

## UVA LAW | originalism

LILLIAN BEVIER: Thank you. And thank you all for coming. We are going to proceed by way of about 12 to-- 10 to 12 minutes for each panelist. And then I hope there'll be some conversation among the panelists. And then we'll take Q and A. We have insisted that we get our full hour. So that's what we're going to do.

So it is now 10:41. We will depart this room at 11:41. Hopefully, we will have been educated by that time into this very interesting topic. And so our first speaker is Professor John Harrison of the University of Virginia Law School.

**JOHN HARRISON:** Thank you, Lillian. The way up is the way down. So I'm going to begin by criticizing the topic and then try to say something more constructive. By way of criticizing the topic, I will say that originalism is a false category. And any supposed opposition between originalism and stare decisis is a big problem.

As for originalism being a false category, well, suppose you think about original purpose, original meaning, original intent, original whatever. In all of those, "original" is the adjective. Adjectives are less fundamental than nouns.

The real question should be about the noun. This is a cylindrical object. "Cylindrical" is an adjective. An ICBM is a cylindrical object. How much does it have in common with my pen? Not that much.

To be a little bit more specific about originalism, Larry Solum and his fundamental work on originalism has said it is a family of theories of the Constitution that have in common-- the Constraint principle and the Fixation principle, that is something is fixed in time and constrains the law subsequently. He's perfectly right.

There is indeed a family like that. But they don't have a whole lot of family resemblance. I'll just give two examples of what would qualify as originalism under Larry's definition, which is quite useful if you want to talk about originalism and say how much do they have in common.

One is, well, there is a form of common-law constitutionalism that is also originalism in that, how does common-law constitutionalism work? It takes some starting point and then proceeds from the starting point by a series of steps, all of which are justified by the common-law method. That satisfies the Fixation principle and the Constraint principle.

The Fixation principle is the starting point. The Constraint principle is every step has to be consistent with notions of how it is permissible to proceed from one situation to another. That's how the common law works. That's a form of originalism, and it really is a form of originalism

precisely because the Constraint principle, the starting point, is quite significant. Here's another question. Is that conventional originalism? Not so much I think. But it satisfies the definition.

Here's another one the Constitution consists of purposes, values, and goals. And the purpose and the function of courts is to take those abstract purposes, values, and goals and enunciate particular doctrines that change over time as the circumstances change over time so that the principles, values, and goals continue to be achieved.

Again, that satisfies the Constraint principle because the connection between the purposes, values, and goals, and whatever the doctrines are has to be meaningful. It satisfies the Fixation principle because the purposes, values, and goals are fixed. But that has a substantial amount of opportunity for the courts, over time, to change what they actually do.

Now one reason I know that what I just described is originalism is because that's how Robert Bork thought about the Constitution. And if he's not an originalist or was not an originalist, no one was. OK, so originalism, false category.

Having said that, I'm going to talk about stare decisis and say nonproblem and having sort of said the category of originalism is only moderately interesting. Instead of originalism, I'm just going to say stare decisis as opposed to x, we'll just use it as a variable, whatever your description of the law is, be it the original meaning or something else entirely, something derived with moral principles, the question then is is that being the law consistent with the idea that case law is somehow binding? And you might think no.

And there is a famous articulation of this by Gary Lawson because, well, whatever x is, unless your x happens to be the cases, otherwise, there's going to be a difference between x and the cases. Gary Lawson said, well, the Constitution says that the Constitution, statutes, and treaties are the supreme law of the land. Cases are none of those. They're not, therefore, the supreme law of the land. So how can they be binding? There seems to be a conflict between anything and stare decisis where stare decisis means following the cases.

That's not true because stare decisis does not really mean cases are law. That comes from the judges believing their own propaganda. They should stop saying things like that. Rather, stare decisis is a principle of evidence about how to find out what the law is. It is a rule of evidence that says looked in particular to a particular kind of evidence, what the cases have said, and give it varying degrees of strength depending on the particular context.

Vertically, the degree of strength given to cases by way of finding out what the law is is very strong. Horizontally, in the Supreme Court of the United States, it is meaningful but not all that strong. But notice, as long as you say stare decisis is about finding out what the law is, it's a way of doing that, then there's no conflict between saying the law is x and the result that comes out when you apply the rules of evidence to the law might, in some sense, be different from what you think ideally the law is.

Well, the rules of evidence do that. The rules of evidence in federal court, for example, sometimes say probative evidence, nevertheless, must be excluded for some reason. The rules of evidence cause mistakes about the facts. What is their primary purpose? It is to get at the facts. How can that be? Well, rules do not always achieve their purpose in part because, normally, they are trying to balance a number of purposes altogether, which is how the rules of stare decisis work. They are aimed at finding out whatever x is. But they're also aimed at stability, at ratifying the reasonable expectations of parties-- like bodies of rules, like the rules of evidence of which they are subpart. They have various functions. And so sometimes, they are not going to achieve all of that function.

OK. That's the way-- the way down. Here is the way up, some constructive implications. First is that, well, I said the rules of evidence or the rules of stare decisis are rules of evidence. They are rules about how to find what the law is. Where do they come from? They're not really written down. A few of them might be derived from statutes. By and large, they are not.

