

STARE DECISIS AND ORIGINALISM: JUDICIAL  
DISENGAGEMENT FROM THE SUPREME  
COURT'S ERRORS

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INTRODUCTION

I have always had a very simple-minded view of judicial duty in constitutional cases: Supreme Court Justices should just apply the law. For that reason, I reject the standard version of “living constitutionalism,” according to which the Court should take every feasible opportunity to conform the Constitution to a progressive vision of a morally evolving society. And I reject a view sometimes found among libertarians, according to which the Justices should always try to fit the Constitution to a political theory that is often attributed (rightly or wrongly) to John Locke. Nor do I accept the view that economic efficiency is the proper criterion for the validity of judicial decisions. Some conservatives also seem to me to go astray when they promote Burkean traditionalism. And I certainly do not think that the Justices should simply defer whenever possible to legislatures, or act so as to protect the institutional or political interests of the Court.

If I had to put a label on my own position, it would be “originalism.” The Constitution is a written document that means what its words, in context, would reasonably have been understood to mean at the time it was adopted. With respect to many issues, this simple-minded proposition is virtually undisputed. Everybody agrees that the various numbers in the Constitution (such as the minimum ages specified for the President and members of Congress) should be understood in a base-10 system. Nobody argues that the term “domestic violence” in Article IV has anything to do with abusive husbands. And even in the highly controversial area of gun control, I have yet to hear anyone maintain that the word “arms” in the Second Amendment refers to the upper limbs of the human body.

Originalism faces two major challenges. First, it is frequently difficult, and sometimes impossible, to identify the original meaning of a legal text with anything approaching the certainty one would like to have in deciding cases. It is easy enough to say that the Justices should apply the law, but that presupposes that they can find out what the law is. If this were the only problem, the simple answer would be that they should dispassionately

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weigh all the relevant arguments and evidence about the original meaning of the text, and decide cases accordingly. Of course they're bound to make mistakes. They're human, as were those who wrote the Constitution. Chemists and physicists cannot pretend to know all the answers in their disciplines, and it would be silly to reject an interpretive theory just because it cannot accomplish all that it aspires to.

The second challenge is related to the first, but is considerably more difficult. The doctrine and practice of stare decisis create a real tension with the principle of originalism, precisely because the Supreme Court undoubtedly has made, and will inevitably continue to make, serious interpretive errors.<sup>1</sup> What should the Justices do when they encounter a conflict between the original meaning of the Constitution and the precedents that are already on the books?

Some commentators have sliced through this Gordian knot by repudiating stare decisis in constitutional cases.<sup>2</sup> This terrible swift sword has the virtue of producing a clean cut, leaving devotion to the Constitution to stand alone in all its splendid purity. If the results upset some apple carts—say, by declaring paper money unconstitutional—that's why we have Article V.<sup>3</sup>

Elegantly consistent though this approach may seem, it turns out to be inconsistent with originalism itself. Stare decisis, in various different versions to be sure, had long served a central function in all of the Anglo-American courts familiar to the founding generation. When Article III granted federal courts "the Judicial power of the United States," it must have been presumed that this included the power (and perhaps the obligation) to apply the principle of stare decisis in constitutional cases. The text obviously does not compel this conclusion, but there is abundant historical evidence from the framing era that supports it, and I have seen none that could refute it.<sup>4</sup>

Originalists, myself included, have pretty much been condemned to muddle along without any usefully precise theory to explain how the Supreme Court should respond to conflicts between the original meaning of the Constitution and erroneous or extremely dubious precedents. The most common substitute for such a theory has been to accept stare decisis as an

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<sup>1</sup> For purposes of this Article, the term "stare decisis" refers to reliance on precedent for a rule of decision without regard to whether the precedent was correctly decided. Stare decisis is never regarded as an absolute rule that always forbids a court to overrule a precedent.

