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STRANGE FRUIT: WHAT HAPPENED TO THE UNITED STATES DOCTRINE OF PRECEDENT?

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"[I]t can be shown that the actual rules are not at all what they are claimed to be, that they can be applied quite differently in quite different circumstances . . . and sometimes not at all."[1]

"The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the judge and satisfies the basic human demand of those affected by judicial action to be told why. . . . In the language of procedural fairness or due process, it can be said that the dignitary values of the person are respected . . . . The judicial statement of findings and reasons also enables the losing litigant . . . to determine whether good grounds exist for an appeal. Unexplained decisions [ ] encourage appeals and make it difficult, even impossible, for the appellate court to determine whether the lower court erred. . . . [U]nreasoned judgment in most cases similarly stymies judicial review. It can give no indication of how similar cases will be decided. Ultimately, it can give no assurance of equality of treatment. It

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Editor's Note: Professor Pether died on September 10, 2013; this manuscript, published posthumously, was nearly finished by Professor Pether—the current text was prepared jointly by (i) her husband, Professor David Caudill, the Goldberg Family Chair in Law at Villanova University School of Law and (ii) one of her former students and research assistants, Peter F. Johnson, Legal Systems Coordinator for the Superior Court of Pennsylvania

1. Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 421 (David Kairys ed., rev. ed. 1990).

is simply judicial fiat, and the rule of (wo)men, not law. There is no accountability for the discharge of judicial office."[2]

I. Introduction

On October 11, 2010, the *National Law Journal* published an article by the *ProPublica* investigative journalist Dafna Linzer, which drew attention to an opinion authored by the D.C. District Court Judge Henry Kennedy Jr., adjudicating a habeas corpus action brought by Uthman Abdul Rahim Mohammed Uthman—a Yemeni "accused by two U.S. administrations of being an al-Queda fighter and bodyguard for Osama bin Laden" and on that basis indefinitely detained without charge for almost eight years.[3] The Obama Administration had concluded that Uthman, one of forty-eight Guantánamo detainees on its "secret list" of those slated for indefinite detention without trial, was "too dangerous to release but 'not feasible for prosecution.'"[4] Additionally, he was not, as a practical matter, repatriable.[5]

Judge Kennedy ordered Uthman released from Guantánamo, but his order subsequently disappeared from the court's e-docket and was later replaced by one "with different facts."[6] Specifically, "eight pages of material had been removed, including key passages in which Kennedy dismantled the government's case against Uthman."[7] As Linzer's article explains, there was a contentious dispute between the Justice Department and Kennedy over how the first opinion was released. In any event, it contained much not eventually in the public record.

For example, the revelation "that one government witness against Uthman had been diagnosed by military doctors as 'psychotic' with a mental condition that made his allegations against other detainees 'unreliable'" disappeared; and the second opinion failed to reveal that witnesses it cited were long-dead, "previously discredited by judges in other cases, questioned by internal Obama administration assessments or found unreliable by military psychiatrists because they were mendacious, mentally ill or subjected to torture."[8] Even the date and site of Uthman's detention was altered between opinion one and opinion two. "In the first version, the judge said Uthman was detained on Dec. 15, 2001, in Pakistan by

2. David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* Common Law Theory 134, 148 (Douglas E. Edlin ed., 2007) (footnote omitted).

3. *See* Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality; Judge's Ruling Vanishes from Docket, Replaced by One with Different Facts*, Nat'l L.J. 1, *1 (2010) (LEXIS).

4. *See id.* at *1, 3.

5. *See id.* at *1 (noting Utman's alleged dangerousness).

6. *See id.*

7. *Id.*

8. *See id.* at *1–2.

Pakistani authorities."[9] The public opinion said "that Uthman admitted being captured 'in late 2001 in the general vicinity of Tora Bora' . . . ."[10]

Linzer's article went on to quote law professors who decried the actions of both the *soi-disant* Justice Department and Judge Kennedy, the latter stuck between the proverbial rock and a hard place.[11] Most pertinent for my purposes, New York University School of Law Professor Stephen Gillers fulminated against Kennedy's "'participat[ion] in the creation of a parallel universe that fools everyone except a small circle of judges' [and stated] 'We don't allow the justice system to create false impressions.'"[12]

There is more that could be said beyond the context of this Article about *l'affaire Uthman v. Obama.* In context, its gravamen is a combination of "so much for the separation of powers"; when it comes to the realization of the *garantiste* function of constitutionalism, legal subjects are critical; and material practices *matter.* More particularly, Professor Gillers is wrong about the exceptionalism of judicial manipulation of the *corpus juris* in the interests of creating false impressions, and worse, in enabling and covering up manifest injustice.[13]

Not only have secret dockets[14] and secret opinions,[15] like secret prisons,[16] been a fact of life in post-9/11 United States "law," but, as I have documented in a series of articles published since 2004 that focus on adjudicatory practices in the federal courts of appeals,[17] secret dockets and secret opinions are symptomatic of practices across the nation in both (what I will ironically call) trial "courts of record," state and federal, and state appellate courts. Since the mid-twentieth century, a pernicious variant of secret judging has become the national norm rather than the exception,[18] rendering, withdrawing, and replacing opinions under the

9. *Id.* at *2.

10. *Id.*

11. *See id.*

12. *Id.*

13. *See generally* Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955 (2009) [hereinafter Pether, *Solipsism*]; Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) [hereinafter Pether, *Scandal*]; Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007) [hereinafter Pether, *Sorcerers*]; Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of* Hart v. Massanari, 62 WASH. & LEE L. REV. 1553 (2005) [hereinafter Pether, *Take a Letter*].

14. *See, e.g.*, Penelope Pether, *Regarding the Miller Girls: Daisy, Judith, and the Seeming Paradox of In re* Grand Jury Subpoena, Judith Miller, 19 LAW & LITERATURE 187, 190 (2007).

15. *See, e.g.*, Pether, *Solipsism, supra* note 13, at 1035.

16. *See, e.g.*, Scott Horton, *Inside the Salt Pit*, HARPER'S MAG. (Mar. 29, 2010, 12:44 PM), http://harpers.org/blog/2010/03/inside-the-salt-pit/.

17. *See generally supra* note 13.

18. *See generally id.*

influence of powerful repeat-player parties and in the interests of manipulating the *corpus juris* common,[19] frequently flouting statutes, prescribing accountability owed by judges to litigants,[20] and hiding what the courts do from the public—and why they do it—an institutional way of life.[21]

The aspect of those practices that particularly concerns me in this Article is the fact that at some point in the years between 1960 and 2001, likely as a matter of form and not just of practice until the mid-1970s, the United States doctrine of precedent underwent a radical change. Courts across the country, including the United States federal courts of appeals, the focus of this Article, declared that some of their opinions would be *published*, which eventually came to mean *precedential*, and others would not. In the federal circuit courts, that unpublished group—most of which are currently formally nonprecedential—has swollen such that it approached 88% of the "merits" decisions in federal appeals in 2013, and it is rising.[22] It is also uneven.[23] The Fourth Circuit, where this binary national doctrine of precedent was first established de facto,[24] has the highest percentage of unpublished opinions.[25] In 2010, when the national nonpublication figure hovered under 85%, 93% of the Fourth Circuit's opinions were unpublished.[26]

Despite the 2006 passage of Federal Rule of Appellate Procedure 32.1, which prospectively ended the citation bans that had grown up alongside and applied to unpublished opinions and helped maintain nonprecedential status of the latter, the question of the precedential status of unpublished opinions, likewise an artifact of the division of the *corpus juris* into published and unpublished opinions, remains contested. Two circuits presently provide that they are precedential, one maintains a position of ambiguity on the question, one inferentially indicates that they are not,

19. *See, e.g.*, Pether, *Scandal*, *supra* note 13, at 1474–83.