That is to say, they are, themselves, customary law. They are-- if you want to say this; I don't like the phrase-- judge-made law. I think it's better to say they are a practice. They are the long-standing practice of American courts. They are a practice with normative force. That is to say, they are customary law.

So the way to think about the rules of stare decisis-- what they are and should be-- is to ask, as one asks about any custom doing common law, what's it for? What have the practitioners of the custom actually been doing? Why have they been doing that? What are the principles that justify the practice and make it normatively binding because, clearly, American courts think that principle of stare decisis is normatively binding? Understanding it as a body of practice, as a body of common law, is, I think, the way up toward understanding what it is, what it should be, how it might change as understandings of what's going on improve.

Another implication of thinking about the rules of stare decisis as a body of customary law is to

see that to some extent, of course, the whole common law is customary law. It is unwritten. It is based on practice, especially the practice, not exclusively, but especially the practice of the courts.

One of the really interesting things about the body of customary law that are the rules of stare decisis is that that is the foundation of the rest of what we think of as judge-made law. Why is it courts make law? Courts make law because other courts are going to follow what those courts have said. And that is to say, the principles of stare decisis are indeed what constitutes the rest of the common law. Although interestingly enough, they are themselves common law. They are themselves customary.

And in order to avoid just vanishing into a loop of self-reference-- having said that customary law is founded on customary law-- I will now move on to my last point, which is to say that behind the question about originalism and stare decisis I think is a more fundamental question. The more fundamental question-- and let the record show that I held up a copy of the Constitution-- the more fundamental question about the American constitutional system is, what is the law?

Law is made by practice. That's one of the messages here. It is made by what people actually do. Is following anything that has to do with this-- and I don't mean necessarily just its original semantic meaning. But it could be its values, its principles, however you want to think about it. Is in fact, having some strong connection to the document really the fundamental principle of American practice? Because, again, whatever those principles that explain the practice are are really the law. That's fundamental tenet of positivism, which I think is the correct theory of law.

And there there's a longstanding debate about that because there are lots of parts of the practice that are difficult to reconcile, again, with whatever one might attribute to the document, not just its original semantic meaning, also its principles, or what-- as I say-- whatever you want to-- whatever you want to say.

That's a serious challenge. I think it's important to evaluate that challenge though in light of the possibility-- and thinking about stare decisis as a set of rules of evidence, I think, makes it easier to see that possibility-- in light of the possibility that the practice that the American constitutional and political system actually follow is in some large extent the output of the combination of this, and whatever you think is in this, and a variety of institutions that are about resolving doubts about what this is.

The federal judiciary is a large part of that institutional process. But other aspects of American politics produce political settlements, the kind of things that Keith Whittington's fundamental work has talked about as constitutional constructions. And if you see the actual practice, not so much as freestanding but as the result of the combination of the Constitution-- again, whatever it means-- and some system for deciding what it means for resolving disputes about it, then I think it becomes a little more plausible to answer the fundamental question, is the Constitution really law? Yes. That's not to say that the answer is yes. That is to say that's the most basic question. And maybe the answer is yes.

**LILLIAN BEVIER:** Thank you. Professor Harrison. Professor Hellman is next.

**DEBORAH** Thanks. Excuse me. I think my remarks actually build on John's and are largely sympathetic with them. So I want to present the claim that one could have a practice of following precedent or rule of following precedent-- by practice, I mean of according some weight to precedent, so it could take either form-- for epistemic reasons. And by that I mean that they're a good way of arriving at what the truth is about what the Constitution requires.

So before I get into that, I just want to set up the question or the issue of what it is to follow precedent in order to give rise to the challenge. You might think there can't be a genuinely epistemic defense for following precedent.

So what does it mean to follow precedent? Imagine there are two cases. C1 is the precedent case. C2 is the case that's before the judge. And the cases are relevantly similar such that the judge thinks that C1 controls C2. And the judge now has to decide what to do in C2.

To follow precedent is to decide C2 in the way that C1 was decided because it is the precedent. So if you thought-- if the judge thought that C1 was rightly decided and came out the same way, that's not an instance of following precedent. That's deciding in accord with precedent. But it's not truly precedential reasoning. Precedential reasoning requires that the judge decide C2 as C1 was decided because C1 [INAUDIBLE] was decided that way.

So if my goal is to make the claim that there are epistemic reasons for having a practice of following precedent, that is that precedential reasoning yields correct legal decisions over the run of cases, it would seem to be not-- excuse me-- not to be an appropriate or apt defense of precedential reasoning. That is, you might-- if you have the view that precedent has this kind of epistemic value, then the judge is following precedent because it yields better decisions over the run of cases. And so it's not an instance of deferring to the prior case because it is

precedent. So that's the challenge that an epistemic defense of precedent faces.

So the first thing I want to do is convince you that it is possible to give a genuinely epistemic defense of what is truly precedent following. And then the second thing I want to do is to suggest that there are good reasons to think that following precedent is epistemically justified.

That is we--

[CHIRPING SOUND]

--that was the end of John. He didn't go over?