<sup>2</sup> See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 31-32 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

<sup>3</sup> On the constitutionality of paper money, see generally Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

<sup>4</sup> For a review of the evidence, see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 809-25 (2009).

unavoidable pragmatic exception to the fundamental principle of applying the Constitution according to its original meaning.<sup>5</sup>

Not surprisingly, this has exposed originalists to considerable scorn and ridicule, especially from proponents of the leftist forms of living constitutionalism. Justice Antonin Scalia has been a favorite target of these attacks, probably because he is the modern Court's most prominent and vociferous exponent of originalist theory. He is frequently accused of appealing to originalism when it produces the results he likes, and of deferring to precedent when that suits his policy agenda.<sup>6</sup> When he occasionally announces that his principles force him to a conclusion he dislikes, as in the flag-burning decisions, it usually involves a fairly narrow issue that lacks significant policy implications. Such decisions are easily discounted by his critics as a convenient and low-cost disguise for a broader pattern of holier-than-thou hypocrisy.<sup>7</sup>

Because I am not a judge, I have the luxury of choosing which cases to opine about, and then offering only conclusions about which I'm reasonably confident. But I've always been bothered by a sense that Justice Scalia's critics on the left have a point, and that I or any other originalist might well be exposed to the same charges if faced with the obligation to decide a great many difficult cases. Not bothered enough to concede that Justices are necessarily just politicians in robes, but enough to be acutely uneasy about the relationship between originalism and stare decisis.

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<sup>5</sup> An exceptionally sophisticated theoretical effort to reconcile originalism with precedent is McGinnis & Rappaport, *supra* note 4. They contend, as I do, that the text of the Constitution authorizes the Supreme Court to incorporate some version of stare decisis in its constitutional decisionmaking. *Id.* at 803-04. They then propose that this doctrine be reformulated as a series of rules designed to balance the costs and benefits to the nation of overruling erroneous precedents. *Id.* at 836-37. The rules they propose would probably be an improvement in several ways over the doctrine and practice of the contemporary Court, especially as it is summarized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992). Nevertheless, the application of the rules proposed by McGinnis and Rappaport would involve an enormous amount of political judgment or guesswork. Their rules therefore remain within the class of pragmatic exceptions to the principle that the Constitution itself binds the Supreme Court.

<sup>6</sup> See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000) ("Justice Scalia uses [original meaning jurisprudence] selectively when it leads to the conservative results he wants, but ignores [it] when it does not generate the outcomes he desires."); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 89 (1997) ("Scalia prefers a Constitution that authorizes the judiciary to protect certain libertarian rights."); Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 968 (1999) ("[Originalism's] principal advocates relentlessly refuse to stick by it. Originalism works if they agree with the outcome dictated by history. If history does not lead them where they want to go, they simply reject it.").

<sup>7</sup> Cf. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1423 (1999) ("Occasionally reaching 'liberal' results such as [invalidating bans on flag burning] has proven very useful to Scalia. He holds up the contrarian cases as proof that his methodology is politically neutral and constrains judicial discretion.").

I wish I could report that I finally came up with a solution while preparing for this Symposium on Judicial Engagement. No such luck. But I hope to throw some new light on the problem by considering a provocative answer proposed by my former colleague, Jonathan Mitchell, who is now the Texas Solicitor General. He derives a doctrine of *stare decisis* entirely from the text of the Constitution, with no admixture of alien pragmatic considerations.<sup>8</sup>

## I. STARE DECISIS AND THE SUPREMACY CLAUSE

Mitchell's argument is based on the language of the Supremacy Clause.<sup>9</sup> That clause identifies three kinds of supreme law: the Constitution, federal statutes, and treaties. By implication, all other kinds of law—including judicial opinions—are nonsupreme, and must always give way to the supreme law of the land. Mitchell also notes that the Supremacy Clause does not rank the three kinds of supreme law among themselves. So far as the text indicates, they are all supreme and none of them is more supreme than the others. Similarly, the constitutional text does not provide any ranking among the various forms of nonsupreme law, such as Supreme Court opinions and state laws.

From these features of the text, Mitchell argues that it is unconstitutional for the Supreme Court to rely on *stare decisis* when, and only when, its precedents (a form of nonsupreme law) conflict with one of the three kinds of supreme law.<sup>10</sup> Conversely, the Constitution does not forbid the Court to follow its precedents, even if they are wrong, when they conflict with a nonsupreme law, or when two forms of supreme law conflict with each other. This argument generates a novel typology that distinguishes permissible from impermissible uses of *stare decisis*.

First, the Court always violates the Constitution when it strikes down a federal statute on the basis of an erroneous constitutional precedent. Doing so effectively elevates a nonsupreme law (the applicable precedent) over a supreme law (the federal statute).

Second, the Court always violates the Constitution when it relies on *stare decisis* to uphold a state law that conflicts with the Constitution. Doing so effectively elevates a nonsupreme law (the state law) over a supreme law (the Constitution).

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<sup>8</sup> See Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1 (2011).