20. *See, e.g.*, Pether, *Solipsism*, *supra* note 13, at 1016–17.

21. *See, e.g.*, Pether, *Take a Letter*, *supra* note 13, at 1587–89.

22. *Compare* JAMES D. BATES, ADMIN. OFF. U.S. COURTS, TABLE S-3 U.S. COURTS OF APPEALS—TYPES OF OPINIONSOR ORDERS FILED IN CASESTERMINATED ON THE MERITS AFTER ORAL HEARINGS OR SUBMISSION ON BRIEFS DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2013, U.S. CTS. (2013), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S03Sep13.pdf (recording rate in year ending September 30, 2013 as 88.2%), *with* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 199–203 (2001) (noting that in ten years from 1990 to 2000, percentage increased from 68.4% to 79.8%).

23. The 2010 rates run from 62% for the D.C. Circuit to 93% for the Fourth Circuit. *See* JAMES C. DUFF, ADMIN. OFF. U.S. CTS., 2010 AO ANN. REP. 46 (2010), *available at* http://www.uscourts.gov/statistics-reports/annual-report-2010. The Fourth Circuit, in 2013, remains the highest at 93.9%. *See* Bates, *supra* note 22.

24. *See* Pether, *Scandal*, *supra* note 13, at 1437 n.7.

25. *See* BATES, *supra* note 22.

26. *See* DUFF, *supra* note 23, at 46.

and nine make the nonprecedential status of unpublished opinions manifest by rule.[27]

Towards the end of the 1960–2001 period, judicial accounts of the genre of the precedential opinion developed from rationalization to theory, albeit theory that strains credulity. Its judicial theorists came to represent them as ironclad, a bulwark against the reaches of interpretive change, and readily and rationally distinguishable from the artifacts of nonprecedential adjudication.[28]

While the binary system of precedent was (i) theorized by judges,[29] including those who were its architects;[30] (ii) trenchantly criticized by the practicing bar[31] and indeed by some senior members of the

27. *See* David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. App. Prac. & Process 19, 50–55, app. at 61–73 (2010). I differ from Cleveland on the characterization of the Fourth Circuit's rule, 4th Cir. R. 32.1, which inferentially treats unpublished opinions as nonprecedential by providing that they may be "citable if party believes that it has precedential value and that no published opinion serves as well." *See id.* app. at 64.

28. *See, e.g.*, Pether, *Take a Letter*, *supra* note 13, at 1586–87.

29. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

30. *See, e.g.*, Jones v. Va. State Farm, 465 F.2d 1091 (4th Cir. 1972).

31. *See, e.g.*, William T. Hangley, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002).

> The limited available information [ ] demonstrates—not surprisingly—that appellate judges are quite fallible in their decisions that a given case adds nothing to the body of law and is "not precedent." For some of these cases, indeed, it is impossible to accept the proposition that they were ever thought to be easy, redundant, and unimportant dispositions. Courts are declining to publish opinions that turn out to be the best authority in a given setting, then refusing to talk about them or permit their discussion [the latter problem was at least partly addressed by the passage of Fed. R. App. P. 32.1 in 2006]. For a court to blind itself, in advance, to the persuasive power of its own reasoning simply makes no sense.

Id. at 647; *id.* at 662 ("To a trial lawyer or a trial judge, a precedent is any earlier decision; it may be binding, merely persuasive or wholly unpersuasive but it is 'precedent' withal."); *id.* at 667 ("Although the circuit [nonprecedential status] rules may rationalize the nonbindingness of some opinions on the theory that they have nothing new to say, the inescapable fact, discussed throughout this Report, is that they often do break new legal ground.").

> It becomes even more radical [than telling lawyers and litigants before the passage of Fed. R. App. P. 32.1, prospectively forbidding circuits' existing citation bans on unpublished opinions that they "must foreswear eighty percent of the available reasoning" in opinions issued by the court before whom they litigate] when one considers the fact that these same circuits are willing to consider, as persuasive precedents, other courts' opinions that are just as nonbinding as their own. The thinking cannot be that all less-than-optimally vetted analyses are to be eschewed but, rather, that the rulemaking tribunal does not want to risk being embarrassed by one of *its* less-than-optimally vetted holdings.

Id. at 668 (footnote omitted).

bench;[32] and (iii) occasioned by judicial and scholarly debates about potential problems, including whether the practice of assigning nonprecedential status to judicial opinions violated the Constitution,[33] it passed effectively unnoticed by almost all the leading United States scholars of the doctrine of precedent.[34] It also occasioned scandalous injustice. That injustice was not merely that of the obvious stripe, which arises from a litigant being told that a court will not be bound by a previous decision in a case with facts and issues analogous or indeed *effectively identical* to her own.[35] Nor yet, in addition, is it exhausted by systematic anti-appellant and pro-appellee decisionmaking that causes unjustified losses, e.g., to (i) veterans litigating over their benefits;[36] (ii) prisoners directly and collaterally appealing their sentences and conditions of imprisonment;[37] (iii) social security claimants;[38] (iv) citizens suing over civil rights violations;[39] (v) those who are disabled;[40] (vi) gay, lesbian, bisexual, and trans-

> [T]he statement that the cases are "not precedent" does not make it so . . . . As a rule, judges are not very tolerant of speakers who fiddle with the meanings of words to suit their purposes. Judges love to quote Lewis Carroll characters, and they are particularly fond of pointing to Humpty Dumpty when chastising writers and speakers who, rather than bringing an act or thing within the meaning of a word, simply move the word's definition to suit the act or thing. But that is exactly what courts are doing when they presume to tell us that an opinion that might be highly persuasive in the real world is not persuasive in court because they have a rule that says so. They are saying that the court "is to be master." They are legislating the weather.

Id. at 680 (footnotes omitted); *see also* Lauren Robel, *The Practice of Precedent*: Anastasoff, *Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 405 (2002) [hereinafter Robel, *Practice of Precedent*] (summarizing response of attorneys to White Commission's surveys and registering that significant number of lawyers blamed inability to adequately predict appellate courts' decisions in their clients' cases on "the lack of circuit precedent on point or a lack of clarity in existing circuit precedent").

32. The late Judge Richard Arnold and former Judge Patricia Wald were chief among them.

33. *See, e.g.*, Pether, *Solipsism*, *supra* note 13.

34. A notable partial exception here is Dean Lauren Robel, who, in this context, is principally a scholar of nonpublication rules rather than of precedent. *See* Robel, *Practice of Precedent*, *supra* note 31, at 401–02; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) [hereinafter Robel, *Unpublished Opinions*].

35. *See* Hangley, *supra* note 31, at 680–84.

36. *See, e.g.*, Charles G. Mills, Anastasoff v. United States *and Appeals in Veterans' Cases*, 3 J. APP. PRAC. & PROCESS 419 (2001) (discussing role of nonpublication in court of appeals for federal circuit and United States Court of Appeals for Veterans Claims).

37. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 286 (1996); *see also* Pether, *Scandal*, *supra* note 13, at 1444–47.

38. *See* Richman & Reynolds, *supra* note 37, at 295.

