An Originalist Theory of Precedent: The Epistemic and Metaphysical Attitudes Toward Originalist Precedent

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I. Introduction

Originalists over the past thirty years have constructed a coherent, elaborate, and powerful theory of constitutional interpretation. In doing so, originalism has changed to overcome cogent criticisms lodged against it. Busied with building and defending originalism, originalists have thus far failed to fully explain the role of precedent in constitutional interpretation. Recently, some originalists, including myself, have provided explanations of the role of nonoriginalist constitutional precedent. In this Article, I take the next step and describe the roles of originalist precedent in constitutional adjudication.

It is crucial for originalists to provide a theory of originalist precedent because, as prominent critics have argued, originalism—at least at first blush—runs afoul of the judiciary’s deeply held commitment to stare decisis. This tension arises, the critics argue, because in each new case originalists are

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3 I will use the label “constitutional precedent” for precedents that purport to articulate the Constitution’s meaning and to apply that meaning to the facts presented by a case.
5 An originalist precedent, as I will explain below in Part III, is a precedent that meets the standard of Originalism in Good Faith. Originalism in Good Faith, in turn, provides that a precedent is an originalist precedent if it evinces a good faith attempt to articulate and apply the Constitution’s original meaning.
compelled to look beyond precedent and freshly interpret the Constitution based solely upon its original meaning. To make matters worse, originalists have failed to address this powerful criticism. In this Article, I offer an originalist defense to this problem.

Originalism must provide an account of the roles originalist precedent plays in constitutional adjudication for at least three reasons. First, originalism, as currently articulated, has a gap. It is not a fully developed theory of constitutional interpretation. It has not yet addressed the status and role of originalist precedent. To offer a rich, robust theory of constitutional interpretation, originalists must tackle originalist precedent.

Second, precedent plays such a central role in our legal practice that all plausible interpretative methodologies must account for the role of precedent in their theories. Stated differently, if originalism cannot account for the role of originalist precedent, then it would dramatically diverge from our current legal practice and lack explanatory power. Professor Richard Fallon, a critic of originalism, has suggested along these lines that “according to the originalist . . . approach[], every case should furnish an occasion for judicial inquiry into the truth about what the Constitution means. Yet the Supreme Court patently does not function this way.”

Third, most scholars believe that stare decisis is normatively attractive, and its prominence in our legal practice suggests that its participants do as well; consequently, theories of constitutional interpretation will be more normatively attractive if they maintain a role for stare decisis. Originalism, in other words, will be more normatively attractive if it provides a role for stare decisis.

In this Article, I show that originalism does retain a robust role for originalist precedent thereby enabling originalism to fit our legal practice and appropriate the normative attractiveness of stare decisis. By following the Epistemic and Metaphysical Attitudes toward originalist precedent, judges can rely on originalist precedent and avoid the extraordinary expenditure of resources necessary to freshly evaluate every possible constitutional issue in cases that come before them. In an Equal Protection Clause challenge to affirmative action, for example, instead of deciding anew whether the Clause prohibits discrimination on the basis of race, courts can rely on originalist precedent for that proposition and move on to the issue raised by the case.

First, I briefly review the debate in originalism over the role of constitutional precedent. Second, I describe how participants in our legal practice can distinguish between originalist and nonoriginalist precedent using a standard called Originalism in Good Faith. Under Originalism in Good Faith, precedents that are a good faith attempt to articulate and apply the Constitution’s original meaning, are originalist precedents.

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7 FALLON, supra note , at 43; see also Barnett, supra note , at 1232 (“In recent years, as the popularity of originalist interpretation has risen . . . its critics have increasingly harped on its supposed incompatibility with the doctrine of stare decisis.”).

8 See Solum, supra note , at 186-201 (defending a “Neoformalist” conception of stare decisis).

9 See Calabresi, supra note , at 327 (stating that “the caselaw construing the [Constitution’s] text is . . . of critical importance”).
Third, in the heart of the Article, I explain the roles of originalist precedent in constitutional interpretation, described by the Epistemic and Metaphysical Attitudes toward precedent. The Epistemic Attitude is that originalist precedent serves the epistemic role of providing presumptive evidence of the original meaning and its proper application. The Metaphysical Attitude is that originalist precedent serves the creative role of determining the defeasible content of the Constitution’s meaning.

Next, I explain how the Epistemic and Metaphysical Attitudes operate in practice. I show that originalist precedent serves the roles of implementing the original meaning, embedding the original meaning in constitutional law, and affecting other areas of constitutional law through its gravitational force. In so arguing, I will elucidate how the role of originalist precedent varies depending on whether the context is one of constitutional interpretation or constitutional construction.

Then, I briefly revisit the original meaning of “judicial Power” in Article III, which requires federal judges to give significant respect to constitutional precedent. I show that the Epistemic and Metaphysical Attitudes meet Article III’s mandate. More importantly, they show that it makes sense to follow Article III’s mandate.

The Epistemic and Metaphysical Attitudes offered in this Article complete the circle of my originalist theory of precedent. In an earlier article, I showed why and how judges should give nonoriginalist precedent significant respect. In this Article, I finish that project by showing how judges should give originalist precedent significant respect via the Epistemic and Metaphysical Attitudes.

II. Background Debate Over Role of Constitutional Precedent in Originalism

A. Constitutional Precedent

Despite—or, as I shall argue, out of faithfulness to—the central role of our written Constitution to our national legal and political life, constitutional adjudication has many of the characteristics of our broader common law legal practice and heritage. Indeed, this affinity has prompted an appreciable number of scholars to argue that there exist no significant differences between

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10 A handful of originalists have stated in passing that precedent “can provide epistemic guidance in the face of uncertain original meaning.” See, e.g., Barnett, supra note , at 1235. In this Article, I elaborate on that insight.

11 Stated briefly, constitutional interpretation occurs when the Constitution’s meaning provides a determinate answer to a legal question, while constitutional construction occurs when there is more than one answer consistent with, but not determined by the Constitution’s meaning. In these cases, a court must construct—create—constitutional meaning to decide the case. For example, the Commerce Clause determinatively answers, in the affirmative, the question of whether Congress can regulate trains traveling across state lines. This is constitutional interpretation. The question of whether Congress can regulate the Internet under its Commerce Clause authority is arguably constitutional construction.

12 Strang, supra note , at 472-84.

13 See MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008) (providing the most recent comprehensive overview of the role of precedent in constitutional adjudication).
constitutional and common law adjudication.14 Less controversially, most constitutional scholars agree that constitutional precedent plays at least a significant role in American constitutional adjudication.15 For purposes of this Article, I need only briefly describe the commonly accepted aspects of constitutional precedent’s roles in constitutional adjudication because my claim is that the conception of originalist precedent I offer sufficiently incorporates those roles.

Most significantly, precedent is a source of legal norms that resolve or help resolve later cases.16 Of similar importance is the role of precedent implementing the Constitution’s norms.17 Constitutional precedent also structures the Supreme Court’s agenda, the cases it will and will not take.18 Constitutional precedent “frame[s], inform[s], and facilitate[s] a constitutional dialogue” in the nation.19 Further, it forms constitutional structures, such as the legal system.20 Other functions include: creating and chronicling history; educating Americans about the Constitution; symbolizing constitutional principles; and shaping national identity.21

B. Nonoriginalist Precedent

Originalists have offered a stunning variety of normative foundations for originalism, which I will not detail here.22 Originalists argue that judges are

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14 For the most widely-cited example of this genre see David Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877 (1996); see also Thomas W. Merrill, The Conservative Case for Precedent, 31 HARV. J.L. & PUB. POL’Y 977 (2008) (arguing that common law constitutionalism is more normatively attractive than originalism); David A. Strauss, Why Conservatives Shouldn’t be Originalists, 31 HARV. J.L. & PUB. POL’Y 969 (2008) (same).
16 GERHARDT, supra note , at 147-53.
17 Id. at 172-76.
18 Id. at 153-55.
19 Id. at 155-57.
20 Id. at 157-62.
21 Id. at 162-72.
22 See BARNETT, supra note , at 109 (arguing that originalism best protects natural rights); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 110-59 (1999) (grounding originalism in popular sovereignty); John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 TEX. L. REV. 703, 802–05 (2002) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution’s supermajority requirements); Lee J. Strang, The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition, 28 HARV. J.L. & PUB. POL’Y 909, 983–97 (2005) (using the Aristotelian tradition’s concept of the common good and the related concept of authority to justify originalism). Lawrence Solum has also argued that one version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications
bound by and must enforce the constitutional text’s original meaning. The text’s original meaning is the publicly understood meaning of the Constitution’s text when it was ratified. Judges today may access this meaning through a primarily historical inquiry. Judges first look to the Constitution’s text and structure: what is the term or phrase at issue and how is it used elsewhere in the Constitution? 23 Judges also ascertain the meaning of the text in contemporary linguistic practice, drawing on the text’s usage in public discourse. Judges further review the social, cultural, philosophical, and religious background at the time.

Originalism as a modern movement in the legal academy began in response to the perceived excesses of the Warren Court. 24 During the 1970s and 1980s, originalists struggled in a less-than-receptive legal academy to explain the basics of originalism. Originalists paid less attention to the practical aspects of constitutional adjudication, including the role of constitutional precedent.

As originalism has matured, however, its proponents have begun to shift their focus from theoretical justifications for originalism to practical issues. Regarding the role of precedent, originalists initially focused their attention on the thorny problem of nonoriginalist precedent. 25 Originalists did so because of the common—and powerful—argument used against originalism: that it was fatally compromised by the existence of well-entrenched and broadly accepted nonoriginalist precedent. 26 As Henry Paul Monaghan stated, originalists “cannot reasonably argue that these [nonoriginalist] transformative changes should now be judicially overthrown.” 27

I have recently argued that significant respect is due nonoriginalist constitutional precedent because of the constitutional and societal goal of effectively pursuing the common good. 28 I maintained that judges should overrule nonoriginalist constitutional precedent except when doing so would gravely harm

23 For a discussion of this aspect of original meaning interpretation see Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747 (1999).
24 O’NEILL, supra note 9, at 94-132 (describing the rise of modern originalist arguments).
26 See, e.g., FALLON, supra note 6, at 3 (“As I argue at length, the originalist model departs radically from actual Supreme Court practice. As originalists themselves acknowledge, doctrines that are of central importance in contemporary constitutional law could not be justified on originalist grounds.”); Michael J. Gerhardt, The Role of Precedent in Constitutional Decision-making and Theory, 60 GEO. WASH. L. REV. 68, 133–34 (1991) (“[F]aithful adherents to original understanding face an inescapable dilemma[. They either can strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law.”).
28 Strang, supra note 12, at 419. I describe the standard of Originalism in Good Faith below, in Part III.C, to distinguish between originalist and nonoriginalist precedents. This standard is different from the one I used in An Originalist Theory of Precedent, and I intend Originalism in Good Faith to supersede my prior thoughts on this subject.
the common good. Other originalist scholars have similarly begun to offer explanations of the status of nonoriginalist precedent. In this Article, I take the next step, and describe the role of originalist precedent.

C. Originalist Precedent

A priori, there are three distinct plausible conceptions on the status and role of originalist precedent in constitutional adjudication: (1) originalist precedent plays no role in later courts’ analyses (the “get rid of it all” conception); (2) originalist precedent plays a role in later courts’ analyses—it influences the later courts’ decision (the Epistemic and Metaphysical Attitudes); and (3) originalist precedent entirely or substantially determines the outcomes of later courts’ analyses (the “common law constitutionalism” conception). According to the “get rid of it all” conception, in each case presenting a question of constitutional meaning, the court must de novo re-evaluate the Constitution’s original meaning and de novo apply that meaning to the case. The “common law constitutionalism” conception requires a court to decide later cases on the basis of originalist precedent without regard for the Constitution’s original meaning. In other words, originalist precedent’s authority is not subject to rebuttal in light of evidence that the precedent incorrectly articulated or applied the Constitution’s original meaning.

The first and third conceptions have their adherents though, for reasons I explain below, I believe that the second conception is the correct originalist stance. The second conception, what I label the Epistemic and Metaphysical Attitudes toward originalist precedent, requires federal judges to give significant respect to originalist precedent in the form of presumptive authority in later cases. I designate this position the Epistemic and Metaphysical Attitudes because of the primary roles originalist precedent plays under this conception: (1) one is epistemic: originalist precedent bridges the analytic gap between the Constitution’s metaphysically determinate original meaning and the facts

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29 Id.
30 See sources cited in footnote supra. Professor Randy Barnett, with his characteristic incisive pen, has labeled those originalists who argue that originalism, properly understood, incorporates some form of stare decisis, “faint-hearted originalists.” Barnett, supra note , at 1232. Others, including himself, who he labels “fearless originalists,” largely reject stare decisis in constitutional interpretation. Id. at 1233.
31 From an originalist perspective.
32 See Thomas Healy, Stare Decisis and the Constitution: Four Questions and Answers, 83 NOTRE DAME L. REV. 1173, 1208 (2008) (giving, as one of four possible meanings of stare decisis, that courts have “no obligation to adhere to decisions they disagree with”).
33 I intend this label to invoke Professor David Strauss’ theory of constitutional interpretation. Strauss, supra note , at 877; see also Healy, supra note , at 1208-09 (noting the position that precedents have a “strong presumption” in their favor).
34 See Steven G. Calabresi, Text vs. Precedent in Constitutional Law, 31 HARV. J.L. & PUB. POL’Y 947, 947 (2008) (distinguishing between doctrinalists, who follow precedent, from documentarians, who primarily follow the Constitution’s text); Healy, supra note , at 1174 (dividing scholarly responses to stare decisis in constitutional adjudication into categories: scholars who argue that stare decisis is constitutionally required; scholars who argue that stare decisis is unconstitutional; and scholars who argue that Congress has the authority to determine the extent of stare decisis).
presented in a concrete case; and (2) the other is metaphysical: originalist precedent determines the content of the Constitution’s norms when the Constitution’s original meaning is metaphysically indeterminate.\textsuperscript{35}

As I noted earlier, originalists have not described the role of originalist precedent in constitutional adjudication. I have already offered one explanation why: originalists were focused on securing the foundations of originalism and have only recently begun to explore other implications of originalism. One prominent example of this phenomenon is the recent discussion on the possibility and implications of the distinction between constitutional interpretation and constitutional construction.\textsuperscript{36} The distinction was first proposed in originalist literature by Robert N. Clinton in 1987.\textsuperscript{37} From there, it was picked up and given prominence by Keith Whittington and Randy Barnett in 1999 and 2004 respectively.\textsuperscript{38} Today, there is a robust debate among originalists over the existence and scope of construction.\textsuperscript{39} Similarly, originalists are beginning to turn their attention to other prominent facets of our legal practice, such as precedent.

