, it might be better suited to holding results, rather than decisional theories, in place.

Second, Justice Scalia's "no harm, no foul" approach to the decisional theories of "evolving standards of decency" in the Eighth Amendment and substantive due process contexts prompts reflection on what fidelity to the Constitution requires. In both contexts, he accepted nonoriginalist decisional theories that led to the same result as the originalist approach he preferred.⁹¹ Is a Justice unfaithful to the Constitution because he joins a poorly reasoned opinion that gets to the right place? Put differently, is fidelity to the Constitution measured by the Court's judgment or its opinion, by its result or by its reasoning?⁹²

Third, stability is fostered by what we might call an "avoidance canon" for stare decisis—avoiding the reexamination of precedent by assuming *arguendo* that it is correct. This technique of assuming, and therefore not investigating, a precedent's validity to avoid the possibility of overruling it is a critical means of keeping law stable. As Part II explained, every judicial decision makes this implicit assumption with respect to a large swath of the law that surrounds the issue contested in court. Sometimes, however, an opinion makes that assumption explicit with respect to specific "neighboring" precedent. Such a move does not endorse the correctness of the prior decision; rather, it avoids inquiry into the decision's merits. Thus, for example, Justice Scalia did not "reconsider" the view that the Fourteenth Amendment incorporated the Bill of Rights against the states, when "straightforward applica-

ing it. *Id.* He did, however, refuse "to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them." *Id.*

90 See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 858–64 (2015) (raising the possibility that stare decisis is a "domesticating doctrine" permitting courts to treat mistaken precedents "as if" they are the law).

91 Justice Scalia took a similar tack in *Hudson v. United States*, 522 U.S. 93 (1997). The Justice believed that the Double Jeopardy Clause prohibited successive prosecution, not multiple punishment, and he had dissented to the Court's prior cases holding otherwise. *Id.* at 106 (Scalia, J., concurring in the judgment). In *Hudson*, the Court backtracked from its position, although not as completely as Justice Scalia would have liked; it continued to maintain that the Double Jeopardy Clause prohibited multiple punishments, but it required successive criminal prosecutions as well. *Id.* Even though this was not the decisional theory that Justice Scalia thought correct, he concurred because the presence of the requirement for successive prosecutions "essentially duplicates what I believe to be the correct double jeopardy law, and will be . . . harmless in the future." *Id.*

92 Cf. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999) ("As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that 'settle[s] authoritatively what is to be done.'" (alteration in original) (footnote omitted) (quoting Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997))).

tion of settled doctrine suffice[d] to decide it.”⁹³ Despite doubts, he did not “explore the subject” whether *Furman v. Georgia*’s interpretation of “cruel and unusual” was consistent with the Eighth Amendment’s historical meaning because the text could bear its meaning. And in several cases, he declined to decide whether precedent should be overruled when the parties did not urge overruling.⁹⁴ To be sure, explicitly stating that one is refraining from considering whether precedent is right signals that one thinks the precedent is probably wrong. That may be an invitation to parties to argue that point in the future, or a Justice may feel compelled to acknowledge obvious tension between relevant precedent and his otherwise stated views. Whatever the motivation, it preserves the precedent without having to address either its merits or the stare decisis question. Justice Scalia once said that the “whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability.”⁹⁵ The avoidance technique for stare decisis says “I am not deciding whether this is false or, if it is, whether stare decisis would compel me to say that it is true.”

The practice of assuming—without deciding—that all surrounding, unchallenged law is correct operates invisibly. It is thus hardly noticed, and the way in which it contributes to the law’s stability is underappreciated. The attention comes when the presumption is set aside. For example, the Court sometimes calls for supplemental briefing to address the issue whether a precedent that the parties did not challenge should be overruled.⁹⁶ Or, Justices

93 See *McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (asserting that the case did not require him to “reconsider” the view that the Fourteenth Amendment incorporates the Bill of Rights against the States, because “straightforward application of settled doctrine suffices to decide it”).

94 See also *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (“While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.”). In *44 Liquormart v. Rhode Island*, he expressed “discomfort” with *Central Hudson*, a case counseling “special care” in the review of blanket bans on commercial speech that were not deceptive or otherwise flawed. 517 U.S. 484, 517 (1996) (Scalia, J., concurring). At the same time, the parties did not raise or brief the question whether the precedent should be overruled, and Justice Scalia did not want to reach the question with inadequate information:

Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence, which all except Justice Thomas agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

Id. at 518.

95 SCALIA, *supra* note 2, at 139; see *supra* note 28.

96 For example, in *Montejo v. Louisiana*, Justice Scalia was part of the majority who sought supplemental briefing on the question whether a precedent key to resolving that case should be overruled. 556 U.S. 778, 792 (2009) (“Accordingly, we called for supplemental briefing addressed to the question whether *Michigan v. Jackson* should be overruled.”). The Court ultimately overruled *Michigan v. Jackson*. *Id.* at 797.

sometimes urge the overruling of a case where the merits of the precedent were neither raised nor briefed by the parties.⁹⁷ The Court also decides how much precedent to unsettle when it decides how broadly to write an opinion: there are sometimes disputes about whether the Court should overrule a precedent outright or merely narrow it and leave the question whether it should be overruled for another day (or never).⁹⁸ These choices are not best understood as choices about the strength of stare decisis. They are better understood as choices about whether to put the merits of precedent on the agenda, thereby forcing the Court to consider whether stare decisis should hold the precedent in place.

Students of stare decisis focus primarily on how stare decisis should play out once the validity of a precedent is on the table, but agenda control is equally if not more important. It also poses a distinct set of questions. For example, it is worth considering whether principle ever obligates a justice to put the question of precedent's validity on the table *sua sponte*; whether duty strongly counsels a minimalist approach that avoids questioning precedent wherever possible; whether it is a matter left to the prudential judgment of each Justice; and, if it is a prudential judgment, what factors should guide the decision.

CONCLUSION

Justice Scalia admitted that “in a crunch I may prove a faint-hearted originalist.”⁹⁹ Stare decisis, however, rarely put him in a crunch, mostly because of the underappreciated features of our system that keep the law stable without need for resort to the doctrine of stare decisis. To the extent he was occasionally faint hearted, however, who could blame him for being human? As the Justice himself put it:

As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace

97 For example, in *Randall v. Sorrell*, Justices Thomas and Scalia urged the overruling of *Buckley v. Valeo* even though the respondents asked only as an “afterthought” and did not brief the stare decisis issue. See 548 U.S. 230, 263–64 (2006) (Alito, J., concurring in part and concurring in the judgment) (insisting that it was “unnecessary” to reach the issue whether *Buckley v. Valeo* should be overruled when respondents asked only as an “afterthought” and did not brief the stare decisis issue); *id.* at 264 (Kennedy, J., concurring) (similar); *cf. id.* at 265–73 (Thomas, J., concurring).

98 See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007) (holding that an Establishment Clause challenge to the executive expenditure of funds did not fall within *Flast v. Cohen*'s narrow exception to the prohibition on “taxpayer standing”). Justice Scalia concurred only in the judgment, because he would have overruled *Flast* altogether rather than distinguish it as the majority did. See *id.* at 636 (Scalia, J., concurring in the judgment) (“Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach.”); see also *id.* at 633 (“Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future.”).

99 See Scalia, *supra* note 1, at 864; *supra* note 1 and accompanying text.

of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton's observation that a thing worth doing is worth doing badly.¹⁰⁰

Nothing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly.

100 Scalia, *supra* note 1, at 863.