**LILLIAN BEVIER:** No, no, no.

**DEBORAH** Oh. OK.

**HELLMAN:**

[LAUGHTER]

Because I can't abuse my 12 minutes yet. OK [LAUGHS]. All right. So the first thing that I want to show you that this epistemic justification really is a form of precedential decision-making. So let me just say-- side note, so here we are at a Fed Soc symposium focused on originalism so when many of you are thinking about what the right legal decision is, you may have in your mind the decision that originalism requires or a particular version of originalism requires.

But the way that I'm talking about what it is to follow precedent and the claim that precedential reasoning yields better decisions-- legally-correct decisions-- I mean to be a kind of black box in the sense that I think that I want to convince you that so whatever you think belongs in the black box of what it is to make legally-correct decisions. So it's not dependent, the claims I'm offering, on any particular view of how the judge ought to come to a decision about what the Constitution requires.

OK. So as I said, there's a kind of tension between the idea of an epistemic justification. If you think precedent yields better decisions, then you're following it because it yields better decisions rather than because it is precedent. But I think this way of thinking of it misses a distinction between the idea of having a rule or practice of precedent following, of stare decisis, that's epistemically justified and thinking in the individual case that following the precedent is epistemically justified.

So the judge could think that it's better overall for our legal system-- we'll get legally-correct decisions more often than not if we have a practice of according wait to precedent. Though in this case before me, I think it's going to lead me to the wrong decision. But I'm going to do it anyway because we have this practice of following precedent. And the judge could defer to that practice. That would be genuinely precedential reasoning because she thinks that she has some sort of professional obligation to do so or something along those lines.

This could happen in two ways. I'll give you two potential judges. And I'll call the first one the arrogant judge. The arrogant judge could think that, look, the legal system needs a practice of following precedent because though I'm good at figuring out what the Constitution requires, the rest of those bozos out there aren't so good at it. So we need this practice of deferring to precedent. We'll get better legal decisions with that practice. And since I'm a member of the judiciary, even though I don't think it's going to lead me to the right decision, I better-- I am obliged to follow it if I endorse the practice overall.

That's an instance in which there is an epistemic justification for precedent. But what the individual judge is doing is genuinely precedential reasoning because she's not deferring to it because she thinks it leads her to the right decision in that case. That's the arrogant judge.

The second one I call the introspective judge. The judge might think, look, all judges, me included, we tend to overestimate our ability to come to the right decision. And so I think, overall, I'll be better off-- get the right decision over the run of cases if I constrain myself to accord some weight to precedent. When I'm faced with the individual case, I don't think that the precedent is correct. I think I've got the right decision without the precedent. But I recognize that I can be misled. And that's why I committed myself at the outset to this rule of precedent following.

So those are two ways two potential judges can help us see that, that there can be a genuinely epistemic justification for the practice of following precedent. So that's the proof of the idea that you could have a genuinely epistemic justification.

But now I want to turn to the second question, why think precedent following or having a practice of according some weight to precedent does yield better decisions over the run of cases? And most of the reasons I am going to offer here I call procedural, that is they're not premised on the idea that precedent is some repository of wisdom, that the precedential cases, generally speaking, are more likely to be correct than the decisions of current decision

makers.

In fact there might be reasons to think that they wouldn't be. After all, judges in the past were infected by different kinds of prejudices and biases that we recognize today-- racism, sexism, what have you. And so we might have reason to be skeptical of the wisdom that is contained in precedential cases.

But nonetheless, I think that precedent contains some epistemic value. And here are the procedural defenses for a practice of according weight to precedent. The first I call contestation. In many practices that are aimed at getting at truth, the adversary system, scientific inquiry, academia, we engage in a practice of exposing our ideas to the views of others so they can reject them, challenge them, et cetera. We do that because we think we're going to have better decisions overall with that process of contestation.

One can think of the practice of stare decisis as instantiating that kind of contestation. The judge thinks she's reaching the right result by her theory of constitutional interpretation. But the practice of according some weight to precedent forces her to engage with the view of somebody who has a different perspective, accord it some weight, and react to it. That, I think, can enhance judicial decision-making.

Second, it helps to fill out a partial perspective. An individual person, judge inherently only has a partial perspective on the truth. So there's a sort of wisdom of Crowd's idea, that according some weight to precedent instantiates. Just like you might-- when you have a big decision to make, ask your friend to play devil's advocate, we can see stare decisis as an artificial conversation across time and space in which the precedent court plays devil's advocate to the current judge who's faced with a decision.

Third, I think it's an important check on judicial hubris. We often talk about the challenge or the puzzle of stare decisis as the judge having to do what she thinks is wrong, the precedent case being the case that's wrong. But maybe the judge isn't actually right about what the correct legal decision is. And so if we have a natural human tendency to overestimate our ability to arrive at what is the right decision, the practice of according some weight to precedent works as a kind of corrective to judicial hubris or human hubris. I don't think it's just judges.

So those are the three kind of procedural reasons for thinking that a practice of stare decisis will allow courts, over time, to more accurately arrive at correct legal decisions. I think there are some-- something to be said for substantive reasons too, although those are weaker. But

you might think that precedents that have endured, been critiqued and refined, have something going for them. But I don't want to rest it on that.