There are other reasons why originalists have not focused on originalist precedent. First, and perhaps most importantly, while there is substantial criticism of originalism on the basis of nonoriginalist precedent, there has been relatively little criticism based on originalist precedent.\textsuperscript{40} Originalists, therefore, could afford to focus on more pressing criticisms. Second, there is substantial disagreement among originalists on the role of nonoriginalist precedent, which has thus become a focus of scholarly efforts. Third, for those originalists whose understanding of originalism tentatively includes a role for originalist precedent, there was less incentive to explore the subject because it was not a significant point of controversy.

\textsuperscript{35} Unless noted otherwise, I use the term indeterminate as a shorthand for both indeterminate and underdeterminate.

\textsuperscript{36} I will discuss these concepts in greater detail later. At this point, let me say that constitutional interpretation is the process of elaborating determinate constitutional meaning, while construction is the creative process of fashioning constitutional meaning when the Constitution’s meaning is indeterminate.


\textsuperscript{39} See Solum, \textit{Semantic Originalism, supra note } , at 19–22 (detailing this divergence); compare Solum, \textit{Semantic Originalism}, at 67-87 (manuscript on file with author) (explaining constitutional construction and detailing the debate over it), with John O. McGinnis & Michael B. Rappaport, \textit{The Desirable Constitution and the Case for Originalism}, at 47-52 (manuscript on file with author) (arguing for original methods originalism which may eliminate much of the need for construction).

\textsuperscript{40} Professor Richard Fallon, though not focusing on originalist precedent, has strongly criticized originalism for failing to fit our legal practice’s commitment to stare decisis. Fallon, \textit{supra note } , at 76-110.
III. Distinguishing Originalist from Nonoriginalist Precedent: Originalism in Good Faith

A. Introduction

My explanation of the function played by originalist precedent in constitutional adjudication depends on a distinction existing between originalist and nonoriginalist precedent and that participants in our legal practice have the capability to ascertain that distinction with reasonable accuracy. Below, I explain how litigants, judges, and scholars can access the distinction in a manner that makes the Epistemic and Metaphysical Attitudes toward originalist precedent possible. After describing the two primary facets of an originalist precedent, I describe the standard I suggest courts should utilize: Originalism in Good Faith.\footnote{I intend this label to invoke Steven J. Burton’s book, and its thesis, that good faith judgments by judges are what our legal practice can and should expect of them. Steven J. Burton, Judging in Good Faith xii (1992).}

B. Distinguishing Originalist from Nonoriginalist Precedent: A First Approximation

The distinction between originalist and nonoriginalist precedent is, at first blush, simple to describe. The distinction is between those cases where the Supreme Court properly interpreted—articulated—and properly applied the Constitution’s original meaning, and those precedents where it did not.\footnote{See Michael J. Gerhardt, The Power of Precedent 8 (2008) (“I understand ‘constitutional law’ to be the byproduct of the efforts undertaken by public authorities to determine ‘constitutional meaning and to implement the Constitution.’”).} Originalist precedent is, therefore, correct, while nonoriginalist precedent is mistaken.

For a precedent to merit the label originalist, it must first correctly express the Constitution’s original meaning. There are a variety of ways in which the precedent could do this, ranging from an explicit statement of the original meaning, to an inarticulate expression of that original meaning. Examples of the first sort are relatively easy to spot. In \textit{Crawford v. Washington}, the Supreme Court clearly stated, following its review of the history of the Confrontation Clause, the Clause’s original meaning: the Clause prohibited “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”\footnote{Crawford v. Washington, 541 U.S. 36, 54 (2004).}

Examples of precedents that state the Constitution’s original meaning opaque are, by definition, more difficult to identify. In these cases, the Court does not explicitly articulate the Constitution’s meaning, leaving one to gather the meaning from other aspects of the opinion. For example, though the Court’s opinion in \textit{Printz v. United States} is an originalist precedent, the precedent’s articulation of the original meaning is not perspicacious.\footnote{Printz v. United States, 521 U.S. 898 (1997).} Instead, Justice Scalia’s opinion draws on rather ill defined “historical understanding and practice,
... [and] the structure of the Constitution.”\textsuperscript{45} Or, the Court articulates the Constitution’s meaning without identifying it as original meaning, requiring one to determine whether the meaning articulated is the Constitution’s original meaning.

Much of the Court’s case law in the antebellum period fits this description. The Court’s articulation of the Constitution’s meaning in the early Republic accorded with the undisputed—originalist—interpretative norms of the period and hence was unreflectively originalist. As Jonathan O’Neill and Christopher Wolfe have demonstrated, originalism was simply the way to interpret legal texts.\textsuperscript{46} Chief Justice Marshall’s interpretation of the Contracts Clause in \textit{Sturges v. Crowninshield} provides a good example.\textsuperscript{47} To ascertain the “meaning of the words in common use,” he relied on the federal structure of the United States, he reviewed the history surrounding the Framing and Ratification of the Clause, and he noted past practices by both the states and the federal government.\textsuperscript{48}

In fact, precedents that opaque articulate the original meaning are relatively rare today. This is the result of the movement toward originalism in response to the previous hegemony of nonoriginalist methodologies.\textsuperscript{49} Consequently, originalism was and remains controversial on the Court.\textsuperscript{50} Its use by its proponents is explicit as a way to show that the proponent’s result is principled (in its proponent’s eyes, of course) and to contrast that principled result with the unprincipled result reached using nonoriginalist methods.

Second, in order to be an originalist precedent, it must accurately apply the original meaning to the facts presented in the case. Ascertaining whether a court properly applied the original meaning falls on a continuum, with clearly correct and incorrect applications on each end, and in between many cases where reasonable disagreement exists.

The Constitution’s original meaning takes the form of legal norms—rules, standards, and principles—\textsuperscript{51} that are more abstract than the given facts of a case.\textsuperscript{52} If the original meaning of a particular constitutional clause is a rule, for example, then that rule provides a norm more general than the class of fact situations to which it is applicable. Consequently, a judge deciding whether and/or how to apply the rule must exercise judgment.

\textsuperscript{45} \textit{Id.} at 905.
\textsuperscript{46} O’\textit{NEILL}, \textit{supra} note , at 12-18 (describing the Court’s use of originalism); W\textit{OLFE}, \textit{supra} note , at 17-72 (same).
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{See O’NEILL, supra note , at 67-160 (giving this history).}
\textsuperscript{50} \textit{See Stephen Breyer, Active Liberty: Interpreting our Democratic Constitution 117-32 (2005) (arguing against originalism); C\textit{ASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA} (2005) (arguing that originalist “fundamentalist” judges are distorting constitutional law).}
\textsuperscript{51} \textit{See Lee J. Strang, Originalism and the “Challenge of Change”: Abduced-Principle Originalism and other Mechanism by which Originalism Sufficiently Accommodates Changed Social Conditions, 60 HASTINGS L.J. 927, 942-56 (2009) (describing this aspect of the Constitution’s original meaning).}
\textsuperscript{52} \textit{See BURTON, supra note , at 28, 68 (noting that reasons are of greater abstraction than the actions they govern).}
Generally, the more abstract the norm a judge is applying, the greater the burden on the judge’s capacities to apply the norm correctly. The relative ease of correctly applying the Presidential Age Clause, compared with the relative difficulty of accurately applying the Fourth Amendment’s prohibition on unreasonable searches and seizures, exemplifies this.

This simple statement is complicated, however, by the existence of archetypal cases which, even within the context of an abstract originalist norm, can make application of such a norm easier. For instance, even if the Equal Protection Clause’s original meaning is a relatively abstract principle, application of that principle to legal impediments to racial minorities purchasing property would remain an easy case. This is because one of the archetypal practices outlawed by the Clause’s original norm was black codes which, among other things, prevented newly-freed black Americans from buying and selling property.

C. Ability and Limits of Ascertaining the Distinction: Originalism in Good Faith

Originalism in Good Faith is the standard interpreters should utilize to determine whether a precedent is originalist or nonoriginalist. A precedent meets this standard if it is a good faith attempt to articulate and apply the Constitution’s original meaning.

Originalism in Good Faith’s core inquiry is: does the precedent in question show an objectively good faith attempt to articulate and apply the Constitution’s original meaning? The inquiry’s focus is primarily on the precedent itself. Therefore, a precedent is an originalist precedent even if later in the author’s personal papers it came to light that the author deceitfully, though plausibly, used originalist arguments to reach what, in the author’s mind, was a nonoriginalist result. The precedent remained an originalist precedent because it plausibly articulated and applied the original meaning.

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53 See I-II, SAINT THOMAS AQUINAS, SUMMA THEOLOGICA Q. 94, Art. 4 (Benziger Bros. ed. 1947) (“The practical reason . . . is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles [of natural law], the more we descend to matters of detail, the more frequently we encounter defects.”).
54 See U.S. CONST. art. II, § 1, ¶ 4 (“neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years”).
55 U.S. CONST. amend. IV.
56 See Strang, supra note , at 960-61 (describing archetypal cases); see also RUBENFELD, supra note , at 178-95 (describing the similar concept of paradigm cases).
57 As Ronald Dworkin has asserted is the case, see RONALD DWORIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 9-11 (1996).
58 RUBENFELD, supra note , at 182.
59 See Randy E. Barnett, Constitutional Clichés, 36 CAP. U.L. REV. 493, 508 (2008) (stating that when “prior decisions do not even purport to be based on original meaning” the decisions are erroneous).
60 Other data bearing on whether the precedent is an objectively good faith attempt to articulate and apply the original meaning is also pertinent. For example, is the precedent’s author is a well known originalist or nonoriginalist, that is relevant data, though probably not of significant weight.
The inquiry is focused on a precedent’s meeting the objective standard of Originalism in Good Faith, not on the subjective beliefs of the precedent’s author. Continuing the previous example, a precedent whose author subjectively believed that the precedent did not accurately articulate or apply the original meaning, but in fact the precedent plausibly did so, is an originalist precedent.

This makes Originalism in Good Faith is significantly different from the Uniform Commercial Code’s definition of good faith. The UCC requires that parties execute and perform contracts in good faith. The UCC’s definition of good faith requires both “honesty in fact” and commercially reasonable standards. In other words, the UCC definition of good faith has both a subjective component and an objective component.

Originalism in Good Faith, by contrast, does not delve into a precedent’s author’s (or authors’) subjective beliefs. Originalism in Good Faith therefore operates instead like qualified immunity. Qualified immunity protects government officials from liability if their discretionary actions were objectively reasonable.

Originalism in Good Faith’s objective standard is more appropriate than a subjective standard for a number of reasons. Most importantly, courts rarely delve into the subjective views of judges who authored precedents, either in the context of vertical stare decisis and horizontal stare decisis. Instead, a precedent is taken at face value, as standing or falling on its own merits. Originalism in Good Faith fits this practice.

Originalism in Good Faith’s objective inquiry is relatively easy to operate because the main data set—the precedent—is readily available. By contrast, a subjective inquiry would open the possibility of scholars and litigants delving into the nonjudicial utterances of judges to try to show subjective bad faith. This broadening of the inquiry would undermine Rule of Law values by undermining (what reasonably appear to be) originalist precedents based on a judge’s subjective views and by making the data relevant to the law, less accessible than the originalist precedent itself.

Relatedly, inquiry into judges’ subjective views would prove disruptive to the judicial process because judges could be reversed and overruled based on claims of bad faith. It would also discourage qualified personnel from accepting judicial office because of the intrusive search into judges’ nonjudicial writings and statements. Judicial office would become more like the contentious and invasive confirmation process.

There is also little need for a subjective standard because the error rate of Originalism in Good Faith will be low. An objective standard will “catch” many precedents motivated by subjective bad faith. At the same time, the objective

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61 U.C.C. § 1-201 (20) (1990).
62 Id.
63 Id.
64 See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).
65 The judge’s personal papers, for example.
standard is protective of precedents that evince a plausible attempt to articulate and apply the original meaning.

Originalism in Good Faith’s objective standard is also one that judges can meet. Although the level of effort needed to meet the standard will vary based on the accessibility of the original meaning and the difficulty of applying the original meaning to the question of the case, judges have the resources to do so.

Lastly, an objective standard fulfills Originalism in Good Faith’s goal of providing a workable benchmark to differentiate originalist precedents from nonoriginalist precedents. For Originalism in Good Faith to be practicable, the effort required to differentiate originalist precedents from nonoriginalist precedents must be lower than that required to conduct a de novo review of the Constitution’s original meaning. Otherwise, the Epistemic and Metaphysical Attitudes would take just as much work as the “get rid of it all” conception of originalist precedent, and my conception of precedent would collapse into the “get rid of it all” conception. Originalism in Good Faith avoids this pitfall by adopting an objective good faith standard that permits participants in the legal practice to relatively easily identify originalist precedents.

There is no set metric to ascertain whether a particular precedent is a good faith attempt to articulate and apply the Constitution’s original meaning. Instead, one must look for indications that the judge(s) acted in good faith. For example, did the judge plausibly review the pertinent data to articulate the Constitution’s original meaning? If not, that is a significant warning that the judge was not in good faith articulating the original meaning. Or, did the judge plausibly respond to credible counter-arguments put forward by the dissent that the original meaning’s application led to a contrary result? If not, that is a significant indication that the judge did not in good faith apply the original meaning.