<sup>9</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>10</sup> Mitchell, *supra* note 8, at 4-8, 24-51.

Third, the Court does not violate the Constitution when it upholds a federal statute on the basis of an erroneous precedent. When the Court is faced with a conflict between the Constitution and a federal statute, both of which are supreme laws, it must apply a tie-breaking rule, and the Constitution provides no such rule. It is therefore constitutionally permissible for the Court to use stare decisis as a tiebreaker.

Fourth, the Court does not violate the Constitution when it strikes down a state law on the basis of an erroneous precedent. Here again, a tie-breaking rule is required because the Constitution does not say that one kind of nonsupreme law must necessarily override another. The Constitution is not violated when the Court uses stare decisis to break the tie.

To get a sense of the unorthodox results that flow from Mitchell's theory, consider the following applications.<sup>11</sup>

First, suppose that the original meaning of the Fifth Amendment's Due Process Clause does not include an equal protection component. This conclusion is easy to reach with considerable confidence. The Court has never offered so much as an argument for the textually implausible "reverse incorporation" doctrine, and I am unaware of any historical evidence to support it. That means, for example, that *Bolling v. Sharpe*<sup>12</sup> misinterpreted the Constitution when it invalidated racial segregation in the public schools of the District of Columbia.<sup>13</sup> Under Mitchell's theory, the Constitution forbids the Court to invalidate a federal statute on the authority of *Bolling* or other equal protection precedents. Accordingly, reliance on such precedents to strike down federal affirmative action programs violates the Constitution.<sup>14</sup> Erroneous constitutional precedents can never justify the invalidation of a federal statute.

Second, suppose that the original meaning of the Commerce Clause does not authorize Congress to regulate an intrastate activity on the ground that the aggregation of many such activities substantially affects interstate commerce. This is an easy conclusion to reach on the basis of arguments

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<sup>11</sup> Some of these examples differ from those offered in Mitchell's article.

<sup>12</sup> 347 U.S. 497 (1954).

<sup>13</sup> *Id.* at 500 ("In view of our decision [referring to the equal protection holding in *Brown v. Board of Education*, 347 U.S. 483 (1954)] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."). Ipse dixit don't get much more abrupt than this one.

<sup>14</sup> In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215-18 (1995), the Court relied on *Bolling* to hold that federal affirmative action programs are invalid unless they survive strict scrutiny. In what looks like an aggravating factor from the perspective of Mitchell's theory, *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). *Adarand*, 515 U.S. at 227. I should note that Mitchell mistakenly says that *Adarand* "nixed a federal affirmative-action statute." Mitchell, *supra* note 8, at 59. In fact, the Court merely remanded for the application of strict scrutiny, and the statute was never struck down. See *Adarand*, 515 U.S. at 237-39. Mitchell's main point remains unaffected, however, because *Adarand* does allow federal affirmative action programs to be invalidated on equal protection grounds.

powerfully articulated by Justice Clarence Thomas and many academic commentators.<sup>15</sup> If that conclusion is correct, *Wickard v. Filburn*<sup>16</sup> was wrongly decided, but it was constitutionally permissible for the Court to rely on this erroneous precedent to uphold a federal prohibition on possessing homegrown medical marijuana.<sup>17</sup> Erroneous precedents may be invoked to uphold a federal law.

Third, suppose that the original meaning of the Contracts Clause is inconsistent with *Home Building & Loan Ass'n v. Blaisdell*,<sup>18</sup> which upheld a state law prohibiting the enforcement of existing contractual terms.<sup>19</sup> This conclusion is almost unavoidable in light of the abundant historical evidence about the meaning of that Clause set forth in the dissenting opinion, and in light of the *Blaisdell* majority's declaration that the Constitution's original meaning was irrelevant.<sup>20</sup> It then follows that the Court violated the Constitution by relying on *Blaisdell* to uphold a statute repudiating a contractual obligation.<sup>21</sup> State laws that violate the Constitution may never be upheld because of an erroneous precedent.

Fourth, suppose that the original meaning of the Fourteenth Amendment's Due Process Clause does not forbid the states to ban abortion, and that *Roe v. Wade*<sup>22</sup> was therefore wrongly decided. There is hardly any obstacle at all to reaching this conclusion since the Court has never even tried to derive its abortion jurisprudence, or the substantive due process mosaic of which it forms a part, from the text of the Constitution. Even if *Roe* is among the most pernicious and clearly unconstitutional decisions of all time, as many people believe it is, Mitchell's theory allows the Court to continue invalidating state laws on its authority.<sup>23</sup> Erroneous precedents may be used to invalidate state laws.