I want to end with one reply to a potential objection. The challenge of stare decisis or of precedent following is often posed as the problem that there is a prior decision which is wrong and the judge in according some weight to precedent has to defer to this wrong decision. And that involves some cost or loss. And so we have to think about that as we think about the other values that it might give rise to.

I want to suggest it's not clear that it does involve a cost or loss. From the perspective of the individual judge, he or she thinks a prior decision is incorrect. But from the perspective of the system, that is as we think systemically and think should we have a practice of following precedent, we from this systemic perspective have no reason to think that the judge today is correct that the prior decision is wrong versus the judge yesterday was correct, and this judge is going to do the wrong thing. So it's not clear that there is a cost. There might be in individual cases. But we can't say systemically that the practice of stare decisis involves that kind of loss. And I'll end there.

**LILLIAN BEVIER:** Thank you very much. Our next speaker is Professor Kurt Lash.

**KURT LASH:** All right. Well, thank you. My thanks to the Virginia Chapter of the Federalist Society for inviting me out and give me a chance to talk about originalism and precedent. For my contribution, I'd like to take a moment and discuss a possible reconciliation of originalism and stare decisis, reconciliation that I think must involve something which I call reverse stare decisis, in which I published in the *Virginia Law Review* discussing a while back.

Originalists struggle with the idea of stare decisis for a variety of reasons. On the one hand, erroneous precedents that do not reflect the original meaning of the text seem to lack the constitutional legitimacy upon which the theory of originalism is based. And for that reason, some originalists believe that stare decisis, at least in constitutional cases, ought to play no role whatsoever when it comes to a prior precedent and involved an erroneous construction of the Constitution.

On the other hand, after more than 200 years of flawed human interpretation, realigning the entirety of the Court's constitutional jurisprudence with the original meaning of the Constitution threatens to impose massive costs in terms of stability and the rule of law. And that's led others to be no more than fainthearted originalists with only a sporadic and seemingly

unprincipled approach to stare decisis.

And what I'd like to suggest this morning is that actually there are principled originalist approaches to stare decisis that can avoid both the worst cases of constitutional illegitimacy and wholesale disruption of American constitutional law. For the purposes of today's talk, I'll call this Madisonian stare decisis in honor of the man who first suggested the idea. I might also call it popular sovereignty-based stare decisis since it reflects the basic principles of popular sovereignty under the American Constitution. All right.

In brief, Madisonian stare decisis views erroneous precedence through the lens of American constitutional theory. The Constitution announces itself as an act of popular sovereignty. We the people do ordain and establish this Constitution. American popular sovereignty accepts the legitimacy of ordinary majoritarian political processes. But the Constitution has greater legitimacy and is treated as the voice of the people themselves due to the supermajoritarian process by which the Constitution is created and amended.

Once we understand the Constitution as an act of popular sovereignty, we're now in a position to judge the degree to which an erroneous constitutional precedent harms or undermines the people's right to declare their fundamental law. And in fact, there are two basic kinds of erroneous constitutional precedents. One gets the Constitution wrong but, nevertheless, allows for some form of majoritarian political response. A second kind of erroneous precedent not only gets the Constitution wrong, it also immunizes that error from any kind of political response.

The first kind of error, because it allows for some type of majoritarian response, imposes the least cost in terms of the principles of popular sovereignty. And accordingly, I think this kind of error can be upheld in some circumstances under the doctrine of stare decisis without fatally undermining the basic democratic legitimacy of the system. The second kind of error, however, one that prevents any kind of majoritarian ratification or rejection, lacks even a minimal degree of democratic legitimacy in a system based on popular sovereignty.

These kinds of judicial errors are presumptively in need of reversal. Or put another way, these high-cost errors should be subject to the doctrine of reverse stare decisis. Absent the most compelling of reasons, they should be reversed at the earliest opportunity.

So let me give you two examples of these two kinds of judicial errors. First, an error that allows

for political response. Suppose that the New Deal court erred in its expansive interpretation of the Commerce Clause. Although such an error imposes a cost in terms of popular sovereignty, it deviates from the will of the people. It nevertheless, allows room for majoritarian ratification or rejection. A later democratic majority may refuse to exercise the erroneous permitted power and do so because it believes the New Deal court got it wrong. In such a situation, a judge might apply *stare decisis* to the New Deal precedence in order to avoid massive legal disruption without fatally undermining the basic democratic legitimacy of the system.

This theory of political response to constitutional errors comes from James Madison and his writing on the constitutionality of the Bank of the United States. As many of you know, Madison opposed the creation of the first bank in the United States on the grounds that no persuasive interpretation of the Constitution gives Congress power to charter such a bank.

Later, when president, Madison appeared to reverse course and now supported the creation of a second bank of the United States. And when he was criticized for looking like he was flip-flopping on the issue, Madison explained that he had not changed his mind about the proper interpretation of the Constitution. Instead, he was willing to acquiesce to a long-standing political acceptance of the prior precedent.

The first bank was enacted despite his objections. And both of the major political parties since that time had accepted the bank as constitutional. This, according to Madison, deserved deference, even if not his agreement. According to Madison, it is quote, "a safe rule of construction," end quote, that a precedent should be presumptively followed when it has the uniform sanction of successive legislative bodies through a period of years and under the varied accession of parties-- ascendancy of parties.