The ability of later participants in our legal practice to label a precedent originalist will vary based on a number of factors. These factors include: the type of analysis used in the precedent; the interpretative commitments of the precedent’s author, if known; the time period and interpretative milieu in which the precedent was written; whether the precedent is prima facie consistent with the text’s known original meaning; whether the precedent plausibly responds to then-available counter arguments; and whether there are indications that the result is inconsistent with proper application of the articulated original meaning. In practice, the ease of determining whether a precedent is originalist will vary. For instance, if the precedent explicitly reviewed the text, structure, and history of the constitutional text in question, then that weighs strongly in favor of designating it an originalist precedent.

Originalism in Good Faith operates analogously to the administrative review standard labeled “hard look” review. Hard look review is employed when federal courts review discretionary administrative agency determinations.

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67 See 3 ADMIN. L. & PRACT. § 10.5 Hard Look Review (2d ed. 2008) (“Courts have developed an expression of a limited review function, called the ‘hard look’ doctrine. This word formula is
To receive enforcement of its action by a federal court, an administrative agency must show that its decision-making process was reasoned: the agency took into account all pertinent data, responded to reasonable counter-arguments, and explained why it reached its conclusion. Similarly, for a precedent to merit the label “originalist,” its author must take into account the data regarding the constitutional provision’s original meaning, explain what original meaning results from that data, then, apply that original meaning to the facts of the case, and in doing so, respond to plausible counterpoints.

Originalism in Good Faith is, for a number of reasons, the appropriate standard to distinguish originalist from nonoriginalist precedents. First, Originalism in Good Faith meets the mandate of originalism because it accords the Constitution’s original meaning authoritative status. The interpreter’s formal goal is to accurately describe and apply the original meaning.

In practice, judges who in good faith strive to articulate and apply the Constitution’s original meaning will regularly succeed. Therefore, it is significantly more likely that opinions written by originalists, such as Justices Scalia or Thomas, in a self-consciously originalist manner, will respect the original meaning, than are opinions written by nonoriginalists, such as Justice Douglas, in a self-consciously nonoriginalist manner.

Second, since the Epistemic and Metaphysical Attitudes toward originalist precedent give originalist precedent only a presumption of bindingness—which can be overcome—good faith mistakes will be corrected. Originalism in Good Faith accepts that precedents which meet the good faith standard it embodies will

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68 Id.
69 I do not intend to suggest that the strictness of the scrutiny applied using Originalism in Good Faith is identical to that used during hard look review. Instead, the analogy is meant to draw out the three aspects of decision-making.
70 For the reasons stated in the text, I conclude that Originalism in Good Faith is superior to a standard that looks only to the correctness or incorrectness of a precedent, which is commonly taken as the dividing line between originalist and nonoriginalist precedent. See Barnett, supra note , at 509 (using the standard demarcation line).
72 A good example of Justice Thomas, articulating and applying the Constitution’s original meaning in good faith, is in his concurrence in United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).
sometimes be mistaken. This prevents precedent from permanently displacing the authoritative original meaning.

Third, Originalism in Good Faith sets the standard at what we should expect of judges. If originalism is the correct method of interpreting the Constitution, then judges must utilize it to fulfill their oaths. And their good faith efforts to articulate and apply the original meaning are necessary to utilize originalist interpretation.

Relatedly, Originalism in Good Faith sets the standard at what we may, as a practical matter, expect of judges. It is futile to require the unerring articulation of the Constitution’s original meaning and the unerring application of that meaning, because that standard is unattainable. This is why Ronald Dworkin had to create the hypothetical judge, Hercules, to exemplify his theory of law. As Dworkin concluded, regarding why the flesh-and-blood humans that constitute the bench would make mistakes, “the . . . judges of the past did not all have Hercules’ ability or insight.” By contrast, a good faith attempt by a judge to articulate and apply the original meaning is attainable. Indeed, our legal practice already demands good faith by judges.

Of course, to meet the standard set by Originalism in Good Faith, a precedent must evince a good faith effort to recover and apply the Constitution’s original meaning. Consequently, the mantle of “originalist judge” will not, by itself, meet the standard. Instead, the authoring judge must “do the work” of explaining the Constitution’s original meaning and of justifying how that original meaning leads to the judge’s conclusion. There are cases where well-known originalist Justices have arguably authored nonoriginalist opinions. Randy Barnett, for instance, has argued that Justice Scalia’s concurrence in Gonzales v. Raich fits this description.

Originalism in Good Faith hinges on judges exercising good faith judgment. Like any theory of precedent, the substantive content of precedents will hinge on the authors’ judgment of what the original meaning required. For instance, in District of Columbia v. Heller, Justice Stevens dissented. His dissent plausibly reviewed the Second Amendment’s original meaning and

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75 RONALD DWORZKIN, TAKING RIGHTS SERIOUSLY 105 (1977) (“I have invented . . . a lawyer of superhuman skill, learning, patience, and acumen, whom I shall call Hercules.”).
76 Id. at 119.
77 See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (“A judge should respect and comply with the law.”); id. Canon 3A (“A judge should be faithful to . . . the law.”).
78 See Gonzales v. Raich, 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring) (arguing that Congress has authority under the Necessary and Proper Clause to regulate intrastate activities that substantially impact interstate commerce).
plausibly applied that meaning to the facts of the case; thus Justice Stevens’ dissent meets Originalism in Good Faith’s requirements. If Justice Stevens could have garnered one more vote for his dissent it, and not Justice Scalia’s opinion, would have received the deference due under Originalism in Good Faith. This possibility is an unavoidable part of practical human institutions. It also afflicts all plausible interpretative methodologies which depend on fallible human judgment.

Originalism in Good Faith is not the first possible conception of originalist precedent; it is not “get rid of it all.” Therefore, some precedent that meets the standard of Originalism in Good Faith will, in fact, incorrectly articulate and/or apply the original meaning. However, this error rate has minimal costs, and Originalism in Good Faith is superior to the first position. As I argued above, Originalism in Good Faith’s error rate is low because it generally produces correct precedent.

Originalism in Good Faith is also superior to the “get rid of it all” conception because it fits our legal practice which gives a significant role to stare decisis. Originalism in Good Faith also preserves the original meaning’s authority by ensuring that later courts may overrule incorrect originalist precedents. Finally, any uncorrected errors are likely relatively close to the correct original meaning because the precedent qualified as an originalist precedent but criticism did not overcome the presumption in its favor; hence, the precedent did not deviate greatly from the original meaning.

Likewise, Originalism in Good Faith is not the third possible conception of originalist precedent; it is not the “common law constitutionalism” conception. Consequently, Originalism in Good Faith may—though there are significant arguments to the contrary—result in more instability than the third alternative. However, Originalism in Good Faith preserves much of the values advanced by the “common law constitutionalism” conception by protecting originalist precedent. Unlike “common law constitutionalism,” Originalism in Good Faith also protects values advanced by originalism generally.

81 Id. at 2824 (“In this dissent I shall first explain why our decision in Miller was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the post ratification history of the Amendment.”).
82 From my own reading of the history, Justice Stevens incorrectly articulated the Second Amendment’s original meaning. If this is true, then the hypothetical majority Stevens opinion would be an incorrect originalist precedent.
83 See supra notes and accompanying text (arguing that Originalism in Good Faith gives pride of place to the Constitution’s original meaning).
84 See Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMM. 311, 326-31 (2005) (arguing that originalism provides more stability than common law constitutionalism). The argument that the third common law constitutionalism conception is more normatively attractive because it more strongly supports stability is especially weak when contrasted with an originalism that preserves a place for some nonoriginalist precedent, as mine does. See Strang, supra note , at 442-47 (arguing that preserving some nonoriginalist precedent serves the common good by preserving rule of law values).
85 One practical import of Originalism in Good Faith and the presumption accorded originalist precedents is that research on the Constitution’s original meaning will receive greater prominence. See Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative
Adopting Originalism in Good Faith means that I must revise my previous statements regarding the demarcation between originalist and nonoriginalist precedent. I previously argued that the distinction was synonymous with correct and incorrect precedents. Under Originalism in Good Faith, however, a precedent may be an originalist precedent—because it met the objective good faith standard—while at the same time being incorrect—the precedent incorrectly articulated or incorrectly applied the original meaning. This should not be surprising. Any requirement that asks for good faith effort from fallible human actors, while disclaiming perfection, may be met with substantively mistaken actions.

D. Summary

Originalism in Good Faith, which asks judges to faithfully articulate and apply the Constitution’s original meaning, provides a practical means of distinguishing originalist precedent from nonoriginalist precedent. Originalism in Good Faith is superior to the other plausible conceptions of originalist precedent. Below, I explain in more detail the Epistemic and Metaphysical Attitudes toward precedent that utilize Originalism in Good Faith.

IV. The Epistemic and Metaphysical Attitudes Toward Originalist Precedent

A. Introduction

In this Part, I describe the characteristics of the Epistemic and Metaphysical Attitudes toward originalist precedent. I tie this conception of originalist precedent to the widely-accepted distinction between constitutional interpretation and construction. I also show that this conception is further supported by and derivative of the distinction between metaphysical and epistemic determinacy. Lastly, I tie all these points together to give a robust account of the Epistemic and Metaphysical Attitudes.

Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMM. 311, 334 (2005) (arguing that, if originalism were to become more prominent, judges, scholars, and attorneys would quickly develop the skill set necessary to operate effectively in that environment). The demand will be greater for research both to confirm or rebut the presumption favoring an originalist precedent. Further, attorneys litigating constitutional issues would focus more of their energies on originalist arguments. 

Adopting Originalism in Good Faith does not substantially modify my previous conclusions regarding nonoriginalist precedent. Previously, I argued that federal judges should overrule constitutional precedent when it incorrectly articulated or applied the original meaning, unless doing so would significantly harm the common good. Originalism in Good Faith, by contrast, requires federal judges to overrule constitutional precedent when it does not evince a good faith attempt to articulate or apply the original meaning, unless doing so would significantly harm the common good. Stated differently, Originalism in Good Faith reduces—slightly—the class of constitutional precedents labeled nonoriginalist precedents.

Though, this is a reasonably contested position. See supra note (discussing originalist differences on the existence and extent of constitutional construction).
B. Preliminary Description of Epistemic and Metaphysical Attitudes

The Epistemic Attitude toward originalist precedent treats originalist precedent—that is, precedent that meets the Originalism in Good Faith standard—as providing the presumptively correct articulation and application of the Constitution’s original meaning. Judges should have the Epistemic Attitude when the Constitution’s original meaning is determinate, and when its meaning is metaphysically determinate but epistemically indeterminate. Originalist precedent in this context does not create the Constitution’s governing norms, and instead it is only an explication of the Constitution’s determinate original meaning in a particular factual context.

Under the Epistemic Attitude, originalist precedent governs later cases so long as the presumption in its favor remains unrebutted. If later judges, litigants, or scholars rebut the presumption, then the precedent loses its bindingness on later cases, and later judges should use their own good faith judgment to articulate and apply the Constitution’s original meaning.

The Metaphysical Attitude toward originalist precedent treats originalist precedent as providing the defeasibly correct construction of the Constitution’s meaning. Judges should have the Metaphysical Attitude when the Constitution’s original meaning is metaphysically indeterminate. Originalist precedent, in this context, creates—determines—the Constitution’s governing norms. However, the precedent’s determination of the Constitution’s meaning is defeasible in light of a differing constitutional construction by the elected branches, for reasons I have explained elsewhere.

As with the Epistemic Attitude, originalist precedent that constructs constitutional meaning is protected by a rebuttable presumption. If later judges, litigants, or scholars show that the Constitution’s original meaning—indeterminate though it is—excludes the precedent’s construction, then the presumption is overcome. Similarly, if later arguments are offered showing that the precedent’s application of the constructed meaning is wrong, then the presumption is overcome.

C. Distinction Between Interpretation and Construction, and Why it Matters to Originalist Precedent

The arguments I make in this Article regarding the Epistemic and Metaphysical Attitudes toward originalist precedent assume the validity of the distinction between interpretation and construction. I draw this distinction primarily from Professors Whittington, Barnett, and Solum. They argue that interpretation is “a search for meaning already in the text” while construction is the creative “construction of meaning” to fill in gaps left after interpretation is

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89 See Strang, supra note , at 70-72 (making these arguments); see also WHITTINGTON, supra note , at 7-13 (arguing that constitutional construction is a political act of creation).
90 See BARNETT, supra note , at 118–30 (explaining constitutional construction and how it differs from interpretation); WHITTINGTON, supra note , at 5–14 (same); Solum, Semantic Originalism, at 67-87 (manuscript on file with author) (explaining constitutional construction and detailing the debate over it).
91 WHITTINGTON, supra note , at 5.
completed. I have argued elsewhere that federal judges must enforce interpretations of the Constitution against the contrary interpretations of the elected branches, but that they must defer to the elected branches regarding constitutional constructions. This Article follows that approach.

The distinction between interpretation and construction flows from the distinction between determinate and indeterminate law. The law is determinate when its application determines the outcome of a legal case—there is one right answer to a legal question—while the law is indeterminate when it limits the outcomes of a legal case but does not mandate one outcome. Likewise, interpretation is the articulation of the Constitution’s meaning, while construction is the choosing of a meaning that is limited by the Constitution, but not determined by it.

Originalist precedent that interprets the Constitution is binding on subsequent analogous cases. Precedent that involves constitutional constructions is also binding on subsequent analogous cases. However, as I will describe below, because it involves constructions and not interpretations, its bindingness is also defeasible through contrary constructions by the elected branches.

The role of constitutional construction is controversial within originalism, and many scholars have put forward thoughtful arguments. In this Article, I avoid taking sides in that debate. Instead, assuming that constitutional construction exists within a fully articulated originalism, I describe the role of originalist precedent within it.