## II. THE LIMITS OF THE SUPREMACY CLAUSE

Apart from its novelty, perhaps the most striking feature of Mitchell's argument is that it enables one to reconcile some seemingly inconsistent

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<sup>15</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

<sup>16</sup> 317 U.S. 111 (1942).

<sup>17</sup> *Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005).

<sup>18</sup> 290 U.S. 398 (1934).

<sup>19</sup> *Id.* at 447-48.

<sup>20</sup> See *id.* at 453-65 (Sutherland, J., dissenting); *id.* at 442-43 (majority opinion).

<sup>21</sup> *City of El Paso v. Simmons*, 379 U.S. 497, 506-09 & n.9 (1965). For present purposes, I leave aside the possibility that the original meaning of the Contracts Clause covers private contracts like the one at issue in *Blaisdell*, but not contracts with a state government like the one at issue in *Simmons*.

<sup>22</sup> 410 U.S. 113 (1973).

<sup>23</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992).

Supreme Court decisions, as well as some seemingly inconsistent positions taken by individual Justices.<sup>24</sup> These involve cases in which members of the Court have adhered more persistently to dubious precedents that constrain the states than to those that constrain Congress.

Mitchell does not claim that any Justice has ever consciously adopted his reading of the constitutional text, and there certainly are more plausible explanations for the pattern he identifies. Perhaps most Justices have a higher regard for the federal establishment of which they form a part than they do for the state governments. Or perhaps they have a greater fear of the consequences, to the nation or to themselves, of persistently crossing Congress. Mitchell believes that justifying such apparent anomalies is a virtue in his theory, apparently because it makes the theory seem more than merely academic.<sup>25</sup>

I am inclined to think that this may actually be a vice in his argument. Its effect is to promote the abuse of federal power because it justifies the persistence of so many congressional transgressions against the Constitution and so many transgressions by the federal judiciary against state prerogatives. Much as I might dislike that outcome, however, I will have to accept it if Mitchell's reading of the constitutional text is correct. But before considering its validity, we should pause to note some of the ways in which Mitchell's argument, assuming it is correct, leaves originalism's difficulties unresolved.

First, his theory offers no way to identify those precedents that are so clearly erroneous that they must be treated as deviations from the original meaning. There are many cases in which an honest originalist would have to confess to serious doubts about the meaning of the Constitution, at least with respect to how that meaning determines the resolution of a particular legal issue. In a case of first impression, originalist Justices have little choice but to resolve the issue as best they can. But if relevant precedents exist, there needs to be some way of deciding how much doubt about their validity is required before one concludes that they were wrongly decided.<sup>26</sup>

I think the examples of erroneous precedents that I offered above should be accepted by almost any informed and candid originalist, and Mitchell offers some additional suggestions. But I'm not sure I could extend the list very far. Is it really possible in most cases to decide, without being influenced by what one thinks the Constitution *should* mean, that a

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<sup>24</sup> See Mitchell, *supra* note 8, at 58-64.

<sup>25</sup> Mitchell thinks that there are many cherished though erroneous decisions that it would be "unthinkable for even the most dogmatic originalists to overrule." *Id.* at 48. And Mitchell himself apparently does not wish to "be confined to the academy for life and unable to implement [his] theory in the real world." *Id.* at 12.

<sup>26</sup> One cannot demand absolute certainty, for then the class of clearly erroneous precedents might be a null set. Even if no one has ever produced a plausible justification for a prior decision, how does one know that there is not some convincing evidence or argument that remains undiscovered?

precedent is *so* clearly erroneous that it must be disregarded? In some cases, I think it is. But such cases may be relatively scarce.<sup>27</sup>

Another unresolved difficulty is how to decide when *stare decisis* should be used as a tiebreaker.<sup>28</sup> According to Mitchell's argument, the Constitution permits the Supreme Court to follow a clearly erroneous precedent in upholding a federal statute or in striking down a state law. But permission is not a command. However large or small the set of erroneous precedents may be, it will include some in which the Supremacy Clause does not dictate whether they should be followed or not. In those cases, should one be guided by how confident one is that the precedents are erroneous, or by other factors such as promoting legal stability and protecting settled expectations? Or should one somehow weigh the strength of one's convictions about the original meaning along with such pragmatic factors? Can one take either of these approaches without being influenced, perhaps quite significantly, by what one thinks the Constitution *should* mean? I have my doubts.