39. *See id.*

40. *See* Robel, *Unpublished Opinions*, *supra* note 34, at 948.

gendered persons;[41] and other "have-nots"[42]—losses likely not justified by the merits of their cases, while at the same time granting government and large corporations a range of benefits not confined to disproportionate wins on appeal.[43]

Additionally, the United States' binary system of precedent sees its proponents on the bench making public claims for its rationality and efficiency in manifest bad faith. One confessed reason why judges issue nonprecedential opinions is because "the judges cannot reach agreement on the legal rules governing the case or to avoid extensive treatment of issues that may be politically sensitive or controversial."[44] The predominant reason, however, is traceable to judicial self-interest of a different stripe. It has been revealed—in evidence collected from circuit judges in both a Federal Judicial Center study and an inquiry conducted by the Federal Judicial Conference's Advisory Committee on Appellate Rules—with candor at once breathtaking and appalling,[45] that the ex ante stripping of precedential authority from the vast majority of judicial opinions issued at the conclusion of appeals as of statutory right or applications for certification for leave to appeal to the federal appellate courts—and the decisions they memorialize and sometimes explicate or justify[46]—is necessary be-

41. *See, e.g.*, Diane Adams-Strickland, *Don't Quote Me: The Law of Judicial Communications in Federal Appellate Practice and the Constitutionality of Proposed Rule 32.1*, 14 COMMLAW CONSPECTUS 133, 141 n.59 (2005) ("Sometimes I suspect that courts are designating certain opinions [on "lesbian, gay, bisexual and transgendered legal issues"] as unpublished [and thus usually nonprecedential] because they find them embarrassing, either due to the rulings they are rendering that are patently unfair, or because the facts they are reciting in the opinion upset the judges . . . ." (quoting Arthur S. Leonard, Letters to the Editor, NAT'L L.J., July 15, 2002, at A21) (internal quotation marks omitted)); Pether, *Scandal*, *supra* note 13, at 1486 n.287, 1486–87, 1537–38 (documenting evidence of state courts using nonprecedential opinions to strip adoptions by gays and lesbians of precedential value); *see also* Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175, 198 (2000) (suggesting that Fourth Circuit issued nonprecedential opinion in *Johnson v. Knable* because it treats gays favorably (citing Johnson v. Knable, 862 F.2d 314 (4th Cir. 1988) (unpublished opinion) (suggesting that inmate's equal protection rights might be violated due to him being denied prison work assignment on basis of his homosexuality))); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 110 (1995) (same).

42. See Pether, *Solipsism*, *supra* note 13, at 957 (using phrase "have-nots"); Robel, *Unpublished Opinions*, *supra* note 34 (discussing, e.g., immigration issues).

43. *See* Richman & Reynolds, *supra* note 37, at 295 ("A court is far less likely to hear oral argument or issue a published opinion in a social security or civil rights case, a prisoner petition, or the like than it is to hear argument or publish an opinion in an 'important' securities or antitrust case.").

44. *See* David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 437 (2010).

45. *See, e.g.*, 5 U.S.C. § 7703 (2012).

46. The distinction here is between (i) unpublished opinions that consist of the single word "Reversed," or "Affirmed"; (ii) those that contain reasoning; and (iii) those that give a result that purports to be accompanied by reasoning, but which is so circular and uninformative as to merely constitute justification. *See*

cause they are neither written nor actually made by the judges whose names they bear.[47]

Rather, they are the work product of junior court staff whose competence the judges mistrust,[48] and whose work the judiciary effectively admits it does not adequately supervise.[49] As one of the two leading contemporary judicial theorists of the United States system of precedent put it:

> Any nuances in language [in nonprecedential opinions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.[50]

The binary system of precedent[51] is not merely influenced by circuit judges, anxious not to dilute the eliteness of their office,[52] attempting to cover not just the fact that they delegate much of their work to junior court staff,[53] but also their belief that those staff lack the capacity to do it

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Pether, *Sorcerers*, *supra* note 13, at 16 (citing ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS app. A at 65–66 (2005) [hereinafter FJC REPORT] (quoting Judge J2-1), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/$file/citatio3.pdf).

47. *See, e.g.*, Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1266 (1996) [hereinafter Tobias, *New Certiorari*].

48. Dean Robel notes that as early as 1990, high percentages of federal judges conceded that they were not writing published opinions in many cases where formal publication criteria provided that they should be written. *See* Robel, *Practice of Precedent*, *supra* note 31, at 403; *see also* THOMAS E. BAKER, JUSTICE RESEARCH INST., RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 21–27, 106–50 (1994).

49. *See* Pether, *Sorcerers*, *supra* note 13, at 16 n.82; *see also* FJC REPORT, *supra* note 46, app. A at 66; *id.* at 72 ("We are already laboring under a back-breaking caseload. The immigration caseload continues to expand. Having to spend more time reading and researching cases when the caseload is already extremely heavy would create an additional burden on chambers."(quoting Judge J9-9)).

50. Letter from Judge Alex Kozinski, United States Court of Appeals for the Ninth Circuit, to Honorable Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 7 (Jan. 16, 2004), *available at* http://www.nonpublication.com/kozinskiletter.pdf [hereinafter Kozinski, Letter to Alito].

51. Nonprecedential opinions take three forms: (i) those which give reasons for the court's decision that make them virtually indistinguishable from precedential opinions, except to the extent that they may be, in some jurisdictions, characteristically briefer; (ii) short opinions with circular reasoning, essentially saying "we affirm the trial court's decision because the appellant doesn't fit within the relevant rule"; and (iii) the so-called AWOPs (Affirmed Without Opinion), or one-word opinions reversing the court below.

52. *See, e.g.*, J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1167–69 (1994).

53. *See* FJC REPORT, *supra* note 46, app. A at 72.

safely.[54] It also frequently means that citizens are in fact denied the rights of appeal the elected legislature has granted them. As a substitute for genuine appellate review by an Article III judge, they receive perfunctory processing by court staff,[55] which often amounts to a shoddy de facto certiorari procedure rather than an appeal as of right.[56]

As one prominent federal appellate judge has recently put it, "assembly-line justice" has made it impossible for judges to carefully consider every case on appeal.[57] Rather, for example, on the Ninth Circuit, half of the cases, or approximately 6,000 appeals annually, "are disposed of" after being "sift[ed] through" by "[m]otions attorneys"—a further 2,000 given "four to nine minutes" of judicial time.[58] The "appellate ideal, . . . consist[ing] of disposition on the merits of every case after briefing, argument, and consultation among three circuit judges, who publish an opinion which fully explicates the result[,]" has thus become a legal fiction (whose fictionality is apparent to those in the know, but generally not to appellants), except for that small proportion of cases that federal courts of appeals judges find interesting enough to get actual judicial attention.[59] For uninteresting appellants (those "with few resources or little power"), the belief—evidenced by the fact of their appellate filings—that they have appeals as of right to the federal appellate *judiciary* is the equivalent of belief in the existence of unicorns.[60]

This Article generates a critical history of the binary United States doctrine of precedent as it has developed since the mid-twentieth century, which history supplements a body of scholarly work that largely (i) fails to account for the doctrine of precedent we actually have and instead (ii) theorizes a practice that has long since ceased to exist herein the United States, and indeed probably never existed at all.[61]

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54. *See id.* at 74.

55. *See, e.g.*, Stras & Pettigrew, *supra* note 44, at 423 (noting that "an increase in the number of law clerks and staff attorneys" is a "systemic change[ ]" used by federal courts "to accommodate the rising [federal appellate] caseload"). They saw this increase and change apparent in the Fourth Circuit, the subject of their study. *See id.*

56. Judge O'Scannlain has argued that the circuit courts should "adopt a discretionary certiorari-like system to dispose of social security disability claims, those immigration cases that have already had two levels of administrative review, and possibly the simplest lawsuits challenging agency action." Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 480 (2009). This argument has been made elsewhere. *See also, e.g.*, Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981).

57. *See* O'Scannlain, *supra* note 56, at 476 (internal quotation marks omitted).

58. *Id.*

59. *See* Carl Tobias, *Fourth Circuit Publication Practices*, 62 WASH. & LEE L. REV. 1733, 1737 (2005) [hereinafter Tobias, *Fourth Circuit Publication*].