D. Distinction Between Epistemic and Metaphysical Legal Determinacy, and its Support for the Epistemic and Metaphysical Attitudes

Building on the previous Subsection’s distinction between constitutional interpretation and construction, in this Section I show that originalist precedent has an epistemic role in the context of interpretation, and it plays a metaphysical role in the context of construction. First, however, I describe the distinction between epistemic and metaphysical determinacy upon which my argument is built. I demonstrate that the Epistemic Attitude toward originalist precedent is appropriate when the law is metaphysically and epistemically determinate. It is also applicable when the law is metaphysically determinate and epistemically indeterminate. The Metaphysical Attitude, though, applies when the Constitution’s original meaning is metaphysically and epistemically indeterminate.

The distinction between metaphysical and epistemic legal determinacy is between whether the law is in fact determinate, and whether participants in our

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92 Id. at 7-8.
93 Strang, supra note  , at 69-72.
94 See id. 69-74 (discussing the relationship between determinacy and constitutional constructions in constitutional interpretation).
95 Id. at 50.
legal practice can ascertain whether the law is determinate.\textsuperscript{98} The law is metaphysically determinate when there is one right answer to a case. This is true even if participants in our legal practice are unable to ascertain what the law is (that is, the law is epistemically indeterminate).

The law is epistemically determinate when the law is metaphysically determinate \textit{and} participants in our legal practice can ascertain that the law is determinate.\textsuperscript{99} Our legal practice, which aspires toward liberal legality and hence law-governed human activity,\textsuperscript{100} aims toward epistemic determinacy.\textsuperscript{101} There is a consensus, however, that it does not achieve that goal, at least in some instances.\textsuperscript{102}

It is often the case that when the law is epistemically determinate it still takes significant work to ascertain the law’s determinate content. In my own practice experience, for instance, there was a considerable subset of cases where, to arrive at the conclusion that the law was determinate and to learn the law’s content, I had recourse to a significant body of legal materials. I labored over statutes, administrative regulations, cases interpreting and applying both, and background constitutional and common law norms. My experience—that the law can be epistemically determinate and yet that it may take great effort to arrive at that conclusion—is supported by the work of many scholars.\textsuperscript{103}

The effort and judgment that is required to accurately ascertain whether the law is determinate varies. In the vast majority of possible cases—especially in "easy cases"\textsuperscript{104}—the effort is minimal. It is especially in the subset of epistemically determinate cases where the burdens on legal reasoning are the highest—those cases that are close to the line of being epistemically indeterminate—that the evidentiary function of precedent under the Epistemic Attitude is most robust.

The law is epistemically indeterminate when, despite its metaphysical determinacy, participants in our legal practice cannot ascertain the law’s content. Stated differently, in some cases, even though there is “one right answer,”\textsuperscript{105} legal actors cannot discover that answer. Part of the reason for this inability to access

\textsuperscript{98} I do not address the question of who or what is the relevant standard for determining epistemological determinacy and instead use the capacious phrase, “participants in our legal practice,” to avoid the issue. I also elide the question of what level of consensus among participants is necessary to qualify for determinacy.

\textsuperscript{99} The law can also be epistemologically determinate and metaphysically indeterminate. Stated differently, participants in our legal practice know that there is no right answer.

\textsuperscript{100} See Burton, supra note , at 10 (arguing that if a judge’s judgment is not law-bound then “it may seem[] judges must resolve indeterminacies on the basis of controversial political values—not the law.”).

\textsuperscript{101} Id.

\textsuperscript{102} See Strang, supra note , at 49-51 (describing the scholarship on this point).

\textsuperscript{103} Dworkin’s Hercules, though possessing greater time, research skill, and judgment than myself, utilized the same mode of inquiry to ascertain the law’s determinate content. Ronald Dworkin, TAKINGS RIGHTS SERIOUSLY 105 (1977).

\textsuperscript{104} See Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985) (explaining the ubiquity of easy cases).

\textsuperscript{105} Dworkin, supra note , at 105.
the law’s determinate content are limitations imposed by the human condition.106 Unlike Hercules, legal actors do not have, to pick just one limitation, unlimited time to devote to ascertaining the law’s content.107

A second reason is that law is a practical endeavor. Unlike intellectual investigations that require theoretical reason the goal of which is certainty, practical inquiries often do not offer certainty.108 Instead, using practical reason, the goal is to determine which course of action is most likely correct. This is a consequence of the subject matter of practical reason: the thick, fact-laden, contingent occasions of human activity.

These concrete situations of human activity pose at least two analytically distinct questions: (1) what ethical (or legal) norms are pertinent to—potentially govern—this case; and (2) what course of conduct does the governing norm prescribe? Answering both questions potentially, depending on the subject, can place tremendous burdens on the judgment of the decision maker.

Analogizing to the realm of ethics, some questions are relatively simple: one who borrows a knife from one’s neighbor to cut vegetables must return it.109 Determining the correct course of conduct presented by this case is relatively straightforward because both the governing ethical norm and the manner by which that norm governs this case are relatively clear. The governing norm is “one must return borrowed items to their owners” and the hypothetical presented a paradigm example110 of that norm.

However, the thicker one makes the hypothetical, by adding new circumstances, the more difficult both analyses become, and quickly so. Continuing the previous hypothetical, assume that the neighbor has a violent temper,111 and that he has been arguing with another neighbor.112 It is now unclear

106 This obstacle to legal determinacy is significantly lessened as access to historical materials has become easier and with the advent of computer assisted historical searches. The Commerce Clause’s original meaning provides a good example of this phenomenon. In 1937, access to the Clause’s original meaning was more limited, and the only means to synthesize the Clause’s original meaning was unaided human effort. Today, by contrast, there are numerous electronic resources that store the historical record, and computers assist in synthesizing original meaning. Randy Barnett’s research into the Clause exemplifies these advances. See Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 ARL. REV. 847, 856-57, 857 nn. 32 & 35 (2003) (describing his methodology of using computer assisted searches of electronically available historical sources). Consequently, the amount of epistemic indeterminacy is less today than in the past, and is likely to decrease further.

107 See DWORKIN, supra note , at 105 (describing Hercules’ lack of human limitations).

108 ARISTOTLE, NICOMACHEAN ETHICS 1109b (“to what degree and how seriously a man must err to be blamed is not easy to define on principle. For in fact no object of perception is easy to define; and such questions of degree depend on particular circumstances, and the decision [krisis] lies with perception [aisthesis].”)

109 See CATECHISM OF THE CATHOLIC CHURCH 2409 (1994) (“[A]ny form of . . . keeping the property of others is against the seventh commandment . . . [including] deliberate retention of goods lent.”); AQUINAS, supra note , at II-II, Q. 66, a. 8 (stating that the unconcealed taking of another’s property without the owner’s consent is robbery which is contrary to justice).

110 See CASUISTRY, supra note , at 251-52 (describing the concept of paradigm cases in the casuist tradition); see also RUBENFELD, supra note , at 178-195 (describing a similar concept).

111 The neighbor lacks the virtue of temperance. See JOSEF PIEPER, THE FOUR CARDINAL VIRTUES (1966) (describing the virtue of temperance.

112 See CASUISTRY, supra note , at 324-25 (giving this hypothetical).
whether the norm of returning borrowed items governs, or whether another norm such as “protect innocent human life” applies.\textsuperscript{113} Further, it is unclear the manner by which one or both of these norms applies to the case.

Returning to the realm of law, and specifically to constitutional interpretation, a similar phenomenon obtains because of law’s practical orientation. Both the articulation of the Constitution’s original meaning and how it governs a particular case will be more or less difficult depending on the subject. As in ethics, it is sometimes clear what the governing original meaning norm is and how it governs a particular case. For example, the original meaning of the Commerce Clause is fairly clear,\textsuperscript{114} and its prescription in the case of whether Congress can regulate the transportation by rail of commercial goods from New York to Illinois is also relatively clear.\textsuperscript{115} In many other situations, however, things are less clear. And, of course, one of the processes—articulating the original meaning or applying that norm—may be clear while the other is less so.

The Epistemic Attitude operates when the Constitution’s original meaning is metaphysically and epistemically determinate. In these cases, an originalist precedent will articulate the determinate original meaning that governs the legal questions raised by the case. [The Epistemic Attitude functions most importantly in the subset of cases that are more difficult because the law is epistemically determinate and hence later courts and judges, who are well-versed in our legal practice, will have access to the law’s determinate content.]

The Epistemic Attitude operates as well when the Constitution’s original meaning is metaphysically determinate but epistemically indeterminate.\textsuperscript{116} This is because the Constitution’s meaning is determinate so that, in principle, there is a right answer. There are obstacles to accessing that right answer which may or may not be permanent. If or when those obstacles are removed—for example, new research techniques permit greater access to the original meaning—it then the law would cease to be epistemically indeterminate. [example?]

By contrast, the Epistemic Attitude does not operate when the Constitution’s original meaning is metaphysically and epistemically indeterminate. Instead, the Metaphysical Attitude applies, and later judges will give deference to originalist precedents that construct constitutional meaning. In these cases, the original meaning does not answer the question, and so the Court must create an answer. In doing so, the Court creates constitutional meaning.

E. The Presumption in Favor of Originalist Precedent

I noted above that Originalist precedent under both the Epistemic and Metaphysical Attitudes is protected by a rebuttable presumption. The

\textsuperscript{113} Id.

\textsuperscript{114} See Barnett, supra note \textbf{1}, at 313 (describing the original meaning as being “to specify how a rightful activity may be transacted . . . and the power to prohibit wrongful acts” in “the trade or exchange of goods[,] including the means of transporting them . . . between persons of one state and another”).


\textsuperscript{116} See Barnett, supra note \textbf{1}, at 1235 (stating that precedent “can provide epistemic guidance in the face of uncertain original meaning”).
presumption protects originalist precedent from subsequent scrutiny and challenge. The presumption arises when a precedent meets the Originalism in Good Faith standard.

Litigants, scholars, and judges may rebut the presumption by showing either that it is more likely than not that the precedent in question incorrectly articulated the original meaning and/or incorrectly applied that meaning.\textsuperscript{117} The presumption in favor of originalist precedent is strong enough that it protects good faith originalist precedents from destabilizing challenges, and thereby prevents my conception of originalist precedent from collapsing into the “get rid of it all” conception. At the same time, the presumption is low enough that litigants, scholars, or judges can effectively challenge precedents.\textsuperscript{118} This prevents my conception from sliding into the “common law constitutionalism” conception of precedent and, most importantly, preserves the primacy of the Constitution’s original meaning.

F. Redux of the Epistemic and Metaphysical Attitudes

The conception of originalist precedent put forward in this Article fits and draws support from the distinctions between constitutional interpretation and construction, and between metaphysical and epistemic determinacy. Judges should have Epistemic Attitude toward originalist precedent when the precedent in question is interpreting the Constitution’s original meaning. This occurs when the original meaning is metaphysically and epistemically determinate. Judges should also have the Epistemic Attitude when the original meaning is metaphysically determinate and epistemically indeterminate.

In both of these situations, originalist precedent is playing an epistemic role by articulating, in good faith, the Constitution’s original meaning and, in good faith, applying that meaning to the facts presented by a case. It is not creating meaning. Rather, the precedent is putting into practice the original meaning.

As I describe concretely in Part V, below, these precedents provide evidence of how the original meaning controls concrete situations. Originalist precedents subject to the Epistemic Attitude show how the gap between the Constitution’s authoritative meaning and the conduct it governs is bridged.

Judges should have the Metaphysical Attitude, by contrast, when the precedent in question is constructing constitutional meaning. This occurs when the Constitution’s original meaning is metaphysically indeterminate. Here, originalist precedent is playing the metaphysical role of creating constitutional law and then applying those norms to the facts of the case.

\textsuperscript{117} Thomas Healy has explained a similar level of respect for precedent. See Healy, supra note , at 1209 (explaining what he labels a “moderate presumption” in favor of precedent). Randy Barnett has suggested what appears to be a lower level of respect for precedent. See Barnett, supra note , at 508 (stating that “precedent can . . . play an epistemic role, placing some burden on a court to justify its departure from prior decisions”).

\textsuperscript{118} The presumption in favor of originalist precedent is not as powerful as identified by Professor Caleb Nelson, “demonstrably wrong.” Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 VA. L. REV. 1 (2001).
I have argued that when federal judges give originalist precedent significant respect, they preserve the epistemic and metaphysical work done by those precedents. My explanation of the Epistemic and Metaphysical Attitudes shows why Article III’s command that federal judges give precedent significant respect makes sense. My explanation gives reasons to think that originalist precedent with weight in later constitutional adjudication is appropriate.

Originalist precedent subject to the Epistemic Attitude explains the Constitution’s resolution of particular issues presented in cases. It does so by specifying how the Constitution resolves discrete legal questions, by making implicit constitutional norms explicit, by resolving perceived tensions in the Constitution’s meaning, and by embedding these resolutions in precedent. These resolutions, preserved in originalist precedent, embody the authoritative norms that govern social activity in the class of situations analogous to the originalist precedent. Giving originalist precedent significant respect preserves these accomplishments and avoids leaving all questions open to re-evaluation.

Originalist precedent subject to the Metaphysical Attitude crafts the Constitution’s norms that resolve particular issues presented in cases. These constructed constitutional norms coordinate social activity. Giving the constructions embodied in originalist precedent significant respect protects the work done by the prior court in constructing the norms, and it prevents continual attack on the precedential resolution of issues.

Below, in Part V, I explain the concrete ways my conception of originalist precedent operates. Then, in Part VI, I show that this conception comports with Article III’s mandate for federal judges. Lastly, in Part VII, I conclude that the Epistemic and Metaphysical Attitudes are more normatively attractive than alternative conceptions of originalist precedent.