Apart from these difficulties, which Mitchell does not purport to resolve, how persuasive is his argument on its own terms? His key textual argument is that the Supremacy Clause draws a sharp distinction between three co-equal forms of supreme law and all other kinds of law. Mitchell, however, draws this conclusion entirely from a fragment of the Clause, without considering the entire text.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>29</sup>

Mitchell mentions the reference to state judges only once, and then only in passing.<sup>30</sup> Read as a whole, the Supremacy Clause offers a clear statement that state judges are required to follow three kinds of federal law even when they conflict with state law. The new Constitution thereby deprived state constitutions and statutes at a stroke of their previous status as supreme law, and state judges were suddenly required to reorient their approach to adjudication. Even if that requirement might have been inferred from the constitutional structure as a whole, which is doubtful, it certainly made sense to

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<sup>27</sup> For an ambitious and well-reasoned argument for rejecting a presumption that demonstrably erroneous precedents should be adhered to, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). Nelson's article, however, does not purport to offer examples that would illustrate how demonstrably erroneous Supreme Court decisions should be identified.

<sup>28</sup> Mitchell expressly declines to address this issue. See Mitchell, *supra* note 8, at 3.

<sup>29</sup> U.S. CONST. art. VI, cl. 2.

<sup>30</sup> Mitchell, *supra* note 8, at 38 & n.146.

issue a direct and unambiguous command. That is exactly what the Supremacy Clause does.

The Clause is silent about the authority of judicial precedents. The principle and practice of stare decisis were at least as well established as the previous supremacy of state constitutions and statutes within their several jurisdictions. Yet no statement about a new limitation on stare decisis appears in the Supremacy Clause. Its manifest purpose is to clarify the dramatic new relation between state and federal law, and especially to make that relation unmistakably clear to state judges, who might naturally have been resistant to recognizing it.<sup>31</sup> Mitchell's claim that the mere use of the word "supreme" in the course of this clarification also implies that the Supreme Court must adopt a novel and complex doctrine of stare decisis is imaginative, but not very plausible.<sup>32</sup>

In addition, the sharp distinction that Mitchell draws between supreme law and nonsupreme law would also seem to imply that erroneous interpretations of federal *statutes* may *never* be adhered to.<sup>33</sup> This would constitute a radical change from the judicial practice familiar to the framing generation, and it is almost impossible to believe that such an alteration would have been imposed by mere implication from the use of the word "supreme" in the Supremacy Clause.

Apart from these textual objections to Mitchell's textual argument, is he right to insist that the Supreme Court is always *permitted* by the Constitution to rely on erroneous precedents to uphold a federal statute or to strike down a state law?<sup>34</sup> I think not. It is true, for example, that the Supremacy Clause does not expressly privilege the Constitution over federal statutes and treaties. But this does not necessarily imply that the Constitution might not implicitly do so, and in more cases than Mitchell allows.

Arguments for ranking the Constitution above federal statutes are well known, having been given prominent expression in *Federalist No. 78*<sup>35</sup> and *Marbury v. Madison*.<sup>36</sup> The fact that the Supremacy Clause does not ex-

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<sup>31</sup> Subsequent events confirmed that the Framers were right to foresee the possibility of conflicts over preemption issues, which occurred even with the Supremacy Clause included in the Constitution. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>32</sup> My discussion of the Supremacy Clause is indebted to an analysis, in a different context, that will appear in JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (forthcoming 2013).

<sup>33</sup> Mitchell expressly declines to address the implications of his argument for statutory construction. See Mitchell, *supra* note 8, at 3.

<sup>34</sup> See *id.* at 37 ("There are *no plausible constitutional objections* when the Supreme Court uses stare decisis as a shield, by invoking wrongly decided precedents to turn aside constitutional challenges to federal statutes or treaties." (emphasis added)); *id.* at 47 ("[N]othing in the written Constitution compels the Supreme Court to apply state law over judge-created or judge-discovered doctrines." (emphasis added)).