60. *See* Tobias, *New Certiorari*, *supra* note 47, at 1264; *see also id.* at 1269 n.25, 1270 (adducing other sources evidencing emergence of binary system of federal appellate justice).

61. *See* Pether, *Scandal*, *supra* note 13, at 1438 n.8.

In Part II, I explore the emergence of the binary system of precedent in the United States in the mid-twentieth century. In Part III, I document judicial justifications for and critiques of the binary system of precedent. Part IV draws on the leading contemporary judicial theorizing of the binary doctrine of precedent and its chief judicial critic. In Part V, I evaluate the binary practice of precedent against the work of leading normative contemporary United States scholars of the doctrine of precedent and then explore early traces in scholarship on precedent in the United States that shed light, often obliquely, on the emergence of the United States' distinctive binary doctrine of precedent. Finally, I read the history of the emergence of the representative artifact of the binary doctrine of precedent, federal court nonprecedential status rules, against its constitutional context. Part VI documents the emergence of a discourse of "precedent fear" in United States scholarly writing and returns to the constitutional contexts in which both this discourse and the binary doctrine of precedent emerged. In the conclusion, I turn to Peter Goodrich's *Reading the Law*[62] and highlight the historical ambivalence toward equality reflected nowadays in a federal judiciary that has failed, in the words of Dr. Martin Luther King, Jr., to "[b]e true to what you said on paper."[63]

II. Ground Zero

"At the time that it was published, the *Corpus Iuris* was already outdated and alien to the society and legal system to which it applied. It is in many ways a defining paradox of the most significant codification within the history of western law that large portions of it never represented the law actually in force, that its purposes were from the very beginning as much political and symbolic as they were in any sense distinctively practical or strictly legal."[64]

In 1962, the United States Court of Appeals for the Fourth Circuit began to treat an identified group of its opinions as formally—although by practice, memorialized in precedent, rather than, as is now the case, by court rule[65]—nonprecedential,[66] claiming that it was "reasonable to refuse to treat them as precedent within the meaning of the rule of stare

62. Peter Goodrich, Reading the Law: A Critical Introduction to Legal Method and Techniques (1986) [hereinafter Goodrich, Reading the Law].

63. *See* Dr. Martin Luther King, Jr., Speech at Mason Temple, Memphis, Tenn.: I've Been to the Mountaintop (Apr. 3, 1968) (internal quotation marks omitted), transcript *available at* http:///www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm.

64. *See* Goodrich, Reading the Law, *supra* note 62, at 96–97.

65. *See* Fed. R. App. P. 32.1.

66. *See* Jones v. Va. State Farm, 465 F.2d 1091, 1094 (4th Cir. 1972) (*Jones II*). For a detailed critical account of the decision, see Pether, *Scandal*, *supra* note 13, at 1445–64.

decisis," while paradoxically opining that "any decision is by definition a precedent . . . ."[67]

This ex post facto account of the emergence of what now amounts to something approaching 88% of the textualized adjudicatory output of the United States courts of appeals as "not precedent" was, either presciently or inevitably, accompanied by an admission of the inferior quality of the adjudicatory practices that produced it.[68] Additionally, and of salience to the conclusions of this Article, it was first articulated in a case where a prisoner sought to rely on an "unpublished"—although at that point in history not formally "nonprecedential"[69]—Fourth Circuit opinion that had found for another prisoner, rather than for the government, when that prisoner sought something critical to federal habeas corpus review of his conviction: the trial transcript.[70] The transcript was a textual field in the battle over criminal procedural due process rights during the Warren Court's "criminal procedural revolution," which attracted almost as much hostility to the Court as did that Court's civil rights revolution and was

67. *Jones II*, 465 F.2d at 1094. In 1975, the Hruska Commission conceded, referring specifically to citation bans, that (some) members of both bench and bar "consider it undesirable and indeed improper for a court to deny a litigant the right to refer to action previously taken by the court." *See* Roman L. Hruska et al., *Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 259 (1975).

68. *See* Pether, *Scandal*, *supra* note 13, at 1458 (discussing *Jones II*, 465 F.2d at 1093). Today, the inferiority is often indicated by the quality of the adjudicatory text, which often gives meaningless or circular reasons for judgment.

69. *See Jones II*, 465 F.2d at 1094. There is no discussion of assigning nonprecedential status to the court's "memorandum decisions" in the extracts from the 1968 Haynsworth Report appended to the *Jones II* opinion, and, although I have not been able to procure the original report in its entirety, it does not contextually seem to entail the development of nonprecedential status rules, but merely the replacement of court-appointed lawyers and hearings of post-conviction appeals by staff attorney screenings to protect the judges from the "burden" that those appeals had come to constitute in the years between 1957 and 1962. *See id.* at 1095. This "replacement" later developed into staff attorney "representation" of prisoners and assisting the judges in the summary adjudication of their "clients'" appeals and expanded beyond "frivolous" appeals into those "which clearly required reversal." *See id.* It is worth noting here that while collateral criminal and prison conditions suits are more or less uniformly dismissed by judges as "frivolous," this is reflected in the domestic context by Senator Orrin Hatch in uncannily similar ways to those used by Senator Lindsay Graham to criticize the application of habeas at Guantánamo. *Compare* 141 CONG. REC. 7479 (1995) (statement of Sen. Orrin Hatch), *with* 153 CONG. REC. 2749 (2007) (statement of Sen. Lindsay Graham). Further, it is inferentially clear from *Jones II* that the innovation of nonprecedential status in that case was a way out of the embarrassment of refusing to follow an earlier decision of a different panel of the same court, given that, on the primary appeal and on the petition for rehearing, Jones was represented by (well-connected and well-credentialed) counsel, Professor William A. Reppy, Jr. of Duke University Law School, a former Supreme Court clerk. Professor Reppy sought to appeal *Jones II* to the Supreme Court, but certiorari was denied.

70. *See Jones II*, 465 F.2d at 1092.

explicitly connected to it in the criminal procedure cases in which the modern doctrine of Incorporation developed.[71]

This factual and legal context of the case that inaugurates the binary system of precedent is of relevance to the intertextual connections this Article makes between the documentary history of the scholarly theorizing of precedent, on the one hand, and that of the emergence of a binary system of precedent that accompanied it in a species of parallel discursive universe, on the other. Reading these parallel histories against each other, as I will argue, shows how battles over the reallocation of social and economic resources (which *Brown v. Board of Education*,[72] looking back to *Lochner v. New York*[73] and forward to the reproductive rights cases—*Roe v. Wade*[74] and its progeny, the most obviously particular is *Planned Parenthood v. Casey*[75])—which, at once symbolized and portended, and lay at the heart of the emergence of the contemporary United States doctrine of precedent.

There is evidence suggesting it was not only the prisoner appeals the Fourth Circuit explicitly cites as the goad for its development of the binary system of precedent, but also the civil rights appeals that moved circuit judges to develop it.[76] There is also, in those parts of the contemporary United States scholarly literature on the doctrine authored by positivists, a discourse of "precedent fear," an anxiety about being bound to a spectral—and different—vision of the national future. This anxiety is reflected in the judicial discourse on appeals by "have-nots" that justifies the differential treatment of their appeals from the moment of that discourse's institutional inception until the present.[77] For example, an attitude of disdain towards the comparatively poor and powerless characterizes the most troubling of the responses of circuit judges cited in the Federal Judicial Center's 2005 report, *Citing Unpublished Opinions in*

71. *See* Pether, *Scandal*, *supra* note 13, at 1448–49 (exploring part of aforementioned jurisprudential revolution of most salience to this Article); *see also* Wilkinson, *supra* note 52, at 1155.