V. Putting into Practice the Constitution’s Original Meaning

A. Introduction

In this Part, I explain the ways in which the Epistemic and Metaphysical Attitudes operate in practice. Subpart B discusses the roles of originalist precedent in the context of constitutional interpretation. Here, originalist precedent does not alter the Constitution’s meaning and the Epistemic Attitude applies. Originalist precedent provides evidence of how the original meaning is connected to and governs the activity under its purview. It bridges the distance between the original meaning and the human activity subject to the Constitution’s governance.

Subpart C covers constitutional construction. Originalist precedent in this context, in many cases, determines the Constitution’s meaning, so the Metaphysical Attitude governs. These originalist precedents create the governing constitutional norm. Unlike when the Epistemic Attitude applies, when the Metaphysical Attitude applies, the originalist precedent does more than simply provide evidence of the Constitution’s meaning: it constructs that meaning. In some other cases of constitutional construction, however, the Epistemic Attitude continues to apply. I will explain when and why.
B. Constitutional Interpretation

1. Specifying the Constitution’s Original Meaning

By specification I mean answering a practical—here, legal—question in the context of a concrete—here, legal—case. Specification makes explicit how the Constitution’s original meaning resolves a particular legal question. It identifies the relevant constitutional norms and determines how those norms order human actions.

Originalists argue that judges should enforce the original meaning of the constitution’s text, but it is an exceedingly rare case, especially today, that turns on the simple application of the original meaning (or, more precisely, the principle, standard, or rule, embodied in the text’s original meaning) to the facts presented in a case. Instead, federal courts have, from their inception, articulated legal norms that specify the result in constitutional cases thereby reducing or eliminating the need for direct appeals to constitutional text.

Specification is the process by which courts create constitutional law. The creation of constitutional law and doctrine through the process of specification is entirely legitimate—indeed, it is a necessary component of constitutional adjudication. A case before a court presents a set of factual circumstances that, if a constitutional case, implicates one or more provisions of the Constitution. The litigants in the constitutional case each argue that the purportedly applicable constitutional provision has a certain meaning, and they argue that application of that meaning to the factual circumstances of the case, leads to them prevailing.

The court first determines the constitutional provision’s original meaning. Second, the court applies that meaning to the case and determines which litigant’s argument prevails. Through this two-step process the court specifies that in factual situations analogous to that presented by the case, a particular result obtains. In doing so, the court announces a rule, standard, or principle, thereby creating constitutional law. That rule, standard, or principle guides future courts’ determinations of future, analogous, constitutional cases. The constitutional law thereby created can come in the form of constitutional law doctrines, tests, and formulas with which lawyers are familiar.\(^{120}\)

By itself, the Constitution is a “sparse collection of general terms” that often lacks the specificity to govern a nation, especially a complex, dynamic nation such as our own.\(^{121}\) Terms like “Commerce,”\(^{122}\) are not self-applying, and much less are phrases like “executive Power”\(^{123}\) or “impairing the Obligation of Contracts.”\(^{124}\) The process of specification takes the meaning of the

\(^{119}\) I use the term specify to distinguish the activity of courts when they create constitutional law or doctrine from what Professor Richard Fallon labels “implementing” the Constitution which is a broader term that in addition covers the creative activity of courts when they put the Constitution into practical effect. See Fallon, supra note 1, at 5-7, 41-42 (describing implementation and distinguishing it from specification).

\(^{120}\) Whittington, supra note 1, at 6.

\(^{121}\) Id.

\(^{122}\) U.S. Const. art. I., § 8, cl. 3.

\(^{123}\) Id. art. II, § 1, cl. 1.

\(^{124}\) Id. art. I, § 10, cl. 1.
Constitution’s general terms and phrases and creates constitutional law capable of meeting society’s needs. The more particularized norms of constitutional law created through adjudication and found in cases have the specificity to connect the meaning of the constitutional terms to practical situations.\textsuperscript{125} And these norms have the determinacy to guide the conduct of society’s members to a much greater degree than the constitutional text standing alone.\textsuperscript{126} Many originalists have hinted at the need to articulate the process of specification,\textsuperscript{127} but this is its first articulation.

The process of specification I have described is not unique to law. Philosophy, and in particular ethics, has grappled with an analogous situation since at least the time of Socrates.\textsuperscript{128} The fact that most philosophical traditions in the field of ethics have articulated means to specify how ethical norms decide concrete cases suggests that specification in law is likewise possible.\textsuperscript{129}

In the realm of practical ethics, philosophers have struggled to articulate how human conduct can be guided by norms—by reasons—\textsuperscript{130} that are, by definition, more general than the specific conduct they are supposed to guide. For example, one commonly accepted norm of human conduct is “do not steal.”\textsuperscript{131} The manner by which that norm guides specific human actions, however, is not always clear. In the property law context, there is a veritable cottage industry of philosophical arguments why—or why not—this norm applies to persons who use another’s property in cases of necessity.\textsuperscript{132} Strong arguments have been advanced on both sides,\textsuperscript{133} indicating that application of the general norm—do not steal—to some situations—those of necessity—is a challenging process.

\textsuperscript{125} WHITTINGTON, supra note , at 6.
\textsuperscript{126} Id.
\textsuperscript{127} See, e.g., Calabresi, supra note , at 327 (“[I]t is certainly the case that many parts of our constitutional text are worded at a high level of generality and the caselaw construing the text is thus of critical importance.”).
\textsuperscript{128} See ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988) (describing the history of how those in the West have attempted to resolve concrete ethical dilemmas).
\textsuperscript{129} My claims in this section, including my analogy to ethics and particularly to the Aristotelian tradition, shows that I reject claims that the truth of constitutional meaning, is only found in its operation. See Roderick M. Hills, Jr., The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning, 119 HARV. L. REV. F. 173 (2006) (giving a pragmatic view of precedent).
\textsuperscript{130} See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 102-05 (1999) (describing human action as reason-governed).
\textsuperscript{131} THE HOLY BIBLE, Exodus ch. 20: 15 (“Thou shalt not steal.”).
\textsuperscript{132} The doctrine of necessity is where one is privileged to use another’s property because of the need to protect one’s or another’s person or property. RESTATEMENT (SECOND) OF TORTS § 195 (1965).
\textsuperscript{133} See, e.g., II-II AQUINAS, supra note , at Q. 66, art. 7 (“In the cases of need, all things are common property, so that there would seem to be no sin in taking another’s property for need has made it common.”); HUGO GROTII, DE IURE BELLII AC PACIS LIBRI TRES, at II.ii.6-7 (B.J.A. de Kantor-van Hetting Tromp, ed., Leiden, 1939) (following Aquinas’ position); William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and other Rescuers: An Economic Study of Law and Altruism, 83 J. OF LEG. STUD. 7, 113 (1978) (offering a law and economics justification for the doctrine of necessity).
Philosophers have articulated a number of means to apply practical norms to particularized instances of human conduct. These include, for instance, creating a practical syllogism with the general norm as the major premise, the specific conduct in question as the minor premise, and the conclusion giving the appropriate course of ethical conduct. Another method is balancing competing reasons for and against action to determine which are of greatest import, and acting accordingly. There are other methods, and the existence, scope, and distinctiveness of each of these methods is contested by philosophers.

Regardless of the method used, however, the philosophical consensus is that practical norms can and do guide concrete human action. The common point of the philosophical arguments discussed above is to establish the means by which humans specify the correct course of conduct in concrete situations.

In law, judges face the same issue: how norms that are more abstract than the facts presented by a case specify the correct course of conduct of the parties in the case. The fact that specification occurs in ethics is a powerful reason to believe that it also occurs in law. We should not be surprised, therefore, by the numerous aspects of our legal practice which indicate that specification occurs in law in manners similar to ethics.

In fully developed systems of ethics, the appropriate methods of specification are identified, numerous intermediate norms are articulated, and proper resolutions to frequent practical questions are recognized. For instance, in the Aristotelian philosophical tradition, significant emphasis is placed on the faculty of the human mind known as synderesis or practical reason, which specifies how one should act in a given context. In law, similarly, scholars across the ideological spectrum have recognized the faculty that enables some judges to achieve excellence in adjudication. Examples include the legal realist Karl Llewellyn’s “situation sense,” and natural lawyer Gerard Bradley’s “legal reason[].”

Over the years, the Aristotelian tradition also has recognized a wide array of intermediate norms. Intermediate norms are lower-level, more concrete norms that are more concrete in their guidance than general ethical principles. As such, they are more directly applicable to specific factual situations.

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134 ARISTOTLE, NICOMACHEAN ETHICS 1144a (D.P. Chase trans., 1911).
136 Reasoning by analogy is a commonly identified third method of specifying the correct course of conduct.
139 KARL LLEWELLYN, THE COMMON LAW TRADITION 60 (1960).
instantiations of higher-level, more general ethical principles. Intermediate norms are one mechanism used in the Aristotelian tradition to bridge the decisional space between general ethical norms and particular practical situations. Intermediate norms can themselves be relatively abstract, such as the prohibition on taking innocent human life which is derived from the more abstract natural law norm of doing good and avoiding evil, or relatively concrete such as the norm permitting killing uniformed enemy soldiers in a just war which is itself a further specification of the two more abstract norms just discussed.

Through this articulation of intermediate norms, the tradition is better able to guide practical conduct. For instance, soldiers have the far easier task of judging whether the war in which they are fighting is just, using the criteria set forth in the Just War Tradition, and whether their opponents are uniformed enemy soldiers, than whether they are “doing good and avoiding evil.”

The same phenomena of identifying the appropriate methods of specification, articulating numerous intermediate norms, and recognizing resolutions to frequently-raised questions, has occurred in our legal practice. Precedent has been the primary mechanism of doing so. It is through originalist precedent that the Supreme Court applies the general norms of the Constitution’s original meaning to its cases. Through precedent, the Court specifies how the Constitution’s original meaning governs human conduct.

A commonly recognized facet of precedent is that the Court will frequently articulate an intermediate legal norm. Intermediate legal norms serve the same primary purpose as intermediate ethical norms. They bridge the space between the relatively abstract constitutional norms embodied in the Constitution’s original meaning and the practical legal questions presented in cases. Legal officials, such as lower court judges and executive officials, and citizens have less of a burden on their judgment—and are more likely to make the right legal judgment—if they have intermediate legal norms to guide their conduct. The Court’s criminal procedure case law, and more specifically the Fourth Amendment’s prohibition on unreasonable searches and seizures, provides an important example of this.

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141 See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 52 (1999) (describing “intermediate moral principles” that “occupy a place between the very abstract first principle and the most concrete and specific moral injunctions”).

142 See AQUINAS, supra note , at Q. 100, a. 1 (“For there are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: e.g., . . . Thou shalt not kill”); HOLY BIBLE Exodus 23: 7 (“The innocent and the just person thou shalt not put to death.”); CATECHISM OF THE CATHOLIC CHURCH § 2268 (“The fifth commandment forbids direct and intentional killing.”) (emphasis deleted).

143 See CATECHISM, supra note , at § 2309 (providing the “traditional elements” of the Just War Tradition). For a thorough review of the Tradition see GEORGE WEIGEL, TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE (1987).

144 I do not mean that the Constitution’s original meaning is always or even frequently abstract. Instead, I am claiming only that its original meaning is relatively more abstract than the cases it governs. From my own historical research into the original meaning of different constitutional provisions, my tentative conclusion is that the Constitution’s original meaning is rarely abstract and instead consists most often of relatively concrete rules and norms of intermediate generality.
Our legal practice has also resolved frequently-raised questions. The resolutions, deeply embedded in precedent and practice, put off-limits the resolutions to frequently-raised questions. One such seminal resolution occurred during the Marshall Court. In two cases, the Court resolved the issue of whether, and to what extent, the Supreme Court could review state court judgments under Article III. In *Martin v. Hunter’s Lessee*, the Court specified that its Article III “judicial Power” over “Cases” included appeals from state court civil suits.\(^{145}\)

Five years later, in *Cohens v. Virginia*, the Court specified that its “judicial Power” extended to state criminal appeals.\(^{146}\) The Court’s resolutions in *Martin* and *Cohens* are unchallengeable and have effectively specified the Constitution’s meaning in this context.

In addition to ethics, everyday life also provides examples of specification at work. Imagine that you are the parent in a family with five children whose ages range from eleven to three. Assume further that in your household there have been no written statements regarding how you will treat your children. Instead, like most families, in yours, the norms you follow in parenting your children are unwritten and rooted in religious, ethical, cultural, social, and traditional norms.

One of the frequent areas of dispute in between you and your children is over the subject of going to their friends’ houses. The sources of dispute are: (1) the times at which your children wish to play at their friends’ houses; (2) the proximity (or lack thereof) of their friends’ houses to your home; (3) the activities that will take place at their friends’ houses; (4) the age and maturity (not necessarily the same thing) of your child; (5) the suitability of the friend as a friend of your child; and (6) the suitability of the friend’s home environment for your child. Your practice has been to balance these and other factors when one of your children makes a request to play at a friend’s house. You balance these factors with the purpose of maximizing your child’s growth toward virtue.

Unfortunately for you, your children have agitated for reform in your household for many reasons, including because they believe that you have arbitrarily applied the factors listed above. In particular, your children believe that you are too concerned with the time they visit friends, and are too hostile to their playing electronic games such as Nintendo at their friends’ houses.

To restore household accord, you take the step of holding a family meeting.\(^{147}\) You and your children agree to follow a norm governing their play at their friends’ houses. The norm is short and uses non-technical language. It states: “Children may play at their friends’ houses subject to reasonable regulation in the child’s best interest.”

After agreeing to the norm, the daily process of requests by your children to play at their friends’ houses resumes. Your seven year old, Alexander, asks to play at Justin’s house. You say yes, in part because your child is older than six.

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\(^{147}\) *See Frank B. Gilbreth & Ernestine Gilbreth Carey, Cheaper by the Dozen* 37 (1949) (describing how the Gilbreth children agitated for reform of family governance which led to a family council).
This process continues for some time. Children request to play at their friends’ houses and you apply the norm. In each instance, you bridge the space between the norm and the specific facts that it governs in the form of your children’s requests. In doing so you specify how the norm determines these various requests.