<sup>35</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>36</sup> 5 U.S. (1 Cranch) 137 (1803).

pressly confirm the validity of these arguments hardly constitutes a refutation of them. Similarly, it is true that the Supremacy Clause does not expressly privilege constitutionally valid state laws over erroneous Supreme Court opinions. But this hardly disproves the proposition that the Constitution implicitly does so, at least in some cases. The fact that the Supremacy Clause does not expressly direct courts to follow one form of supreme law over another, or one form of nonsupreme law over another, does not imply that reliance on *stare decisis* in such cases is always constitutionally permissible.

It is possible, I suppose, that the adoption of Mitchell's theory by the Supreme Court might have some useful effects. First, by establishing two classes of cases in which the Court is simply forbidden to rely on mushy and malleable pragmatic justifications for following precedent, the theory would incentivize the Justices to think more seriously, or at least more often, about the original meaning of the Constitution. Especially in cases where at least one Justice was prepared to insist, on originalism grounds, that a federal statute be upheld or a state statute struck down, others on the Court would find it more difficult than they do now to simply blow past the Constitution.

Second, in cases where the original meaning is found to be clear, the Justices would have less incentive to interpret precedents in an implausible or even dishonest way. This would obviously be true when erroneous precedents point toward invalidating a federal statute or upholding a state law. But even when Mitchell's theory permits reliance on erroneous precedents, a requirement that they be ignored in other cases should dispose reasonable judges to be less obsessive about creating the appearance of consistency with prior erroneous decisions. Justices who felt obliged to follow the Constitution itself when the Supremacy Clause demands that they do so might be less prone to a lazy and thoughtless deference to precedents in cases where the Court is permitted, but not required, to use *stare decisis* as a tie-breaker.

Over time, these effects might generate a healthy change in the culture of the Court. The Justices would spend more time thinking about the original meaning of the Constitution. Their debates with one another would presumably have more to do with the many genuinely difficult questions that arise when one attempts to ascertain original meaning. Such a cultural shift within the Court would at least represent a step in the direction of greater judicial respect for the Constitution.

Unfortunately, I believe that such good effects would be far outweighed by the bad effects that would arise from adopting Mitchell's implausible textual analysis. Its implausibility is a sufficient reason to reject his argument, but his theory would also encourage the entrenchment of congressional transgressions against the Constitution and judicial transgressions against the legitimate authority of the states. That practical effect pro-

vides an additional reason to keep looking for a better answer than Mitchell's to a problem that he rightly regards as important.

### III. STATE COURT DISENGAGEMENT FROM SUPREME COURT ERRORS

Mitchell's textual argument infers far too much from the use of the word "supreme" in the Supremacy Clause and fails to take account of the full text of the Clause. But he is certainly right about one thing. The Constitution, federal statutes, and treaties are all specifically made the "supreme Law of the Land," and the constitutional text does not so much as suggest that any judicial opinions can possibly have that status. A genuinely reasonable inference might be that state courts are commanded by the Constitution not to treat U.S. Supreme Court opinions as supreme law, and that they are required to disregard all judicial opinions that conflict with one of the three forms of supreme law.

Note that I am not suggesting that the Supremacy Clause directs or authorizes the lower *federal* courts to disregard erroneous Supreme Court opinions. Article III characterizes these as "inferior Courts," and one can reasonably infer from the text that the judges of these courts are obliged to accept guidance from what the text calls a "supreme Court."<sup>37</sup> Article III plainly contemplates the creation of a hierarchical judicial establishment, and it wouldn't be much of a hierarchy if the Supreme Court were largely confined to making suggestions about how the inferior courts should decide cases.

The state courts are different. The Constitution nowhere characterizes them as "inferior" to any federal court, or implies that they are to be integrated into a hierarchical federal establishment. Article III provides for the Supreme Court to have appellate jurisdiction over certain cases arising in the state courts, and that implies that state courts must respect the Supreme Court's judgments in those cases. But it does not imply that state courts are otherwise bound by Supreme Court *opinions*. And the text of the Supremacy Clause appears to imply that state courts are forbidden to treat erroneous Supreme Court opinions as though they were the supreme law of the land.

If state courts accepted the argument I've just sketched, there might be some unfortunate results. Perhaps these courts would begin adopting diverse interpretations of federal law, leading to a harmful lack of uniformity around the country, or perhaps they would adopt implausible or even perverse interpretations of the supreme law of the land. If that were to happen, Congress could address the problem by providing for exclusive jurisdiction in the federal courts over matters in which state court behavior was having bad effects. In one area where this would not work, the prosecution of state law crimes, the remedy of habeas corpus is already available. In part be-

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<sup>37</sup> U.S. CONST. art. III.

cause state courts would be aware of Congress's power to curb irresponsible behavior, I doubt there would be much of it.