72. 347 U.S. 483 (1954).

73. 198 U.S. 45 (1905).

74. 410 U.S. 113 (1973).

75. 505 U.S. 833 (1992).

76. *See* Audio tape: What Is "Authority?", Panel Presentation, held by the Association of American Law Schools (Jan. 3–6, 2001) [hereinafter McKeown Presentation] (remarks of Judge Margaret McKeown, United States Court of Appeals for the Ninth Circuit) (on file with author) (estimating that 79% of opinions of federal courts of appeals are unpublished); *see also* Wilkinson, *supra* note 52, at 1158–59 (flagging prisoner habeas and § 1983 Civil Rights Act claims, social security disability claims, civil rights actions arising from access to public accommodations and employment as among leading causes of increases in federal appellate caseload and characterizing such as "relatively straightforward cases" since 1950s).

77. *See* Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1026 (1994) (calling it "imposition language" (internal quotation marks omitted)).

Federal Appeals.[78] Such responses include this, from a judge on the Second Circuit, on his court's legislated adjudicatory obligations to hear and determine appeals made by some of the judge's fellow government employees:

> Many of our non-precedential opinions are in pro se appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made. Allowing citation of these decisions would . . . suggest that the court has reached considered decisions on particular issues when in fact that is often not true.[79]

The contours of this unselfconscious hybrid of hierarchy and contempt, dating from 2005, also appear decades earlier, and, as I will go on to suggest, have both an adjudicatory and academic jurisprudential prehistory and much deeper and distinctively American constitutional roots.

The *Jones v. Va. State Farm*[80] (*Jones I*) appeal was brought in the early 1970s by a Virginia state prisoner who had been incarcerated since his conviction in 1952, in what must have looked like a timely attempt to secure a free transcript in order to prosecute a federal habeas action.[81] As irony would have it—or not, given the judicial attitudes unselfconsciously revealed by the Fourth Circuit in its opinion responding to Jones's appeal—the request was met with one or more of the following: (i) an entrepreneurial anti-postconviction-appellant and anti-Warren Court doctrinal innovation, which went against the grain of the criminal procedural revolution;[82] (ii) adjudicatory incompetence of the most basic kind, which either did not know, or could not, or did not bother to find out, what law judges—or whoever is doing the work nominally ascribed to judges—on its own court were making; or (iii) what might politely be called disingenuousness.[83]

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78. *See* FJC REPORT, *supra* note 46, at 75.

79. *Id.* (quoting JF-2).

80. 460 F.2d 150 (4th Cir.) (*Jones I*), *adhered to on reh'g*, 465 F.2d 1091, 1094 (4th Cir. 1972).

81. *Compare id.*, *with* Mayer v. City of Chicago, 404 U.S. 189 (1971) (granting indigent prisoners right to transcript or its functional equivalent in all criminal cases), *and* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that states must furnish indigent defendants with free trial transcript or its equivalent if necessary for adequate and effective appellate review of their convictions).

82. *See* Pether, *Scandal*, *supra* note 13, at 1448; *see also* Thomas Y. Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372, 374 (1981) (giving account of widespread judicial (and scholarly) view that "the Warren Court's due process decisions [gave] indigent criminal appellants a 'free ride' on appeal—[ ] creating incentives to appeal which are not balanced off by any costs or disincentives").

83. *See* Pether, *Scandal*, *supra* note 13, at 1450–65 (providing detailed critique of Fourth Circuit's sequence of decisions and their reasoning, which, inter alia,

Announcing that unpublished opinions were also nonprecedential, the panel claimed that it had, in its earlier opinion in the same matter, "deliberately failed to mention" a recent Fourth Circuit decision which had held a plaintiff—situated, for legitimate precedential purposes, apparently identically to Mr. Jones—was entitled to a transcript for the same purposes Jones sought it.[84] It also claimed that its earlier decision in *Jones I* was "of course, irreconcilable" with that decision, the decision *Jones I* had not mentioned, and that the first decision had been, silently and without trace, "effectively overruled" by *Jones II*.[85] The panel went on to declare that henceforth:

> [W]e will not ourselves in published opinions cite or refer to [unpublished opinions of this court]. But although unmentioned, it should be clearly understood by the bench and bar that any prior [unpublished opinion] in conflict with a subsequently published opinion is to be considered overruled.[86]

Its reason was that:

> We believe that our screening procedures and disposition by unreported memorandum decisions accords with due process and our duty as Article 3 judges, but we confess its imperfection. We concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done. But because memorandum decisions are not prepared with the assistance of the bar, we think it reasonable to refuse to treat them as precedent within the meaning of the rule of stare decisis. We prefer that they not be cited to us for an additional reason: since they are unpublished and generally unavailable to the bar, access to them is unequal and depends upon chance rather than research.[87]

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covers complete misreading of Supreme Court authority in *Knight v. Coiner* by suggesting it was neither "carefully reasoned," nor "fully expostulated" (internal quotation marks omitted)). In *Jones II*, the court also makes evident that at least one reason why it should not treat unpublished opinions as precedent is because they are not judicial work product. *See id.* at 1452. Another evident possibility is that the *Jones II* panel, alerted by Professor Reppy to the existence of the apparent precedent that favored his client's position, simply disapproved of the precedent as an ideological matter of the outcome or because they thought the law it apparently made (until the same circuit that issued it said it didn't) was nakedly instrumentalist in a direction that Chief Judge Haynsworth and Judges Craven and Field were not prepared to go. This possibility is supported by the entrepreneurially anti-inmate law the *Jones I* court—which was comprised of the same three circuit judges who decided *Jones II*—made.

84. *Compare Jones II*, 465 F.2d at 1092–94 (citing Knight v. Coiner, No. 14,940 (4th Cir. Feb. 11, 1971)), *with id.* at 1093.

85. *See id.* at 1093.

86. *Id.* at 1094.

87. *Id.* Memorandum decisions were not prepared with the assistance of the bar because the initial group of affected appellants was indigent prison inmates,

That earlier, unpublished Fourth Circuit opinion on which Mr. Jones had sought to rely held that, in certain circumstances, the Commonwealth of Virginia had a "constitutional obligation" to provide indigent prisoners trial transcripts for the purposes of their pursuing collateral appeals without their making a showing of "need" for the free transcript.[88] At first instance, Judge Robert Merhige—the Fourth Circuit's (lone) federal district court judicial equivalent of Judges Frank M. Johnson Jr. and J. Skelly Wright, who were the district court fellow travellers of the "unlikely heroes" of the Fifth Circuit who applied the equitable injunction to implement *Brown*'s desegregation mandate[89]—ordered that Virginia produce Jones's record, both from his trial and from subsequent state habeas proceedings.[90] When Virginia appealed, the Fourth Circuit reversed Judge Merhige's opinion.[91]

It is worth underscoring at this point that while practices imbricated with the binary system of precedent first articulated in *Jones II*—such as (i) ceasing to appoint lawyers to represent indigent prisoners; (ii) the diversion of classes of cases that irked the Fourth Circuit bench to "the screening track";[92] (iii) their processing in the absence of oral argument by specially-appointed junior court staff, at this time and in this place called "habeas clerks";[93] and (iv) their disposition by means of a "memorandum order,"[94] that is, what later came to be rationalized as an unpublished opinion—emerged in the Fourth Circuit in 1962; 1972 marks the date that the Fourth Circuit first explicitly treated them as nonprecedential.[95] As

and the court had ceased its earlier practice of having court-appointed lawyers represent them.

88. *See id.* at 1092.

