ON TEXT AND PRECEDENT

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Until recently, the conversation on originalism and the role of precedent has been dominated by two main camps, which I will call unoriginal originalists and unprecedented precedentialists. Unoriginal originalists refers to people who purport to pay close attention to text, history, and structure, but when these sources conflict with precedent, this camp basically does not have a theory at all. The theory becomes a sort of muddling through, sometimes following precedent and sometimes not. If one, however, is just going to muddle through, or be pragmatic about when to follow precedent, does that not undercut the very grounds on which one is an originalist in the first place? Why not then muddle through across the board or be pragmatic across the board?

It is tolerably clear, for example, that the exclusionary rule is completely made up from a constitutional perspective, and that no Framer ever believed that illegally seized evidence should be excluded from court; that England never had an exclusionary rule; that the Fourth Amendment definitely does not provide for an exclusionary rule; and that no state excluded evidence for the first hundred years after the Declaration of Independence, even though most of the states had Fourth Amendment counterparts.[1] If anything is clear, it is that the exclusionary rule is inconsistent with the original meaning of the Fourth Amendment, yet none of the supposedly originalist Justices on the Supreme Court reject the exclusionary rule. Even Justices Scalia and Thomas exclude evidence pretty regularly, and never quite tell us why they do so when it means abandoning the original meaning of the Fourth Amendment.[2]

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1. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 93–94 (2000).

2. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring (joined by Thomas, J.)).

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What originalists ought to do is to deduce a theory of precedent from the text, history, and structure of the Constitution itself, and thus to see what are the proper metes and bounds of precedent. We have not seen a sustained effort to deduce such a theory yet, which is why we have unoriginal originalists.

The other side of the text versus precedent debate fares no better. On the other side are the unprecedented precedentialists—scholars and Justices who cannot explain why sometimes the Court ought to overrule and sometimes it ought not to overrule. Consider the following important statement from the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:[3] "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[4] This point of view has recently carried the day on the modern Supreme Court, at least since the *Casey* decision.[5] The problem with this thesis is that it is inconsistent with both pre-*Casey* and post-*Casey* precedent. The *Casey* Court claims that its view of precedent—the view that a decision to overrule should rest on some special reason over and above the belief that the prior case was wrongly decided—has been "repeated in our cases."[6] To support that proposition, however, the Court cited only dissents![7] Neither of the dissents cited was squarely on point, which leaves the careful reader with a sneaking suspicion that perhaps the *Casey* Court's view of when to overrule precedent was not well-established in the pre-*Casey* case law.

A strict count of the number of cases where the Supreme Court overruled itself on the basis of text, history, and structure alone, which excludes cases where there were overrulings because the doctrine was unworkable or because of some other pragmatic or doctrinal consideration, reveals five important cases in the twentieth century pre-*Casey*, and there may well be more.[8] This includes only pure, naked overrulings; that is, instances where the Court overruled itself based only on a

3. 505 U.S. 833 (1992).

4. *Id.* at 864.

5. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 242–44 (2006).

6. *Casey*, 505 U.S. at 864.

7. *Id.* (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)).

8. *See* Amar, *supra* note 1, at 34 n.28 (collecting cases).

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changed view of the original meaning of the constitutional provision in question, effectively holding that the underlying case was wrong as an originalist matter. Analysis of these cases leads to the conclusion that *Casey* put forward a view of the sanctity of precedent that was itself unprecedented.

A summary of the views presented in my *Supreme Court Foreword* published in the *Harvard Law Review* in 2000 sheds light on the question of when to overrule a precedent based on the original meaning of the document itself.[9] The *Foreword* talks about a great principled divide that cuts across liberalism and conservatism in constitutional law scholarship. This great principled divide among lawyers separates out documentarians—people who believe in the primacy of text, history, and structure, like Steven Calabresi on the Right,[10] or Justice Hugo Black on the Left[11]—and the great doctrinalists in constitutional law—like David Strauss on the Left,[12] or the second Justice Harlan on the Right.[13] I argue that there is a great distinction in principle between those who pay more attention to the document and those who tend to privilege the doctrine.

I side with the documentarians, and thus I will try, from the perspective of the document, to give you its account of doctrine. It is an account in which doctrine has an important but ultimately subordinate place. A thoroughgoing commitment to the document would leave vast space for judicial doctrine, but doctrine would ultimately remain subordinate to the document itself. Article III of the Constitution proclaims that the text of the Constitution is to be enforced as justiciable law in ordinary lawsuits.[14] Therefore, the document itself envisions that in deciding cases under it, judges are going to offer interpretations, give reasons, develop mediating principles, and craft implementing frameworks to enable the document to be construed in courts as law. These interpretations, reasons, principles, and

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9. Amar, *supra* note 1.

10. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

11. *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

12. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

13. *See, e.g.*, Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991).

14. *See* U.S. CONST. art. III, § 2.

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frameworks are, in a word, doctrine, and the Constitution contemplates that doctrine will exist.

In *McCulloch v. Maryland*,[15] the great Chief Justice Marshall properly reminded us that our Constitution does not and cannot partake of the complexity of a legal code.[16] Why? Because if it were that detailed, it would not have been understood by the public—the people who had to read it to decide whether to vote it up or down in the ratification process. Consequently, the broad dictates of the Constitution, in order for the document to work in court, will have to be concretized in all sorts of ways.