Next, your nine year old, Lucy, asks to play at Felicity’s house. As parents will attest, one of the sources of data upon which to decide whether to permit Lucy to play at Felicity’s house is your prior decisions. Your prior applications of the norm provide evidence of how Section 10 governs the current request.

You say no to Lucy because the factors of time and proximity weigh heavily against playing at Felicity’s even though Lucy is older than five. Lucy appeals to the norm. Even through the norm is the provision governing this situation, she does not focus on parsing its meaning. Instead, Lucy argues that she is older than your seven year old, Alexander, who you permitted to play at Justin’s. Lucy also marshals other “cases” to show that, like her siblings in those cases, you should permit her to go to Felicity’s house.

Lucy is taking the tact of many children: use analogous prior applications of the norm to her siblings as evidence of the norm’s meaning in her situation. She argued that, properly specified, the norm permitted her to play at Felicity’s house. The affinity of this hypothetical to reality shows that, in everyday family life, specification is used to resolve concrete disputes governed by previously established norms.

The Epistemic Attitude, to summarize, describes the evidentiary role that originalist precedent plays in a fully-developed originalism. Originalist precedent, as in ethics and everyday life, explicates how concrete cases are governed by the original meaning. Originalist precedent is the “data” repository for later courts looking to decide analogous concrete cases. Preserving the work done by originalist precedent is why Article III requires federal judges to give significant respect to constitutional precedent. Originalist constitutional precedent creates constitutional law that federal courts will use in future adjudications. If the constitutional law created through the process of specification is a faithful ascertainment and application of the Constitution’s original meaning, then later courts should work within that constitutional law to decide future cases.

With some constitutional texts, the need for constitutional law is clearer than in others. For instance, the Fourth Amendment prohibits “unreasonable” searches and seizures. The Search and Seizure Clause was drawn from Article XIV of the Massachusetts’ Declaration of Rights, drafted by James Adams, who in turn drew from the Pennsylvania constitution. The Fourth Amendment’s Search and Seizure Clause was relatively novel—and hence its original meaning is relatively hard to discern—because the Fourth Amendment was primarily the

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148 I defend this proposition in Part VI below. See also Strang, supra note (providing an extended defense of this proposition).
149 U.S. CONST., amend. IV.
culmination of American efforts to eliminate general warrants.\textsuperscript{151} There are, broadly speaking, two views on the original meaning of the Search and Seizure Clause: (1) the Clause is an independent prohibition on unreasonable government action; and (2) the Clause was a “statement of political moral principle . . . an explanation or justification for the Warrant Clause.”\textsuperscript{152}

Assuming that the Search and Seizure Clause is an independent prohibition, the Court must create constitutional law to specify how the Clause’s principle applies to different concrete circumstances. The constitutional doctrines the Court articulates will be applications of the Clause’s principle of reasonableness to these concrete circumstances.

For instance, the Court announced, in the context of passenger automobile stops for traffic violations, that a police officer “may order passengers to get out of the car pending completion of the traffic stop.”\textsuperscript{153} In \textit{Maryland v. Wilson}, the Court applied the principle of reasonableness to the facts of the case and created a per se rule that would govern future analogous cases. The \textit{Wilson} Court relied on the earlier case of \textit{Pennsylvania v. Mimms} which had ruled that police officers may order drivers of passenger cars to exit their vehicles on routine traffic stops.\textsuperscript{154}

The \textit{Mimms-Wilson} line of cases has, through application of the Search and Seizure Clause’s reasonableness principle, created a rule of constitutional law. The \textit{Mimms-Wilson} rule specifies how the principle of reasonableness applies in a given context, and the Court’s specification is authoritative in future cases. The \textit{Mimms-Wilson} rule governs future cases with analogous factual circumstances. Litigants in such future cases will not, absent exceptional circumstances, make appeals directly to the Search and Seizure Clause and instead will craft arguments based on the Court’s precedent.

With other constitutional texts, the necessity of the creation of constitutional law is less clear, but it remains nonetheless. The Article II, § 1, cl. 4, requirement that the President “shall . . . have attained to the age of thirty five years,” possibly the most concrete phrase in the Constitution, provides an example.\textsuperscript{155} The age requirement is often used by scholars as the most prominent counter to claims by critical legal scholars that the law is indeterminate.\textsuperscript{156} The rulelessness of the age requirement itself precludes many questions that would otherwise result in litigation and consequently precludes the significant need for constitutional law that exists with other, less rule-like constitutional provisions.

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\textsuperscript{151} Id. at 150-79.  \\
\textsuperscript{152} THE HERITAGE GUIDE TO THE CONSTITUTION 324 (Edwin Meese, III, \textit{et al.}, eds, 2005).  \\
\textsuperscript{153} Maryland v. Wilson, 519 U.S. 408, 415 (1997).  \\
\textsuperscript{155} U.S. CONST., art. II, § 1, cl. 4.  \\
\textsuperscript{156} See, e.g., Schauer, \textit{supra} note \textsuperscript{,} at 414, 420 (using this provision).
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However, situations may still arise that call for specification of the Presidential Age Clause and the creation of constitutional law. For instance, an underage plaintiff could advance the argument that the age requirement is more properly interpreted as a maturity requirement, and that he is sufficiently mature.\footnote{See Gary Peller, \textit{The Metaphysics of American Law}, 73 CALIF. L. REV. 1151, 1174 (1985) (making this argument); Girardeau Spann, \textit{Deconstructing the Legislative Veto}, 68 MINN. L. REV. 473, 532-33 (1984) (same).} An originalist judge faced with that argument would ascertain the original meaning of the age requirement and then apply that meaning to the facts presented by the case. In doing so, he could find that while Article II, § 1, cl. 4, has as one of its goals the maturity of the President, it uses the rule of thirty-five years of age instead of the standard of maturity to define the requirement for the office.\footnote{Or, he could advance the claim that the age requirement in Article II was subsequently altered by the Fifth Amendment which prohibits irrational age discrimination. \textit{See} Anthony D’Amato, \textit{Aspects of Deconstruction: The “Easy Case” of the Under-Aged President}, 84 NW. U. L. REV. 250, 255-56 (1989) (making this argument).} The court would then announce a rule that the age requirement requires that the President be thirty-five years old. In doing so, the precedent specified the Clause’s meaning.

Alternatively, if the hypothetical plaintiff is correct and the original meaning of Article II, § 1, cl. 4, is a standard of maturity, then the court could issue a decision that would guide future courts in ascertaining whether a particular person meets the maturity standard in Article II, § 1, cl. 4. The decision would explain why the constitutional text prohibited or permitted the plaintiff to be President. Either way, the court creates constitutional law that specifies the constitution’s original meaning and which will govern future adjudications.

Today, of course, it is exceedingly rare for the Court to face an entirely new issue of constitutional law and hence the Court’s decisions are generally decided on the basis of the Court’s constitutional law. This results from the process of specification that began with the first constitutional cases and the Court’s interpreting and applying the original meaning, thereby creating constitutional law. For example, in \textit{Marbury v. Madison}, Chief Justice Marshall relied on the nature of the judicial process to argue that, when faced with a statute that conflicts with the Constitution, a court must follow the Constitution.\footnote{There is little scholarship on the original meaning of the age requirement, but what there is indicates that the age requirement is not susceptible of the maturity interpretation.} Marshall characterized the judicial process as “apply[ing] the rule to particular cases” which requires a judge to “expound and interpret that rule.”\footnote{\textit{Id.}} The judicial process described by Marshall is one of specification. Judges determine the meaning of the Constitution, apply that meaning to the case at hand, and in doing so create constitutional law.

The Epistemic Attitude directs judges to give presumptive deference to originalist precedent that specifies constitutional meaning. This respects the originalist precedent’s good faith articulation and application of the original meaning, consistent with Article III’s mandate.
2. Bringing to Light Implicit Constitutional Norms

Much of the Constitution’s original meaning is relatively patent; many of its norms are fairly obvious. To ascertain the original meaning in such cases does not require significant research or judgment. An example of such a patent originalist norm is the Coinage Clause, which authorizes Congress to “coin money.” It is clear that this provision’s original meaning grants Congress at least the authority to issue legal tender in the form of “metallic tokens.”

However, even when the Constitution’s original meaning is metaphysically and epistemically determinate, it often requires significant research and judgment to articulate that meaning. In these cases, the Constitution’s original meaning is implicit and originalist precedent makes explicit—brings to light—that original meaning.

The Second Amendment’s protection of an individual right to keep and bear arms is an instance of this. It is not manifest that the Second Amendment’s original meaning protects an individual rather than collective right. Indeed, it was not until the early-1980s that significant support for the individual right interpretation of the Amendment—labeled the Standard Model—arose. By the mid-1990s, however, the Standard Model had become, as the label suggests, the consensus interpretation. The Supreme Court in District of Columbia v. Heller, in an originalist opinion, made explicit the implicit original meaning of the Second Amendment by ruling that it protected an individual right.

The same phenomenon occurs in ethics. Returning again to the Aristotelian tradition, some ethical propositions are patent, while others are

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161 U.S. CONST. art. I, § 8, cl. 5.
162 See Robert G. Natelson, Paper Money and the Original Understanding of the Coinage Clause, 31 HARV. J.L. & PUB. POL’Y 1017, 1061 (2008) (“The more common meaning of “coin” in the eighteenth century, as now, referred to metallic tokens.”). For discussions on the original meaning of the Coinage Clause see id. (arguing that the Clause’s original meaning included congressional authority to print paper money); Strang, supra note , at 475 (“There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money.”); Kenneth W. Dam, The Legal Tender Cases, 1981 SUP. CT. REV. 367, 389 (“[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money].”); Claire Priest, Currency Policies and Legal Development in Colonial New England, 110 YALE L.J. 1303, 1399 n.358 (2001) (“It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender.”).
163 U.S. CONST. amend. II.
164 Likely that first modern scholarship to strongly support the Standard Model was Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204 (1983).
165 See Randy E. Barnett & Don B. Kates, Under Fire: The New Consensus on the Second Amendment, 45 EMORY L.J. 1139, 1141 (1996) (“Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment.”).
166 See Randy E. Barnett, News Flash: The Constitution Means What it Says, THE WALL STREET JOURNAL, June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called “original public meaning” jurisprudence ever adopted by the Supreme Court.”).
implicit. The first principle of natural law—do good and avoid evil—is *per se nota*, self-evident. There are a host of other natural law norms that are also manifest.

However, there are many implicit norms. These are norms the full explication of which took thought, argumentation, and time. For example, the Aristotelian tradition articulated the norm that it is “just to charge interest on a loan” after centuries of discussion. This norm was implicit in the tradition’s broader philosophical commitments. After significant thought, argumentation, and time, this ethical norm was made explicit in the tradition.

The Constitution’s original meaning will frequently not be apparent for a number of reasons. First, the data upon which to make a determination of what the original meaning is may be difficult to access or, if accessible, may present other obstacles such as an unmanageably large amount of data. Second, the factual situations that would provide an opportunity to make explicit the implicit norm may not have arisen or been presented. Third, the cultural, political, and economic environment may make the search for or articulation of implicit constitutional norms imprudent or not well received.

The Epistemic Attitude directs judges to give originalist precedent that brings to light implicit constitutional norms presumptive respect. This respects the originalist precedent’s good faith articulation of the implicit original meaning norm, consistent with Article III’s mandate.

3. Resolving Perceived Tensions in the Original Meaning

Originalist precedent resolves perceived tensions between constitutional norms by identifying, in a particular case, which of a stable of possibly governing norms in fact governs the outcome of the case.

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168 See I-II AQUINAS, *supra* note , at Q. 94, a. 4 (“[T]he natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusion, as it were, of those general principles . . . in some few cases it may fail both as to rectitude . . . and as to knowledge.”).

169 See *id.* at Q. 94, a. 1 (“[T]he precepts of the natural law are . . . self-evident principles.”); FINNIS, *supra* note , at 29-32 (explaining the concept of self-evident propositions of natural law).

170 See *id.* at Q. 94, a. 1 (giving self-preservation, procreation, and practical reason as examples of self-evidently good goods).


172 For a review of the history surrounding what constitutes usury see JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY (1957); JONSEN & TOULMIN, *supra* note , at 181-94.

173 See JOHN FINNIS, AQUINAS 207 (1998) (stating that two principles supported charging reasonable interest: the cost of the lender sharing the borrower’s risk, and the harm to the lender in the form of expenses and losses, including opportunity costs).

174 See JONSEN & TOULMIN, *supra* note , at 193 (“Over five centuries there emerges a moral doctrine of precise definitions and distinctions, of narrowly limited solutions and well-reasoned arguments.”).

175 Although, as mentioned earlier, today’s more-readily accessible historical materials and assisted research tools has diminished these obstacles.

176 For example, for many years, and to a lesser though still significant degree today, the legal academy dismissed originalist arguments. Therefore, a scholar would lose standing in the academy if the scholar took originalist arguments seriously and sought to articulate the original meaning.
The norms embodied in the Constitution’s original meaning have focal cases. Given the care with which the Framers drafted the Constitution, it is unlikely that the focal cases of original meaning norms conflict. However, as one extends from the focal case, it becomes more difficult to ascertain whether the norm governs a particular case. When portions of two or more of the Constitution’s norms beyond their respective focal cases plausibly apply to the same case, a perceived tension between the norms exists. Originalist precedent resolves that tension.

A famous instance of resolving perceived tensions was between the Bankruptcy Clause and the Contracts Clause, and the long-standing state practice of bankruptcy and insolvency laws. The Bankruptcy Clause authorized Congress to establish “uniform Laws on the subject of Bankruptcies,” while the Contracts Clause prohibited states from passing laws “impairing the Obligation of Contracts.” On the other hand, following adoption of the Constitution, states continued to pass bankruptcy and insolvency laws that applied to pre-existing debts. Many Americans before, during, and following Ratification of the Constitution, plausibly argued that the Bankruptcy and Contracts Clauses prohibited states from passing such legislation.