It is because the bank had received this kind of majoritarian support from the political branches in the years after its first enactment that Madison concluded that he was duty-bound not to oppose the new bank bill despite his personal views on the matter. In fact, to veto the bill, quote, "would have been a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment," end quote.

To Madison, majoritarian acceptance not only justified standing by an arguably erroneous precedent, the availability of a political response significantly reduced the cost of judicial error. As Madison wrote to critics of Marshall's later opinion in *Cohens against Virginia*, although the Supreme Court might have erred, quote, "there is no evidence that the Court expresses either

the opinions of Congress or their constituents. Congress may, therefore, abstain from the exercise of powers claimed for them by the Court," end quote.

Notice, Madison's theory of majoritarian ratification of judicial error presupposes the opportunity for a majoritarian response, either ratification or rejection. This implies that a judicial error that prevents any action or response by the political branches by definition cannot be a proper recipient of Madisonian stare decisis.

For example, suppose that *Roe against Wade* erroneously removed the issue of abortion from the political process. If so, then this kind of error imposes the highest cost in terms of popular sovereignty and ought to be presumptively reversed. Standing by such a decision would lack even the barest degree of democratic legitimacy and, therefore, cannot be a candidate for the application of stare decisis. Instead, this kind of error is a candidate for reverse stare decisis.

Presumptively requiring reversal absent extraordinary circumstances. The same would be true by the way for *Heller* or the *McDonald* case in the Second Amendment area. As these examples illustrate, a Madisonian approach to stare decisis weighs the cost of judicial error according to the degree to which the error undermines the people's right to establish their fundamental law. Even as ardent a popular sovereigntist as Madison was willing to stand by erroneous precedent if that precedent left room for some time-- some kind of majoritarian response. In such a case, majoritarian acceptance can supply a degree of democratic legitimacy to precedents otherwise in conflict with the original understanding of the people who ratified the Constitution.

A quick addendum to this theory-- and here I would be touching upon some matters discussed by Josh this morning. It involves an issue that actually is in the paper that's part of his talk. And it involves something which I call the use of discount stare decisis. Even in cases where a different political majority have accepted over time an otherwise erroneous precedent, an originalist justice may still resist applying stare decisis due to a fear that upholding an erroneous precedent might entrench the erroneous reasoning of that precedent.

That can be avoided, however, through the use of what I call discount stare decisis. And again, I think Josh touched on this. You would stand upon the judgment in the prior case. But you would refuse to extend its reasoning. One can refuse to extend a precedent to a new area. This is precisely what Madison did in the case of the *Bank of the United States*. Although he acquiesced to the creation of the bank, he refused to accept Hamilton's or

Marshall's interpretive reasoning in support of the bank. And he continued to call for a limited construction of federal power.

In closing, I believe Madisonian stare decisis provides originalists an approach that reconciles originalism with the rule of law values that are guarded by the doctrine of stare decisis. It does so, moreover, in a manner that is both normatively attractive and judicially workable. And to the extent that this approach frees the Court to adopt the principles of originalism, the result will be increased fidelity to the sovereign will of the people. Thank you.

**LILLIAN BEVIER:** Thank you very much, Professor Lash. We have one more, our on student, Henry Dickman.

**HENRY DICKMAN:** Good morning, and thank you for having me here. So I'd like to touch on again what Professor Blackman talked about this morning, which is the practice of stare decisis in the courts of appeals. And one thing that I think is important to note is that the courts of appeals are grappling with two doctrines of stare decisis and not just one. They have to contend with vertical stare decisis, where they're interpreting the decisions of the Supreme Court. And they're grappling with horizontal stare decisis, where they're interpreting the past decisions of that same Court.

And usually these two doctrines of stare decisis work well together, but not always. Sometimes there are conflicts when a Supreme Court decision undermines a prior circuit precedent but does not conclusively overrule it. And a circuit, in that situation, is stuck with figuring out which precedent it should follow.

Let me give you an example of this from a recent case that the Seventh Circuit faced. Let's back up. In 1989, a Seventh Circuit panel held that restitution was available for a certain violation of the Federal Trade Commission Act. The Act itself did not specifically authorize restitution. It authorized other remedies. But the Seventh Circuit said that restitution was implied.

A few years later, the Supreme Court got a case called *Meghrig versus KFC Western*, and they were interpreting a different statute in that case. It was an environmental statute. And likewise, the plaintiffs were seeking restitution. But the environmental statute did not authorize restitution. And the Supreme Court said, where there is a comprehensive statutory scheme and a specific remedy is not mentioned, it's not available.

So does that Supreme Court decision necessarily overrule the Seventh Circuit decision? I

don't think so. But it casts doubt on it. It makes you think that if the Seventh Circuit got its 1989 case after the *Meghrig* decision, it would have come out differently.

So this past August, the Seventh Circuit gets a repeat of the 1989 case. And it has to decide, do we follow the Supreme Court case which is kind of on point? Or do we follow our own past precedent, which is directly on point. And of course, those decisions lead to different outcomes. And the Seventh Circuit decided to follow the Supreme Court's lead and overrule its own past precedent using a local rule of appellate procedure that most circuits don't have. And I think that was the right decision, to follow the Supreme Court's lead even though it didn't directly overrule the case.