89. *See* Pether, *Scandal*, *supra* note 13, at 1440–41 (internal quotation marks omitted) (citing JACK BASS, UNLIKELY HEROES 17 (1981)); *see also id.* 1449 n.61 ("recording that the 'unlikely heroes' of the Fifth Circuit Court of Appeals supported District Judge Skelly Wright in desegregating the New Orleans schools in the face of an attempt to close the schools to circumvent *Brown*, acting with even greater resolve in the St. Helena parish desegregation case, in resolving the Birmingham schools 'crisis,' and in desegregating schools in Savannah and Mobile" (citing BASS, *supra*, at 125–35, 221–30)).

90. The district court opinion in the case is not available, and it appears from *Jones I* that Judge Merhige "requested" rather than "ordered" the production of transcript, or so the Fourth Circuit opined in characterizing Judge Merhige as "improvidently treat[ing] th[e] petition as one for habeas corpus," because he was anxious that an "order" would "amount to unwarranted interference in state court prosecutions or litigation . . . ." *See Jones I*, 460 F.2d at 152 & n.3.

91. *See id.* at 153.

92. Instead of their being treated like all other appeals and, where necessary, having court-appointed counsel representing the litigants who brought them.

93. *See* Pether, *Scandal*, *supra* note 13, at 1460–63; Pether, *Sorcerers*, *supra* note 13, at 45–46.

94. *See Jones II*, 465 F.2d at 1095.

95. *See id.* Some literature inaccurately identifies the Fifth Circuit as the source of screening to the "nonargument track," including, for example, the recent publicity document produced by the Administrative Office of the United States Courts, cited herein, which attempts to justify the proliferation of staff attor-

well it might, faced with justifying—to Mr. Jones and his counsel, Duke Law Professor and former Supreme Court clerk William Reppy—a decision that "apparent[ly] disregard[ed] [ ] precedent" it had previously established.[96]

Official accounts of the emergence of unpublished opinions source them to a rational and systematic law reform process generated by the Federal Judicial Conference, initially in 1964, when it recommended that federal courts publish only those opinions "of general precedential value,"[97] and then given more momentum after 1973, when it asked all courts to adopt publication plans.[98] However, parallel institutional initiatives reveal a great deal of anxiety about imposing nonprecedential status on unpublished opinions by fiat, initially recommending against including a nonprecedential status provision in the model selective publication rule.[99] More recently, in debates over mandating the prospective cessa-

neys. *See supra* notes 22 & 23. Though this literature is only modestly informative insofar as it accounts for the work staff attorneys actually do—the screening of pro se prisoner cases constituted the initial focus of staff attorney offices when they were formally authorized and established by Congress in 1982. *See* Pether, *Scandal*, *supra* note 13, at 1449 n.62. Despite the inference that the institution of the staff attorney emerged in the Fifth Circuit, the Fourth Circuit's own account makes it clear that they inaugurated the office in 1962. *See id.* at 1449 ("Chief Judge Haynsworth's account is that between 1956/1957 and 1962, the pressure of postconviction appeals became so heavy on the Fourth Circuit that it conceived its doubled institutional practice of ceasing to provide prisoners appealing convictions with independent legal representation and 'unpublishing' the majority of the decisions emerging from these circumscribed appeals."). David Stras and Shaun Pettigrew's (unsupported) claim that "[t]he staff attorney position was created in 1973 to accommodate rising caseloads," is likewise incorrect. *See* Stras & Pettigrew, *supra* note 44, at 443; *see also* ADMIN. OFFICE OF THE U.S. COURTS, STAFF ATTORNEY OFFICES HELP MANAGE RISING CASELOADS (2004), *available at* https://web.archive.org/web/20040311204032/http://www.uscourts.gov/newsroom/stffattys.htm.

> Central legal staffs on the federal appellate level had evolved during the 1970s, however. In 1973, the Fifth Circuit was the first to receive separate funding to hire staff law clerks, as distinct from judges' law clerks—or "elbow clerks" as they are sometimes called. The U.S. Court of Appeals for the Ninth Circuit followed in 1974, and by 1980 there were 117 staff attorneys working for the various appellate courts.

Id.

96. *See Jones II*, 465 F.2d at 1092.

97. *See* Pether, *Scandal*, *supra* note 13, at 1437 n.7 (internal quotation marks omitted).

98. *See id.* at 1437 n.6, 1443; *see also id.* at 1443–44 (discussing conflict surrounding implementation in 1974 or 1976); Pether, *Solipsism*, *supra* note 13, at 970.

Dean Robel suggests that the 1975 Hruska Commission cited the "proliferation of precedent" when it recommended citation and publication restrictions, which would obviate the need for judges to "polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution." *See* Robel, *Practice of Precedent*, *supra* note 31, at 402–03 & n.11 (internal quotation marks omitted); *see also* Hruska et al., *supra* note 67, at 257.

99. Advisory Council on Appellate Justice et al., *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice* 20 (Fed. Judicial Ctr. Research Series No. 73-2 & State Courts Work-in-Progress Series Publ'n No. NCSC W0004 Aug. 1973) [herein-

tion of citation bans that were long a feature of the regime of unpublished opinions, senior judicial law reformers carefully skirted the issue of the doubtful constitutionality of by-then common nonprecedential status rules.[100]

Adding to the contextual relevance of Mr. Jones's appeal for my purposes here was that the earlier unpublished decision granting an inmate access to the transcript the inmate sought to rely on, although appearing under the virtual signature of a judge or panel, was, so *Jones II* inferentially suggests, in fact written by a staff attorney who got the law wrong.[101] And the sequence of decisions exemplifies in the most basic of ways how the binary system of precedent does injustice.

That opinion, *Knight v. Coiner*, so the *Jones II* court said, had held that "there is a constitutional obligation on the states to furnish free to indigents trial transcripts for purposes of collateral attack absent a showing of need. . . . at least where a transcript was in existence and possessed by the state or by petitioner's attorney."[102] While labeling *Knight* as "whether right or wrong, [ ] not [ ] carefully reasoned or fully expostulated," *Jones II* in fact considerably overstates *Knight*'s pro-prisoner holding, claiming that it is authority for the now rejected proposition that what is involved here "is a *constitutional obligation*."[103]

However, although *Knight* was based on a significant misstatement of the Supreme Court precedent it cited, it actually granted the appellant's certificate of probable cause to appeal a federal district court order dismissing his federal habeas petition and remanded the matter to the district court.[104] The reason for the grant of the certificate of probable

after *Standards for Publication*], *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/33 (calling inclusion of such rule inadvisable because of risk of leading Committee into "morass of jurisprudence").

100. *See* Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure 30 (May 22, 2003), *available at* http://www.nonpublication.com/newrule32.htm (noting that Federal Rule of Appellate Procedure 32.1 "takes no position on whether refusing to treat an 'unpublished' opinion as binding precedent is constitutional").

101. *See generally* Pether, *Scandal*, *supra* note 13, at 1446–47. The court in *Jones II* admits *Knight* was "not [ ] carefully reasoned or fully expostulated . . . ." *Jones II*, 465 F.2d at 1093. One can read this admission in tandem with the appendices to *Jones II*, which reference the court's growing reliance on "very able young lawyers." *See id.* at 1095. The reasonable inference being that a court compelled to address these new practices, by way of an explanation for *Knight*'s shortcoming, suggests a causal connection between the two.

102. *Jones II*, 465 F.2d at 1092 (describing *Knight*, No. 14,940 (4th Cir. Feb. 11, 1971)).

103. *See id.* at 1092, 1093 (emphasis added).