The Supreme Court resolved the perceived tension in two cases: Sturges v. Crowninshield and Ogden v. Saunders. First, in an opinion by Chief Justice Marshall, the Sturges Court ruled that states could not pass bankruptcy and insolvency laws that discharged pre-existing debts. Later, in Ogden, the Court ruled that state bankruptcy and insolvency laws that discharged debts incurred after passage of the laws were constitutional. The Court in both cases reviewed the text and history of the Clauses in a good faith articulation and application of the original meaning. Sturges and Ogden receive significant respect under the Epistemic Attitude because they are evidence of how the Constitution’s original meaning is not in tension.

This same phenomenon of perceived tension occurs in ethics with ethical norms. In fact, one of the most powerful challenges to ethical theories is describing how to either avoid or resolve prima facie conflicts between ethical

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177 See FINNIS, supra note , at 9-11 (describing the concept of focal cases). The focal case is the mechanism used to distinguish “the mature from the undeveloped on human affairs, the sophisticated from the primitive, the flourishing from the corrupt, the fine specimen from the deviate case, the ‘straightforwardly’, ‘simply speaking’ (simpliciter), and ‘without qualification’ from the ‘in a sense’, ‘in a manner of speaking’, and ‘in a way’ (secundum quid).” Id. at 10-11. For a description of the similar concept of paradigm cases see RUBENFELD, supra note , at 178-95.

178 U.S. CONST. art. I., § 8, cl. 4.
179 U.S. CONST. art. I., § 10.
180 Id. § 8, cl. 4.
181 Id. § 10.
norms. Different philosophical traditions have arrived at different mechanisms to resolve perceived tensions between ethical norms. In the Aristotelian tradition, for instance, many perceived tensions that arise between natural law norms directing an individual toward integral human fulfillment are usually viewed as just that, perceived but not true conflicts. In other words, there is a right answer to the ethical question.

Over time, the tradition has addressed many perceived tensions. One of the most profound tensions, one that has received sustained attention in the Aristotelian tradition, is that between the obligation to tell the truth and the obligation to avoid harming others that arises, for example, when one is asked to disclose information that will lead to the unjust treatment of another. More specifically, this occurs when an agent from an unjust regime asks a homeowner to disclose whether a fugitive is in the homeowner’s house. The homeowner knows that the fugitive is in the house and that, if that fact is disclosed, the regime will treat the fugitive unjustly.

Members of the Aristotelian tradition, over centuries, focused on this perceived tension. Today, the tradition has concluded that the homeowner must not disclose the location of the fugitive. It thereby resolved the perceived tension. Members of that tradition give that conclusion—that resolution of the perceived tension—significant respect.

The Epistemic Attitude directs judges to give presumptive respect to originalist precedent that resolves perceived tensions in the original meaning. This respects the originalist precedent’s good faith articulation and application of the original meaning, consistent with Article III’s mandate.

4. Embedding the Constitution’s Original Meaning

Originalist precedent embeds the Constitution’s original meaning in the Supreme Court’s constitutional law. The process of embodying the original meaning in case law protects and defends that meaning.

It does so in a number of ways; first, by putting the Court’s institutional prestige behind the original meaning. The Court’s originalist precedent carries with it both the respect for the Constitution’s original meaning and the Court’s own, independent weight. Second, the original meaning is protected by the Court’s reasoned explanation of the reasons behind it. Frequently in explaining itself in its opinion, the Court provides reasons why the result reached by the Court—in accordance with the original meaning—is substantively good.

See Richardson, supra note 188, at 284-90 (describing and criticizing the dominant methods of resolving concrete ethical problems).

See JONSEN & TOULMIN, supra note 189, at 195-215 (describing the tradition’s grappling with the perceived conflict).

Id. at 213.

See Strauss, supra note 190, at 82 (noting the common practice by the Court of giving normative arguments in favor of its conclusion).

See Crawford v. Washington, 541 U.S. 36, 63-69 (2004) (arguing that the Confrontation Clause’s original meaning is superior to nonoriginalist interpretations); United States v. Lopez, 514 U.S. 549, 564-68 (1995) (arguing that limiting Congress to a Commerce Clause power more in line with the Clause’s original meaning would have the good effect of maintaining our federal system and prevent overcentralization).
Articulating why the original meaning is good ensures wider support for it. The Court has also argued, on occasion, why, even though the original meaning is not ideal, it is better to follow that meaning rather than create a different meaning.\textsuperscript{193}

Embedding the Constitution’s original meaning in originalist precedent protects that meaning from alteration. This is valuable because the original meaning itself is valuable: it generally resolves coordination problems in a manner superior to judicial coordination, the most commonly proposed alternative.\textsuperscript{194} Embedding the original meaning also advances Rule of Law values such as stability of the law.

Embedding the Constitution’s original meaning fits the Epistemic Attitude. The embedded original meaning permits it to better perform its function of preserving the epistemic work done by the precedent.

C. Constitutional Construction

1. Introduction

This Subsection describes how originalist precedent in the context of constitutional construction receives respect via both the Metaphysical and Epistemic Attitudes. Originalist precedent in the context of constitutional construction plays the same roles as precedent in the context of constitutional interpretation. It also, as I explain below, creates constitutional meaning and has gravitational effect on other areas of constructed constitutional law.

2. Creating Defeasible Constitutional Meaning

Constitutional construction occurs when the outcome of a case is indeterminate. It occurs in two fashions: first, when the Constitution’s original meaning is metaphysically determinate but epistemically indeterminate; and second, when the Constitution’s original meaning is both metaphysically and epistemically indeterminate. In the former category, the Epistemic Attitude applies; in the latter category, the Metaphysical Attitude applies. I first explain why this is the case, and then I describe in more detail the unique aspects of the Metaphysical Attitude.

The Epistemic Attitude applies to metaphysically determinate but epistemically indeterminate cases because, as I described more fully above,\textsuperscript{195} the Constitution’s original meaning is determinate. There is an obstacle—perhaps permanent, perhaps temporary—to the interpreter’s access to that determinate original meaning. Until such time as the metaphysically determinate original meaning is accessible, the originalist precedent will play the epistemic role of providing evidence of the original meaning and will receive significant respect for that reason.

\textsuperscript{194} See John O. McGinnis & Michael B. Rappaport, The Desirable Constitution and the Case for Originalism at 27-33, available at http://ssrn.com/abstract=1109247 (manuscript on file with author) (arguing that “judicial updating” of the Constitution leads to worse results than following the Constitution’s original meaning); see also Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 105 (1989) (describing the deepest flaw of nonoriginalist methodologies as “mak[ing] law the product not of mind, but of accident”).
\textsuperscript{195} Supra Part IV.D.
Originalist precedent governed by the Metaphysical Attitude, by contrast, in addition to providing evidence of the Constitution’s indeterminate original meaning, also creates determinate—though defeasible—original meaning. These precedents are entitled to significant respect because they create the legal norm that coordinates social activity. Until a later Court determines that the originalist precedent should be overruled, it is the governing constitutional law.

In addition, the originalist precedent’s construction of constitutional law is, as I suggested, defeasible. Though there is significant disagreement on this point, my tentative conclusion is that originalist precedent that constructs constitutional law is subject to defeasance by the elected branches. Therefore, if the Court at Time X constructed Meaning 1, and Congress passed a statute that is constitutional only under Meaning not-1, then Congress has reconstructed the Constitution’s meaning. So, in a case at Time Y involving the constitutionality of the statute, the Court should adopt Meaning not-1 (so long as it is consistent with what is known about the original meaning).

The same roles played by originalist precedent in the context of constitutional interpretation are also played by originalist precedent in constitutional construction: specifying constitutional meaning, bringing to light implicit constitutional norms, resolving perceived tensions in the original meaning, and embedding the Constitution’s original meaning. There are two significant differences, however. First, originalist precedent in the context of construction resolves original ambiguities. Second, originalist precedent that constructs constitutional law has a gravitational effect on other areas of (constructed) constitutional law.

Gravitational force is the power of cases and the legal principles they instantiate to influence the law around them, including later cases. Originalist precedent that constructs constitutional meaning is significantly analogous to common law adjudication because, in both, the courts are creatively articulating law. In both, the law is that body of legal rules and principles that best fits and justifies the legal practice. The legal principles in both influence the law—exert gravitational force—in that area.

Originalist precedents that do not construct constitutional law do not have gravitational force because they do not create the governing legal principles. Instead, the Constitution’s determinate original meaning provides those legal principles, and originalist precedent instantiates them.

196 See Barnett, supra note , at 1235 (acknowledging that precedent can “fix[]” the Constitution’s meaning, at least in the case of ambiguity).
197 See id. (stating that precedent that “resolve[s] latent ambiguities in the text by ‘fixing’ its meaning” is not defeasible and instead is subject to change only via constitutional amendment).
198 I have elsewhere defended this position. See Strang, supra note , at 70-72 (supporting this claim). I followed Keith Whittington on this point. See Whittington, supra note , at 11 (“The judiciary should not prop up old constructions that are no longer politically authoritative.”).
199 See Dworkin, supra note , at 111-17 (describing gravitational force).
D. Preliminary Response to the “New Doctrinalists”

I intend the conception of originalist precedent I offer here as a partial\textsuperscript{201} response to the claims made by scholars known as the New Doctrinalists.\textsuperscript{202} The New Doctrinalists are a group of scholars who have revived focus on the Supreme Court’s legal doctrine built in precedent. Two key points advanced by the New Doctrinalists are: (1) there is a distinction between propositions about the Constitution’s meaning and propositions implementing or putting into effect the Constitution’s meaning;\textsuperscript{203} and (2) there is a permissible disparity between these two sorts of propositions.\textsuperscript{204} New Doctrinalist scholars argue that these two key points are not only an accurate description of our practice;\textsuperscript{205} they claim that these points are necessary to any plausible theory of constitutional interpretation.\textsuperscript{206}

In this Article, I showed that originalism, with the Epistemic and Metaphysical Attitudes toward originalist precedent, preserves a significant place for constitutional doctrine. Constitutional doctrine is expressed in originalist precedents, and then this doctrine, so long as the presumption in its favor remains unrebutted, will govern later cases. In this way, originalism fits the descriptive claim of the New Doctrinalists that constitutional doctrine is a central facet of our legal practice.

I also established that, at least in the context of constitutional interpretation, there is no disparity between the constitutional doctrine thus created, and the Constitution’s governing original meaning. Instead, doctrine is the method of making express the Constitution’s meaning in particular contexts. There is a trivial disparity in the sense that the doctrine does not simply repeat the canonical form of the Constitution’s meaning. But that is true any time a practical norm is applied to concrete activity. The doctrine states that when such-and-such is the case, the governing constitutional meaning requires such-and-such an outcome. At least with issues of constitutional interpretation, therefore, the New Doctrinalists claim that a disparity between meaning and doctrine is necessary, is overblown.

\textsuperscript{201} In a future article, I hope to more directly address the New Doctrinalists’ claims.
\textsuperscript{203} See, e.g., Kermit Roosevelt III, \textit{Constitutional Calcification: How the Law Becomes What the Court Does}, 91 VA. L. REV. 1649, 1652 (2005) (“[T]here is a distinction between the Constitution itself and the rules that courts apply in deciding cases.”).
\textsuperscript{205} See Mitchell N. Berman, \textit{Constitutional Decision Rules}, 90 VA. L. REV. 1, 35 (2004) (arguing that “the single most conspicuous” aspect of constitutional judicial review is the “judge-made tests of constitutional law that are not most fairly understood as themselves products of judicial constitutional interpretation”); see also Strauss, supra note , at 882 (“[I]n practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role.”).
\textsuperscript{206} FALLON, supra note , at 37-42.
However, in the context of constitutional construction, the New Doctrinalists arguments have real traction. I showed that the Supreme Court is genuinely creative when it constructs constitutional meaning. This leads to a gap between the determinate constitutional meaning and constitutional doctrine constructed by the Court. The disparity between constitutional meaning and doctrine in the context of construction is necessary: without constructing meaning, the Constitution’s meaning alone would not resolve the case, so to decide the case the Court must add meaning that is substantively different from the Constitution’s meaning.

VI. The Epistemic and Metaphysical Attitudes Meet Article III’s Requirement that Federal Judges Give Significant Respect to Constitutional Precedent

A. Introduction

In this Part, I briefly review the original meaning of “judicial Power” in Article III. It requires federal judges to give precedent significant respect. Then, I show how the Epistemic and Metaphysical Attitudes toward originalist precedent meet this constitutional command.

B. The Original Meaning of “judicial Power” in Article III Requires Significant Respect for Constitutional Precedent

In a previous article, An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good, I conducted a broad-ranging and in-depth review of the original meaning of “judicial Power” in Article III. I started with English legal practice and then continued with early colonial practice, revolutionary American practice, American practice at the time of the Framing and Ratification, and post-Ratification practice until 1800. While some times and places, such as early-American colonial practice, were exceptional, the surprisingly consistent legal practice was to give precedent significant respect.

I found that English legal practice was characterized by the declaratory or evidentiary theory of precedent. Under this view, precedents are not themselves the law but are instead the best evidence of the underlying common law principles of which the precedents are a manifestation. The declaratory theory of precedent required later judges to give precedent significant respect. Only if a precedent was “flatly absurd or unjust,” could a later judge depart from it.