Consider the Fourth Amendment: It establishes general parameters. The parameters are not, according to the text, that every search and seizure requires probable cause,[17] no matter what some legal scholars may claim. It does not say that a warrant has to issue before each and every search can take place. It does not say that the exclusion of evidence is the proper response to an illegal search.

The text creates parameters, but it does not specify what they are. What the text does say is that every search and seizure has to be reasonable. What does an open-ended word like "reasonable" mean in this context? Interpreting it requires a vast number of strategic, pragmatic, empiric, institutional, second-best judgments by courts about how to create a framework of what searches are reasonable in today's world. Thoroughgoing documentarians do not mean to displace such an inquiry, so long as the doctrine really does properly exist as an implementation of the proper principles that people did authorize.

Documentarians do not begin and end with the document. We begin with the document, insist on its priority and fundamentality, and try to ponder how to translate that wisdom into rules that can be made to be enforceable in court. To think about those rules in court, one must distinguish between a supreme court and inferior courts. Inferior courts, in general, are not judicially authorized to disregard the doctrine of the Supreme Court, even if those inferior courts think that doctrine is wrong, because the Constitution itself creates a structure of ver-

15. 17 U.S. (4 Wheat.) 316 (1819).
16. *Id.* at 407.
17. *See* U.S. CONST. amend. IV.

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tical authority.[18] There may be rare cases in which a judge might act as a civil disobedient—Michael Paulsen has written very acutely about that problem[19]—but there is no general judicial authority of an inferior to overrule or, if you will, underrule or undermine the views of the Supreme Court, even if the inferior judge thinks that the Supreme Court's rules are incorrect.

Should the Supreme Court be bound by its own prior precedents? Here again, the document provides broad outlines to the answer, even though it does not answer all the questions that are raised by this issue. The Constitution creates the Supreme Court as a continuous body, and as a continuous body it is ideally structured to consider what it has done in the past and to anticipate what it will do in the future. The institutional design suggests precedent may properly be taken as the default rule. There ought to be a presumption that the Court will do again what it has done before, unless and until the Justices are persuaded that their prior decision was wrong. Accordingly, it makes sense to say that the burden of proof is on someone who wants to prove that a precedent is mistaken, just as the burden of proof ought also to be on someone who wants to prove that a law is unconstitutional. We have a presumption of the constitutionality of statutes, and someone who wants to overcome that presumption must give reasons if they are going to succeed in doing so. In other words, the Court ought not to treat its precedents as if they were more important than statutes, which are the people's own pronouncements. Rather, the Court should treat precedents as if they are comparable in force to statutes; that is to say, as if they are on a coordinate par with statutes.

Courts might not only treat a past precedent as a default or starting point; they may even give it a certain epistemic weight. That our predecessors, who were thoughtful men and women, came to a certain result might be a reason for thinking that result is actually the right one. It is not an irrebuttable reason, but if the precedent came from the pen of John Marshall, for example, it might be a very strong reason.

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18. *See* U.S. CONST. art. III.

19. Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2733–34 (2003).

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Nonetheless, even when the Court comes to a settled conviction that the previous decision was a mistake and that the burden of proof has been overcome, *Casey*'s principle suggests that the Justices are not even going to try to state whether what the Court did was really a mistake in the previous case. For the Court to do that is for the Court to privilege its own case law even more than statutes. After all, when Congress makes a constitutional mistake by passing an unconstitutional statute, the Court is happy to say that Congress has made a mistake, and to correct it.[20]

There are other reasons why certain precedents are entrenched against reversal. Some mistakes may have been ratified by the people in some way, or ratified by the passage of time. Another structural feature of the judiciary is that it acts late in the process, only after the legislative and executive branches have already acted. Thus, a case involving the constitutionality of the Bank of the United States reached the Supreme Court many years after the political branches had passed on the question.[21] Chief Justice Marshall noted in *McCulloch* that there had been important reliance interests created by the Bank that the Court could not lightly disrupt.[22] These reliance interests are why we have a presumption of constitutionality when it comes to statutes. Because courts act later in time, and act on things that have already happened, courts must have a certain respect for the reliance interests that may have grown up around a law. Similarly, certain precedents may have been, in important respects, relied upon by institutional actors. Still, the existence of such reliance interests goes only to the question of what is a proper judicial remedy for a mistake. It does not go to the question whether a mistake was made in the first instance.

It might very well mean that the Supreme Court cannot undo its mistakes on a dime, but the Court's first obligation, when it has made a mistake, is to tell us it that it has and at least issue a declaratory judgment to that effect. Perhaps Congress or a state legislature will respond to the news that the Supreme Court made a mistake by phasing in a new regime over a course of

20. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

21. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401–02 (1819).

22. *Id.* at 401.

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years; legislatures can act differently in some ways than the Supreme Court. Perhaps the Supreme Court will respond to the conclusion that it made a mistake by gradually trying to get back to a proper constitutional approach. But it does not seem to me that when the Supreme Court has made a mistake, it ought to respond by not telling the citizenry because it fears that the American people cannot handle the news. The Court should not, as it did in *Casey*, say that it refuses to overrule a mistake because telling the truth would undermine the people's confidence in the Supreme Court.[23] Such language is unprecedented and in tension with the Constitution itself.

23. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992).

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