104. *See* Pether, *Scandal*, *supra* note 13, at 1453–55. The *Knight* court wrongly read *Wade v. Wilson*, which refrained from establishing a constitutional right to a transcript where a prisoner had previously succeeded in borrowing a copy, as authority for the proposition that "[w]here a transcript exists, the Supreme Court and this Circuit [in an unpublished opinion which has disappeared from the public record] have required that judicial action be taken to aid the prisoner in acquir-

cause, the procedural predicate to an appeal, was that Knight was denied equal protection by being refused a free copy of his trial transcript by West Virginia state courts, in the main because a transcript was in existence.[105] And rather than articulating a *right* to the transcript, as the *Jones II* court claimed, *Knight* opined that "the Supreme Court has 'required that judicial action be taken to aid the prisoner in acquiring the transcript' where one exists."[106]

The crowning irony in this saga of untrustworthy adduction and reactionary exaggeration of precedent, going hand in hand with the abolition of precedential value of federal appellate court decisions by judicial fiat, is that in *Jones I*, the Fourth Circuit had developed then-current Supreme Court doctrine on the provision of transcript against its grain. Making the rhetorical appearance of *extending* Supreme Court precedent, which it cited as authority for the proposition that "when a need for a transcript in order to collaterally attack a conviction is shown, equal protection and due process require the state to furnish an indigent prisoner such transcript without charge," it actually *limited* it, deploying in *Jones II* what it called "a proper corollary of that proposition . . . ."[107] That "corollary" emptied the precedent of meaning: "[T]he state may constitutionally decline to furnish an indigent with a transcript until a need for it is shown, even though the transcript is already in existence."[108]

The practice of an issuing court determining that its own precedents lack precedential value, and thus that factually similar cases may be decided differently, is also contextually of interest to the scholar of United States constitutional precedent. This is because, while developed under the leadership of Simon Sobeloff during his tenure as the Fourth Circuit's Chief Judge, the practice was first documented in 1962 by his successor,

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ing the transcript . . . ." *Id.* at 1455 & n.93 (first alteration in original) (quoting *Knight*, No. 14,940 at 3) (internal quotation marks omitted) (discussing disappeared, unpublished opinion); *see also* Wade v. Wilson, 396 U.S. 282 (1970). The Ninth Circuit, earlier in *Wade*, reversed a district court order that an indigent prisoner be provided with a free transcript in order to pursue habeas relief because "the logic of the Supreme Court holdings compels a finding that [a right to transcript in those circumstances] exists," holding that he had not established a ground of error, and opining that the prisoner could not "demand a transcript merely to enable him to comb the record in the hope of discovering some flaw." *See Wade*, 396 U.S. at 284–85 (quoting district court), *vacating* 390 F.2d 632 (9th Cir. 1968); *see also* Pether, *Scandal*, *supra* note 13, at 1452–55.

105. Which it indicated differentiated it from *United States v. Shoaf*. *See* Pether, *Scandal*, *supra* note 13, at 1455 n.92; *see also* United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

106. *See Jones II*, 465 F.2d at 1092 (quoting Wade v. Wilson, 396 U.S. 282, 286 (1970)).

107. *See Jones I*, 460 F.2d 150, 152 (4th Cir. 1972) (extending Supreme Court precedent rhetorically); *Jones II*, 465 F.2d at 1093 (limiting precedent in actuality).

108. *See Jones I*, 460 F.2d at 153.

then Chief Judge Clement Haynsworth, who, a year later, authored the Fourth Circuit's opinion in *Griffin v. Board of Supervisors*.[109]

These "unpublished" or nonprecedential opinions emerged from the "screening track" for processing appeals, now a contemporary national institution,[110] likewise developed by the Fourth Circuit.[111] When *Jones II* was decided, some ten years after the Fourth Circuit institutionalized unpublished opinions and the processing of the appeals of archetypical "have-nots" by junior court staff, those opinions disposed of a subset of appeals that had grown, between the immediate post-*Brown* period, 1956–1957 and 1962, to constitute a perceived "burden" on the circuit's

109. 322 F.2d 332 (4th Cir. 1963), *rev'd*, 377 U.S. 218 (1964). In *Griffin*, the Supreme Court protracted litigation over the closure of Prince Edward County public schools by holding that, before the federal court could rule on the legality of Prince Edward County's response to enforcement of *Brown* by closing all its schools and finding ways to support operation of whites' only private schools through tuition grants and tax credits, the Virginia Supreme Court of Appeals should rule on decision.

110. *See generally* ROGER A. HANSON, CAROL R. FLANGO & RANDALL M. HANSEN, NAT'L CTR. FOR STATE COURTS, THE WORK OF APPELLATE COURT LEGAL STAFF (2000), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/59; JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS (2000), *available at* https://bulk.resource.org/courts.gov/fjc/caseman1.pdf.

111. *Compare Jones II*, 465 F.2d at 1093 (attaching 1968 report by Fourth Circuit Chief Judge Clement Haynsworth to Federal Judicial Center detailing development since 1962 of screening procedures for pro se post-conviction prisoner appeals by former Fourth Circuit Chief Judge Simon Sobeloff), *with* HANSON ET AL., *supra* note 110, at 62 (2000) (stating without attribution that "[i]n 1951, the Court of Appeals for Veterans Claims began to use central staff attorneys, with most of the regional federal courts of appeal following suit in the mid seventies," while noting that "[c]entral staff attorneys were originally employed to help the courts process cases filed by unrepresented prisoners," and that "[i]n almost all courts, central staff attorneys perform a screening function, reviewing appeals as they become ready for the court's attention and routing them into an oral argument track or a non-argument track"). *See also* ROBERT A. LEFLAR, AM. BAR FOUND., INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS (1976); MCKENNA ET AL., *supra* note 110, at 8 (noting that "[a]t one time, screening meant diverting a case from the presumptive oral argument track to a nonargument track"); DANIEL J. MEADOR, NAT'L CTR. FOR STATE COURTS, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); ALVIN B. RUBIN & LAURA B. BARTELL, FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES (rev. ed. 1989); RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990); Rose Elizabeth Bird, *The Hidden Judiciary*, 17 JUDGES J. 4 (1978); David J. Brown, *Facing the Monster in the Judicial Closet: Rebutting a Presumption of Sloth*, 75 JUDICATURE 291, 291–93 (1992); James Duke Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 UCLA L. REV. 465 (1976); Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937 (1980); Charles H. Sheldon, *The Evolution of Law Clerking with the Washington Supreme Court: From "Elbow Clerks" to "Puisne Judges,"* 24 GONZ. L. REV. 45 (1988–89); Marianne Stecich, *Job Enrichment for Court Clerks*, 59 JUDICATURE 394 (1976); Mary Lou Stow & Harold J. Spaeth, *Centralized Research Staff: Is There a Monster in the Judicial Closet?*, 75 JUDICATURE 216, 217–21 (1992).

judges.[112] These disfavored appeals were regarded as "frivolous," and they comprised, at first, collateral or "habeas" appeals against criminal convictions and then others, also apparently brought pro se.[113]

Perceiving itself burdened by post-conviction criminal appeals in which there was "no merit," the court backed away from an earlier procedure of appointing lawyers to represent convicted prisoners in these appeals. It began to assign to junior, legally-qualified court staff, at first a young lawyer employed in the clerk of court's office (and later to a growing staff of "habeas clerks"), the difficult—some would say impossible—hybrid role of (i) screening "purely frivolous" appeals so they stayed off the court's hearing docket; (ii) preparing for summary adjudication those cases and those which "required reversal" of the lower court's judgment; and (iii) acting as "advocates for the appellants."[114]

By 2000, a Federal Judicial Center report observed that a frequent incident of staff "screening" of appeals was "staff attorneys [ ] recommend[ing] a decision on the merits of the case and draft[ing] an order or proposed opinion."[115] As court-staff decisionmaking and the unpublished opinion that silently memorialized it emerged as a pervasive adjudicatory practice and frequent norm, so too the binary system of precedent envisaged by the Fourth Circuit at the outset of screening and the issuing of formally unpublished opinions became institutionalized.[116]

III. *Per Incuriam*—Or Precedent, with Zombies

"A decision can only properly be labelled *per incuriam* where a binding rule of law which, if taken into account, would have materially affected

112. *See Jones II*, 465 F.2d at 1094.