On the other side, there might be some very good effects if state courts were to become less deferential to Supreme Court opinions. The most obvious pathologies of the Supreme Court arise from an awareness among the Justices that everyone who counts will almost always treat their pronouncements as if they were the law, and indeed the supreme law of the land. This leads to arrogance and intellectual laziness, both of which are amply displayed in many Supreme Court opinions written by Justices of all jurisprudential and ideological persuasions. If state courts, and especially state supreme courts, considered themselves obliged to disregard erroneous Supreme Court precedents, the Justices would acquire a new incentive to provide persuasive explanations for their decisions. Any informed observer of the Court's work should easily recognize that such incentives are needed.

The Supreme Court might also become more willing to correct its own past mistakes. The Justices are understandably inclined to regard most of the criticism they get from politicians as irrelevant noise or as threats that it would be dishonorable to heed. As for academic criticism, why would the Justices even take the trouble to know about it except when a law clerk finds something that can be cited to support a conclusion already arrived at? State courts, however, are not just kibitzers without the responsibility for actually deciding cases. Sustained criticism from these judges might get a little more respect from the Justices, especially if accompanied by reasoned refusals to follow unconvincing Supreme Court opinions.

The obligation to disregard erroneous Supreme Court opinions might also have some salutary effects on the state court judges themselves. As the power and prestige of the federal government have increased over time at the expense of the state governments, so has the prestige and power of the state courts been diminished. Not surprisingly, state courts have tended to become excessively deferential to the Supreme Court. Justice William Brennan called attention to this problem many years ago when he urged state judges to stop indulging a presumption that state constitutional provisions should be given the same interpretation that the Supreme Court had given to parallel provisions of the U.S. Constitution, even when the provisions are identically phrased.<sup>38</sup>

Justice Brennan's immediate motivation was to foster greater protection for civil liberties that he thought had been unduly constricted by some of his own Court's recent decisions. Whether he was right or wrong to be alarmed about those decisions, he was surely right that state courts should exercise independent judgment when interpreting their own state constitutions. If the Supremacy Clause were understood to require that state supreme courts also exercise independent judgment in interpreting the U.S.

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<sup>38</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

Constitution, these judges would have new incentives to show that they can do a better job than their federal counterparts. Such competition could lead to better decisions and opinions from all the judges involved. And if this hope were not fulfilled, Congress always has the power to prevent such competition from leading to serious dislocations.

#### CONCLUSION

Originalism has had an uneasy relationship with stare decisis, but the two seem wedded in a way that precludes divorce and thus encourages adultery. Almost all originalists have decided, on pragmatic grounds, that the Supreme Court's constitutional infidelities must sometimes be allowed to mature into de facto constitutional amendments. Jonathan Mitchell has proposed a new theory—based solely on the text of the Supremacy Clause rather than on pragmatic considerations—that purports to identify which interpretive infidelities must be rejected and which may be allowed to continue indefinitely.

According to Mitchell's theory, it is unconstitutional for the Supreme Court to rely on stare decisis when, and only when, its precedents (a form of nonsupreme law) conflict with one of the three forms of supreme law identified in the Supremacy Clause. Accordingly, erroneous precedents may never be relied on to strike down a federal statute or to uphold a state law that conflicts with the supreme law of the land. Conversely, erroneous constitutional precedents may be relied on to uphold a federal statute or to strike down a state law.

Mitchell's argument overstates the implications of the use of the word "supreme" in the Supremacy Clause, and it overlooks the principal purpose of the Clause. The better reading is that the Clause was meant to establish both the supremacy of specified federal laws over any form of state law, and the obligation of state courts to respect that principle. The Supremacy Clause is simply silent about the Supreme Court's duty when its precedents conflict with the original meaning of the Constitution.

Mitchell is right, however, to emphasize that the Supremacy Clause implicitly rejects the notion that Supreme Court opinions can be the supreme law of the land. Because the Clause is directed primarily at commanding state courts to follow the supreme law when it conflicts with a nonsupreme law, a reasonable inference is that state courts are not bound by erroneous Supreme Court opinions. If state supreme courts were to take that inference seriously, we might see a healthy intellectual competition between them and their federal counterpart. If all these contestants were to begin taking the Constitution more seriously than they do now, the nation could be the ultimate winner.