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207 Strang, supra note .
208 Id. at 447-71.
209 See id. at 452-57 (describing how, because of contingent sociological reasons such as limited case reporters, the practice of precedent evolved from a weaker form of respect for precedent to a more robust conception like that in England).
210 See id. at 452 (“Americans had an understanding and practice of precedent, which developed over time from the colonial era to the Ratification of the Constitution. By the time of the Ratification, the Framers and Ratifiers understood judicial power to include stare decisis: judges must give significant respect to prior analogous cases and must give significant reasons for overruling precedents.”).
211 Id. at 447-52.
212 Id. This is, of course, an epistemic role for precedent.
213 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69.
American practice prior to the Revolution, after some initial hesitancy caused by the challenging circumstances presented by the colonial experience, adopted the declaratory theory of precedent.\textsuperscript{214} Adherence to the traditional conception of stare decisis continued into the Framing and Ratification period.\textsuperscript{215}

During the Framing and Ratification, all references to “judicial Power” that I uncovered that referenced stare decisis or precedent, either explicitly stated or assumed as part of a larger argument, that federal judges would create and in turn be bound by constitutional precedent.\textsuperscript{216} It is telling that both proponents and opponents of the proposed constitution relied on the assumption that federal judges would give significant respect to constitutional precedent in order to make other, controversial arguments.

For instance, Alexander Hamilton in \textit{Federalist} 78 argued for the controversial proposition that Article III’s tenure protections for federal judges, most importantly tenure and salary protections, were appropriate.\textsuperscript{217} To support this heavily contested portion of the Constitution, Hamilton relied on the uncontroversial claim that federal judges would create and, in turn, be bound by constitutional precedent. Hamilton argued that “the records of [federal] precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.”\textsuperscript{218} To entice the best lawyers to serve on the federal bench, Hamilton contended, the Constitution properly granted tenure and salary protections. Otherwise, few successful attorneys would engage in the “long and laborious study” necessary to master precedent that was the core of a federal judge’s job. Others made similar use of the assumption that federal judges would give significant respect to constitutional precedent.\textsuperscript{219}

Following Ratification and the creation of the new federal judiciary, all participants in the legal practice gave precedent significant respect. Indeed, judges, litigants, and even the court reporters, utilized precedent as one of the central tools in legal argument.\textsuperscript{220} Alexander Dallas, for example, who was the Supreme Court’s first reporter, regularly commented on the parties’ precedent-based arguments in notes in his reports.\textsuperscript{221}

Later scholarship on this point has not challenged, and instead, those scholarly efforts that have reviewed the historical record have supported my basic conclusions.\textsuperscript{222} For instance, Professors McGinnis and Rappaport, after reviewing

\begin{itemize}
  \item \textsuperscript{214} Strang, \textit{supra} note , at 452-57.
  \item \textsuperscript{215} \textit{Id.} at 457-62.
  \item \textsuperscript{216} \textit{Id.} at 462-67.
  \item \textsuperscript{217} \textit{The Federalist No. 78} (Alexander Hamilton).
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} \textit{See} Strang, \textit{supra} note , at 462-63 (describing Anti-Federalist arguments that relied on this assumption).
  \item \textsuperscript{220} \textit{Id.} at 467-71.
  \item \textsuperscript{221} \textit{Id.} at 468 n.347.
  \item \textsuperscript{222} Professor Thomas Healy has recently reaffirmed his prior conclusion that “judicial Power” did not incorporate a conception of stare decisis. Healy, \textit{supra} note , at 1180-81. Professor Healy concluded that he and I “simply interpret[ed] the facts differently.” \textit{Id.} at 1181. This is true, as far as it goes, though my claim was that my description of the history was more accurate for many reasons, including my reconciliation of a previous scholarly divergence on the extent to which
\end{itemize}
the evidence surrounding the original meaning of judicial power, determined that “there is a strong case for concluding that the Constitution incorporates a minimal degree of precedent within the judicial power.”

C. How the Epistemic and Metaphysical Attitudes Toward Originalist Precedent Fulfill that Constitutional Obligation

The Epistemic and Metaphysical Attitudes toward originalist precedent require judges to meet their Article III requirement and give significant respect to precedent. They do this by according originalist precedent a presumption of correctness, in the case of the Epistemic Attitude, and additionally defeasible bindingness in the case of the Metaphysical Attitude. Judges will give earlier cases that meet the standard of Originalism in Good Faith at least a presumption of correctness so that, unless the presumption is overcome, the earlier case will govern the later case.

VII. The Epistemic and Metaphysical Attitudes are More Attractive Than Alternative Conceptions of Originalist Precedent

All else being equal, a more normatively attractive originalism is preferable to a less attractive conception of originalism. For this reason, the most prominent originalists have offered originalist theories of interpretation that are, from the perspective of those committed to their respective philosophical traditions, normatively attractive. Randy Barnett provides an example of this because he argues that his originalism, with its libertarian reading of the Constitution’s original meaning and its presumption of liberty, leads to the most protection of natural rights. Similarly, the Epistemic and Metaphysical Attitudes increase originalism’s normative attractiveness and is preferable to other conceptions of originalist precedent.

As I noted above, broadly speaking there are three plausible conceptions on the role of originalist precedent: (1) “get rid of it all”; (2) the Epistemic and Metaphysical Attitudes; and (3) “common law constitutionalism.” The “get rid of post-Revolutionary states followed stare decisis. Strang, supra note , at 458-62. (I mistakenly stated that Healy cited only two instances of overruling domestic case, when he had cited seven such cases. Id. at 459.) I also added new data including my review of pre-1800 federal court practice. Id. at 467-71.


224 BARNETT, supra note , at 109; see also WHITTINGTON, supra note , at 110–59 (grounding originalism in popular sovereignty); John O. McGinnis & Michael B. Rappaport, Our Supermajoritarian Constitution, 80 TEX. L. REV. 703, 802–05 (2002) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution’s supermajority requirements); Lee J. Strang, The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition, 28 Harv. J.L. & Pub. Pol’y 909, 983–97 (2005) (using the Aristotelian tradition’s concept of the common good and the related concept of authority to justify originalism). Lawrence Solum has also argued that a version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications for originalism. See Solum, Semantic Originalism, supra note , at 128–34.
it all” conception is unattractive for a number of reasons. First, it diverges significantly from current practice: it fails to fit our legal practice. This conception’s failure to fit therefore strongly counts against it.

Second, under the “get rid of it all” conception, originalist precedent does not serve the epistemological and constructive roles I outlined above when describing the Epistemic and Metaphysical Attitudes toward originalist precedent. The “get rid of it all” conception, therefore, cannot claim the benefits that come with the Epistemic and Metaphysical Attitudes. It cannot, for instance, take advantage of the efficiency that derives from the presumption that originalist precedent controls later cases.

Third, there is the harm to Rule of Law values. Many critics of originalism have argued that adoption of the “get rid of it all” conception would lead to instability in the law as the law both has an increased chance of change and in fact does change more frequently, both of which undermine stability in and reliance on the law. Although I think that these criticisms are overstated, often as a way of trying to generally discredit originalism, it is true that the “get rid of it all” conception will protect Rule of Law values less well than the Epistemic and Metaphysical Attitudes.

For instance, the presumption of correctness under the Epistemic Attitude makes it less likely that originalist precedent will be challenged and, consequently, less likely to be overruled (or modified in some other way, such as narrowed). The “get rid of it all” conception, in comparison, without the presumption, invites litigants and judges to reevaluate both a precedent’s articulation of the Constitution’s original meaning and its application. I argued above that both of these operations frequently place heavy burdens on human judgment and that, therefore, reasonable judges (and litigants) could and would plausibly come to different conclusions. The pragmatic result is a higher likelihood of change in the law and harm to Rule of Law values.

To make the costs of the “get rid of it all” conception more concrete, it is helpful to hypothesize how it adversely impacts a federal appellate court judge’s job. Imagine an originalist federal appellate court judge sitting on a case in which the judge must decide a question on the Constitution’s meaning. To avoid issues of vertical stare decisis, assume further that the question is not one that the

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225 See Strauss, supra note, at 883-84 (noting that precedent and constitutional doctrine make up a significant portion of argument in constitutional cases).


229 See Barnett, supra note, at 1232 (arguing that originalism’s critics, who use stare decisis to condemn originalism, do so to protect cases whose substantive results the critics prefer).

230 Vertical stare decisis is the bindingness of precedent by a higher court on a lower court.
Supreme Court’s precedent answers.231 There is, however, applicable originalist
circuit court precedent.232

Appellate court judges—and all federal judges, to a greater or lesser
extent—are under tremendous pressure to efficiently adjudicate their crushing
case load. The “get rid of it all” conception would make federal appellate judges’
jobs unmanageable. Judges and litigants would have to reevaluate every possible
constitutional issue, regardless of how settled the issue.233 Daniel Farber
explained how this would play out in the context of the First Amendment:

It is simply unworkable to leave everything up for grabs all of the
time. Imagine if, in every First Amendment case, the lawyers had
to reargue basic questions such as whether the First Amendment
applies to the states or whether it covers nonpolitical speech (both
of which have been debated by scholars). Every brief would have
to be a treatise, arguing every point of First Amendment doctrine
from scratch. Moreover, different judges could adopt completely
different First Amendment theories, so a lawyer in a case before
the Supreme Court might have to write nine different briefs based
on inconsistent theories of the Constitution. Similarly, dialogue
between the Justices themselves would be stymied because they
would be operating within different conceptual frameworks.
Unless most issues can be regarded as settled most of the time,
coherent discussion is simply impossible. Surely “it would overtax
the Court and the country alike to insist . . . that everything always
must be up for grabs at once.”234

In each case that raises a constitutional issue, the judge would be obliged to take
up the often time-consuming task of first, uncovering the Constitution’s
applicable original meaning and, second, engaging in that often just-as-difficult
task of applying the original meaning to the question presented in the case.
Judges simply do not have the time to do this.

More fundamentally though, as I argued above, the correct application of
the Constitution’s original meaning is one that we may expect, in many cases—
and despite diligent, good faith effort—will coexist with reasonable disagreement.
Consequently, the “get rid of it all” conception of originalist precedent would
result in significant, inconsistent precedent.

The Epistemic and Metaphysical Attitudes, by contrast, avoid these costs
while preserving originalism as a viable theory of interpretation. The originalist
judge with the Epistemic and Metaphysical Attitudes toward originalist precedent

231 A possible example of this was the legal question of whether the Second Amendment protects
an individual right to keep and bear arms prior to the Supreme Court’s District of Columbia v.
Heller decision.
232 Continuing with the Second Amendment example, prior to Heller, a number of circuits had
ruled on the Second Amendment’s meaning vis-a-vis an individual right.
233 See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 892
(1996) (explaining the “common-sense notion that one reason for following precedent is that it is
simply too time consuming and difficult to reexamine everything from the ground up”).
will give precedent significant respect which accords with our legal practice. The judge’s—and litigants’—work will therefore be more efficient because they need not revisit all possible questions of constitutional meaning and application. The Epistemic and Metaphysical Attitudes’ significant respect for originalist precedent protects the Rule of Law values stare decisis serves.

The “common law constitutionalism” conception avoids the costs of the “get rid of it all” conception, but it does so at the expense of originalism itself. The “common law constitutionalism” conception fully embraces stare decisis and the Rule of Law values it advances. Binding legal norms, embodied in the court’s precedent, will remain authoritative and hence the interests of reliance built up around those norms are protected. Proponents of this position also argue that there is increased stability of the law, and that greater fairness is achieved. Advocates of this position therefore avoid the pitfalls of the “get rid of it all” conception. This is a significant accomplishment.

Unfortunately, it comes at an unacceptable cost, especially if, as I have shown, the Epistemic and Metaphysical Attitudes can preserve most of what makes the “common law constitutionalism” conception attractive. The cost of the “common law constitutionalism” conception is the near-total, abandonment of originalism. According to the “common law constitutionalism” conception, originalist precedent is protected by a near-irrebuttable presumption. Thus, a precedent that, for instance, later research strongly suggests incorrectly articulated the original meaning, would remain viable. Over time, constitutional adjudication would ever more deviate from the Constitution’s original meaning, leaving it a relic, unimportant to legal questions which are settled on the basis of precedent.

This eventuality is tellingly parallel to our current legal practice where nearly all areas of constitutional law are significantly influenced by or, in many instances, dominated by precedent at odds with the Constitution’s original meaning. It is not controversial that our current practice is largely nonoriginalist. Only because of historical accident, such as that which occurred in District of Columbia v. Heller, does the Constitution’s original meaning play a significant role.

The Epistemic and Metaphysical Attitudes toward originalist precedent offer a better option. They preserve much of our current practice including, most importantly, a robust doctrine of stare decisis. At the same time, they ensure that the Constitution’s original meaning remains meaningful. Originalist precedent has weight in later courts’ analyses only if it meets the requirements of Originalism in Good Faith: only so long as the presumption that protects it remains unrebutted. The precedent therefore remains open to challenge and the

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235 See Strauss, supra note , at 926-27 (arguing that, unlike precedent, originalism is relatively unconstraining of judges).
236 Healy, supra note , at 1214.
237 See David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 899, 906 (1996) (concluding that while common law constitutionalism cannot “[e]xplicitly” overrule the text, it can produce “creative” interpretations)
238 Strauss, supra note , at 883.
239 See id. at 884 (stating that legal change has been largely not text-based).
Constitution’s original meaning largely remains the governing body of norms in our legal practice. This means that originalism retains viability in a way that it does not under the “common law constitutionalism” conception.

VIII. Conclusion

In this Article I have shown that originalism preserves a substantial role for originalist precedent using the Epistemic and Metaphysical Attitudes. Precedent that meets the test of Originalism in Good Faith, that is a good faith attempt to articulate and apply the Constitution’s original meaning, is originalist precedent. Originalist precedent receives significant respect under the Epistemic Attitude because it provides evidence of the Constitution’s original meaning by specifying that meaning in concrete cases, bringing to light implicit constitutional norms, and resolving perceived tensions in the original meaning. Originalist precedent receives significant respect under the Metaphysical Attitude because it constructs constitutional law, again by specifying that meaning in concrete cases, bringing to light implicit constitutional norms, and resolving perceived tensions in the original meaning. It also exerts gravitational force on other areas of law.

The Epistemic and Metaphysical Attitudes enable judges to meet their Article III obligation to give precedent significant respect. These Attitudes are also more normatively attractive than alternative conceptions of originalist precedent.