Now why do I think that? You have to go back to understanding what the purpose of stare decisis are. I agree with Professor Harrison, that stare decisis is a practice rather than a constitutional or statutory obligation, which means that judges can think about what the purposes of stare decisis are and where they're best served and apply stare decisis selectively in certain applications.

Most people think that vertical and horizontal stare decisis serve five key values-- uniformity in law, protecting the reliance interests of would-be litigants, equality among litigants who are appearing before the court at different times, judicial economy, and accuracy in decision-making. And I want to focus on two of those values in particular-- uniformity in law and the reliance interests of litigants.

I think that the presumption in favor of following Supreme Court precedent that undermines it but does not conclusively overrule serves both of those values well. Let's talk about uniformity first. When the Supreme Court establishes or issues a decision, it establishes a rule for the entire country to follow. So if half the circuits thought the answer to some legal question was A, and the other half thought it was B, the Supreme Court decides a case, and now the circuits all agree this is what the answer is.

It gets trickier when only some circuits have an on point prior precedent. So I'm going to borrow an example from a famous Supreme Court case called *Flood versus Kuhn*. Let's say that the First Circuit had decided a case where they said that the federal antitrust laws do not apply to baseball. That's what the First Circuit says. Second Circuit doesn't have any precedent on this issue. Then we have a case before the Supreme Court which says that the federal antitrust laws do apply to football. OK.

Now let's say that the baseball case comes back to the circuit courts. The Second Circuit, of course, is going to say that the federal antitrust laws apply to baseball because it's going to say on the authority of the Supreme Court's football case, we're going to extend that logic to baseball. The First Circuit's in a tougher situation because they have this baseball precedent which says that baseball-- that antitrust liability shouldn't extend to baseball. But the Supreme Court has indicated otherwise in the football context.

If the First Circuit sticks to its prior precedent, then we have another circuit split. The First Circuit says that the antitrust laws do not apply to baseball. And the Second Circuit says that they do. And now the Supreme Court has to take a baseball case right after it's taken the football case. There's doctrinal inconsistency within athletics at large. And then there's geographic inconsistency between the First and Second Circuits. So I think that this presumption encourages uniformity in law.

Second, people often talk about stare decisis protecting the reliance interests of individuals. I think that is fairly true in the Supreme Court context. But I think we have reason to believe it's less true in the Court of Appeals context, that people are relying less on circuit precedent than Supreme Court precedent.

For one, individuals are often operating in multiple circuits, and it's hard to keep track of all of the different legal obligations that they have. And sometimes those legal obligations may actually be inconsistent with each other. Second, most Supreme Court cert grants are for circuit splits. And so whenever the Supreme Court issues a decision, a circuit precedent is necessarily going to be overruled. And so we see the circuits getting overruled more in the first place, which means that those precedents are inherently less stable.

There might be some exceptions where a circuit precedent does engender a significant degree of reliance. I think law enforcement, for example, depends a great deal on the specific circuit precedents generated in the Fourth, Fifth, and Sixth Amendment contexts. Maybe two in federal law matters on contract and property law, the circuit precedents would have a greater deal of reliance. But for the most part, I think we can say that Supreme Court precedents might create a larger degree of reliance. But circuit precedents on the whole engender less reliance, which means that the cost of overruling a circuit precedent is not quite as high.

I just want to finish by saying what might the originalism and textualism implications of this be.

Well, if the presumption is that circuit courts should follow the Supreme Court's lead, I think today that's probably good news for originalists and textualists. The Supreme Court's moving more in this direction. And so if the circuit courts are going to take the Supreme Court's lead, they can overrule more of their nonoriginalist or nontextualist precedents.

Now, of course, we might have a Supreme Court in the future that takes more of a living constitutionalist or purpose of this approach in its constitutional or statutory interpretation. And that might mean that circuit courts would then be overruling their own originalist precedents under this presumption that I've articulated.

But what I've articulated is just that. It's a presumption. And I think it can be overcome in certain cases, if the circuit court has a high degree of confidence that its own precedent is the accurate one and that the Supreme Court's precedent is inaccurate or at least would be inaccurate as extended to this specific context.

Professor Hellman talked about stare decisis being like playing devil's advocate sometimes. And I think that logic applies here, where if you force a circuit court to grapple more with what the Supreme Court has said, the circuit court says, yes, we know what you said about football. But we still think we're right about baseball. Well, that can help lead the circuit to better decision-making regardless of which way it goes.

But overall, I think the law of the circuit doctrine, which is this rule that circuits apply following their own precedent, I think it's become a little bit too much of a straitjacket and has hindered the key interests that we have in uniformity in federal law. And I think that when the Supreme Court opens the door to revising some contradictory precedents, that the circuit court should take the green light and resolve their own contradictory precedents. Thank you.

**LILLIAN BEVIER:** Thank you very much.

[APPLAUSE]

I'd now like to open the panelists to one another's questions for one another. John?

**JOHN HARRISON:** Excuse me. I have a thought for each of everybody else. So I'll go first, if you don't mind. As for Debbie, my question is contestation, hubris, engagement, those sound like they're relatively soft. It sounds to me like what you're saying has better explanatory effect for horizontal stare decisis at the Supreme Court level, whereas to explain the really rigid vertical

stare decisis, certainly in the federal system, I think most or all of the states, I think you need to add nonepistemic considerations, that it's just-- it's not just about getting it right. There are other institutional considerations-- stability and predictability by parties that have-- that need to be incorporated.

For Kurt, I have a question that I think is somewhat-- is somewhat similar. And again, it sounds to me like what you're saying is horizontal for the Supreme Court, which is where a lot of the focus is. How much do you want to say-- because it does seem to me that since precedent is a practice, it is customary law, how much do you want to say not only that your proposal is consistent with basic constitutional principles, but also that it is the practice of the Supreme Court so that you've got that other element of just the justification for any customary law?

And Henry, my question for you is is what happened in the Seventh Circuit really a pure case of the kind of phenomenon you're interested in? Seeing as to answer the question about how they would deal with an intermediate-- with an intervening Supreme Court case that undermines but doesn't reject, they use their equivalent of the Irons process, that is to say, the en banc court actually passed on that.

It seems to me that you'd have a pure case of what is the law of stare decisis had it been a panel by itself that had to decide, well, we don't know because there isn't Seventh Circuit doctrine on this question. And if instead of just going to the body that makes that doctrine, the panel alone had said, well, what is that doctrine in this situation-- this is common law-- in this situation that hasn't arisen yet.

It seems to me, as I said, you've gotten a purer case of trying-- of a court trying to figure out what is the law as opposed to, well, the en banc court can kind of make it what is the law of stare decisis.

**LILLIAN BEVIER:** OK. I think I'm going to give each of you an opportunity to respond to the question. So Debbie, do you want to go first?

**DEBORAH HELLMAN:** Sure. So first, I will say in making the case for an epistemic justification for precedent, I didn't mean to say that was the only justification for precedent. I meant to add it to the bag of possible justifications. So the other things-- stability, predictability, equality among litigants, I think those are all-- and legitimacy issues-- I think those are all important justifications also. I just meant to add it.

And I think that you're absolutely right that it has the most play in the horizontal stare decisis. And the others are-- the other values are probably more important or that it's more that they play a bigger role in the vertical. I think that epistemic has some role to play there too. But I absolutely agree with that.

**JOHN HARRISON:** Kurt? And John's question to me was, how does my idea map onto the current practice of stare decisis? One of the common criticisms of the practice of stare decisis is that it's chaotic or seemingly unprincipled. I think that's very common in the literature where it appears that you might have one group of justices in *Casey* taking one position on stare decisis and then same justices you know in the later case, *Lawrence*, seeming to take another position on stare decisis.

I think the criticism to some degree is unfair or at least needs to be interrogated. I think what's going on is that stare decisis is applied in the context of normative constitutional theory. So a justice facing an erroneous precedent is not only considering rule of law values with stare decisis, they're also bringing their own ideas of normative constitutional theory and their own idea of how much harm that prior precedent is doing to the legitimacy of constitutional law and to the practice of constitutional law in the United States.

And so I think that's already a part of it, that it makes stare decisis look chaotic. But what's happening is you're looking at a different justice approaching a different precedent and seeing the error on the need to rectify the error outweighing considerations of stare decisis due to their analysis of how harmful past precedent might be. My theory is simply based on that same idea, that if you are a popular sovereigntist, originalist, you have a theory of what harms the constitutional system. And different harms are greater than others, depending upon how much they undermine the people's right to establish their fundamental law.

And so in some situations, it would be inappropriate to apply stare decisis. And others, stare decisis might come into play. So I think that's already happening. It's happening, but it's happening in different ways due to the fact that different justices have different theories of constitutional harm.

**HENRY DICKMAN:** Yeah, professor, I would just say that the Seventh Circuit actually has a fairly unique rule where a panel can overrule its prior precedent unless a majority of all active circuit judges disagree. And so it's kind of the inverse of Byron's footnote, where you need a majority to approve. Here, you need a majority to disapprove, which is just kind of an interesting twist.

I think on the whole, the question I'm interested in is to what extent can a panel say, yes, we know we've decided this exact same legal question before. We don't care because the Supreme Court has kind of spoken in this other area. And for me, that makes the Seventh Circuit case particularly apt because the 1989 case was just completely disregarded in favor of the *Meghrig* decision. And I think it's a positive development because it enables decisions like *Meghrig* to have broader effect throughout the federal courts.

**LILLIAN BEVIER:** Are there other questions among the panelists? Debbie?

**DEBORAH HELLMAN:** Well, I'll just draw one to Kurt. I have others, but I want to let other people, especially the audience-- so to me, the kind of underlying orientation, I guess, of the principle of stare decisis is to cabin in a way everything that you said with a little caveat. That is instead of saying an erroneous precedent about something that forecloses democratic correction, I would-- the orientation of the principle of stare decisis would be to say a precedent that I think or believe is erroneous and that asks us to think about the problem in a different kind of way.

A second way of putting the point would be to say that when I think about whether we should have a practice of according some weight to precedent in the kinds of cases where you think we ought to have a reverse stare decisis, I think it's important to think about it systemically like-- and you said, it could be *Heller*. It could be *Roe*.

That we all should think, well, given that it could be *Roe*, it could be the one I'd put on the other side, would be *Buckley*. That's the one I'm dying to overrule. I think it's completely erroneous. So given *Buckley*, given *Roe*, and given that judges think they're right that this is an erroneous precedent-- and I know that I'm going to disagree some of the time-- would I rather have a principle that's part of our way of doing law, that says they have to check themselves. They have to think about it a little more. It's not clearly an erroneous precedent. And when you have two examples, one that you think is clearly erroneous, and one that you think is clearly correct in your mind, then you I think, well, given that that particular judge thinks that the precedent is erroneous but could be wrong, is it better to have a practice that forces that judge to put the brakes on a little bit?

**JOHN HARRISON:** No. It's a good point. And it goes into the idea of shades of disagreement, how high a threshold of evidence in my own mind do I have before I conclude-- darn it-- they just got-- they just got it wrong, period? And to the degree that I'm not sure, I think judicial humility is a

good thing. So I have no problem with that.

And that might minimize the cases in which my theory would apply. But I still think at the end of the day, there will be maybe a smaller percentage of cases where it's just, darn it, I know what they decided, and I know why they decided it. And it was just wrong. And it was wrong the day they decided it. And so even if I'm not sure in my entire theory, I know that it's wrong and should be reversed if we were deciding it is as an original matter.

There will be that limited number of cases where I'm doing the best I can and I really think it's wrong. It would be at that point that I would face this consideration as whether or not the political process has had a chance to respond to that erroneous precedent or not.

But I think you're right. What it does is it forces in your analysis of stare decisis as a judge to bring humility into play and to establish a principled threshold before you will just say, I disagree with however many years of precedent. So it's a good point. But I think still at the end of the day, there is going to be that limited category where you still conclude that they're wrong.

**LILLIAN BEVIER:** I think we're ready for-- we have a few minutes for questions from the audience if any of you have any to pose to our panelists.

**HENRY DICKMAN:** There's one over there [INAUDIBLE].

**LILLIAN BEVIER:** Yes.

**AUDIENCE:** My question is for Professor Lash.

**LILLIAN BEVIER:** Could you talk a little bit louder?

**AUDIENCE:** My question is for Professor Lash.

**KURT LASH:** Yes.

**AUDIENCE:** So when you're a nonoriginalist-- nonoriginalist, and your theory is surrounded in popular sovereignty, why is that [INAUDIBLE]? And so it seems-- why is that-- why is the Constitution adoption or advocacy the only moment because it seems like what your theory opens up the possibility of is something like a massive supermajority of the country has approved over a long period time by exercising congressional powers [INAUDIBLE] like the Congress [INAUDIBLE].

People from various different political parties and different ideological persuasions have used the Congress' power. And it looks like probably if you're grounded in popular sovereignty as your normative value, originalism, you could throw it out the window because we've got a much larger portion of the population in exercising their will behind this power. It's not granted in the Constitution. So if you take popular sovereignty as the fundamental value, how do we maintain originalism today?

**KURT LASH:** Thank you. First of all, there, of course, would be additional constitutional moments after the founding. You would have to take in consideration the changes in reconstruction and then the progressive era amendments and take all of that. So there isn't just the founding.

On the other hand, the value about American popular sovereignty, here I'm basing that theory on-- the theory as articulated by Gordon Wood. I'd also say as articulated by St. George Tucker in the early decades of the Constitution. Popular sovereignty, which distinguishes the mere majoritarian actions of the political process from the voice of the people, there is no perfect process for identifying the voice of the people. We could do it in different ways.

But the way that we've done it under the Constitution is this two-tiered supermajoritarian voting process that forces people to think deeply to provide an opportunity for the other side to organize opposition. And it doesn't become entrenched constitutional law till it satisfies two rounds of supermajoritarian voting. That has a greater degree of democratic thickness that justifies treating it as higher law.

Now what you're talking about is the political process, ordinary majoritarian process, maybe for an extended period of time, has accepted a particular precedent that maybe was erroneous under originalism principles in the beginning. But it's been accepted broadly across time. I would stick with the distinguishing between higher law and ordinary law because at no point during that political process was there anything more than mere majoritarian decision-making, a single 50% plus one kind of decision.

There was never a national conversation where, yes, do we really agree that errors should now be entrenched as a matter of constitutional law that required a supermajoritarian voting process? So I think it has a bare legitimacy but still not the same kind of legitimacy that you would get in higher law. And it's that bare legitimacy that I would see as justifying maintaining it as a matter of precedent but still not giving it such entrenched legitimacy that the reasoning behind it should now guide constitutional law in the future.

So I guess I'm continuing to maintain that distinction. Bruce Ackerman would talk about this distinction between higher law and ordinary majoritarian law. Even an extended period of majoritarian law I still think is different in-kind than the higher law making of that two supermajoritarian voting process.

**LILLIAN BEVIER:** We have time for one more question. Do we have one more questioner? Well, if not, I'm sure most of the people that left would have had lots of questions. But they had to go to class. Well, thank you so much. This has been a wonderful panel. And we thank all four of you.

[APPLAUSE]

**KURT LASH:** Thank you.

[APPLAUSE]