113. *See id.* at 1094–96.

114. *See id.*

115. *See* McKenna et al., *supra* note 110, at 9 (noting that this occurred "in several courts"). The "screening and workup of nonargued cases" are among "major duties" of staff attorneys in circuit courts, and "[i]n general, central staff attorneys assist the courts of appeals by screening appeals and by preparing cases for disposition without oral argument"; later, they register that "[n]onargument decision-making practices are closely tied to the screening process," and that "[i]n most courts the central staff attorneys draft memoranda and proposed dispositions of some type," while "[a] few courts have the staff attorney prepare a neutral memorandum." *Id.* at 7, 12. Further:

> Most have the attorney draft an order that will (if adopted) dispose of the case and, if necessary, an opinion explaining the order. These opinions are not routinely published, but some courts make exceptions. In a few courts, the staff attorney works with one judge to draft a disposition for the remaining two judges to review. In several courts, the staff attorneys present cases to the merits panel, either in person or by telephone.

Id. at 12.

116. Since the beginning of West's business based on collecting and publishing some judicial opinions, only some of the available corpus had in fact been published. *See* Pether, *Scandal*, *supra* note 13, at 1437–38 nn.7–8, 1443 n.26 (providing account of evidence of history of partial publication of judicial opinions in United States).

the outcome of the instant case, has been ignored by the court in the precedent decision. The previous decision is in such circumstances 'demonstrably wrong' and cannot be followed."[117]

The next federal appeals court opinion on the bifurcated doctrine of precedent was issued in a Tenth Circuit dissent authored, although not published, in 1986, when that circuit issued Tenth Circuit Rule 36.3 providing, inter alia, that "unpublished opinions and orders and judgments of this court have no precedential value."[118] The dissent, written by the circuit's chief judge, was not made public until 1992.[119] It opined, forcefully, that:

> Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.[120]

Going on to ask, rhetorically, "what will this court do if we know of a prior ruling which is controlling, although it was unpublished? We would clearly have the duty as a matter of basic justice to apply it," Chief Judge Holloway made a case ostensibly against the citation ban that, together with the nonprecedential status rule, formed part of Tenth Circuit Rule 36.3, which was in reality more compelling as to that rule than to the ban.[121]

Making five salient points about the "stepchildren" of the binary system of precedent operating in United States courts, he reasoned, first, that relative precedential utility is fact-sensitive, and, with evident skepticism, he considered the claim that, in the common law tradition, "law" is applied certainly and mechanically to "facts," and thus does not merit publication (and that even cases plausibly characterized this way are not at least potentially precedential).[122] Next, he notes that denying precedential status to part of the corpus of judge-made law does injustice, and, addition-

117. *See* GOODRICH, READING THE LAW, *supra* note 62, at 77 (citation omitted) (describing classical form of nonbinding common law judgments).

118. *See Re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 36 (10th Cir. 1992) (*Tenth Circuit Rules*) (internal quotation marks omitted).

119. *See id.*

120. *Id.* at 37 (Holloway, C.J., dissenting) (citation omitted).

121. *See id.*

122. *See id.* at 38.

ally the courts' justifications for consigning most of their opinions to the "nonprecedential" bucket are at best unpersuasive.[123] Further, there is a logical problem in the premise that precedential value may be determined ex ante.[124] And finally? Inferentially, this: the most corrupt justification for the binary system of precedent is that nonprecedential decisions are unsafe. Why do I use the word *corrupt*? In part, because the judges have chosen to erect an adjudicatory edifice that they feared at the outset would be—and, of which increasingly became aware, *is*—unreliable.

There is, however, a broader basis for my judgment. Compare Chief Judge Holloway's indictment with the musings of Fifth Circuit Chief Judge Edith Jones, who, in 2003, before her ascent to her circuit's chief judgeship famously (and ironically in the present context), told the Harvard Law School chapter of the Federalist Society that "[t]he American legal system has been corrupted almost beyond recognition," and that "the question of what is morally right is routinely sacrificed to what is politically expedient."[125] Eight years earlier, she had written:

> [A]s the docket is "dumbed-down" by an overwhelming number of routine or trivial appeals, judges become accustomed to seeking routine methods of case disposition. . . . The situation is like that of a competitive tennis player forced to spend the bulk of his time rallying with novices. Just as the player's competitive edge will erode from lack of peer contact, so are judges' legal talents jeopardized by a steady diet of minor appeals.[126]

This apparently justified, in the judge's mind, the following institutionalized practice:

> Appeals are processed on different tracks, depending on such criteria as whether they were filed pro se or whether they present "routine," as opposed to novel, issues. Simply to keep up with the volume of appeals, growing components of which are cases filed by prisoners and direct criminal appeals, courts have had to employ staff attorneys rather than leaving initial review to individual judges. Staff attorneys often take primary responsibility for reviewing the trial court record, assessing the issues presented, and

123. *See id.*

124. *See id.*

125. *See* Geraldine Hawkins, *American Legal System Is Corrupt Beyond Recognition, Judge Tells Harvard Law School*, MASSNEWS.COM (Mar. 7, 2003), *available at* http://www.massnews.com/2003_Editions/3_March/030703_mn_american_legal_system_corrupt.shtml.

126. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1493 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)).

> preparing memoranda that can readily be transformed into unpublished or published opinions.[127]

Given (i) the many judicial admissions that delegation of document review, decisionmaking, and opinion-writing to staff is often incomplete;[128] (ii) that the reason for nonprecedential status is that staff work and (inferentially) lack of adequate supervision mean that staff-written opinions are unsafe to eat;[129] and (iii) the suggestions by a leading federal judicial critic of the two-track appellate adjudication system that "obvious danger signals" of binarized handling of cases include "predominance of certain kinds of cases (for example [section] 1983 prisoner cases) on [the

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127. *Id.* at 1492. As of 2000, the Fifth Circuit used judges to screen "diversity, Title VII, bankruptcy, some tax, and some agency cases. Staff attorneys do initial screening for pro se cases, prisoner cases challenging conditions of confinement, habeas corpus cases, civil federal question cases, immigration cases, cases in which the United States is a party, civil rights cases other than Title VII, and Social Security cases." MCKENNA ET AL., *supra* note 110, at 10 tbl.5. Thus, in that latter group of cases, staff then both assigned cases to the track that ended in an unpublished opinion and did much or all of the decisional work except for formal approval of their work by judges who apparently had not read the record. According to the Fifth Circuit rules, "Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a)." 5TH CIR. R. 47.5.3, *available at* http://www.ca5.uscourts.gov/clerk/docs/5thcir-iop.pdf. "Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a)." *Id.* 47.5.4.

As of 2000, judges did initial screening on only two circuits. It is especially troubling, as a leading study of the circuit courts has concluded, that criminal appeals are decided in this way, noting that "several clerks indicated that they had worked on cases without excerpts [from the record] and the other judges on the panel had not ordered the record or requested any of the documents from the record"; this "means that at least some judges make decisions about sufficiency of the evidence, jury instructions, and the like without seeing the evidence or instructions being reviewed." JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 69 (2002).

128. *See* Pether, *Scandal*, *supra* note 13, at 1491–92; Pether, *Sorcerers*, *supra* note 13, at 36.

129. *See* Tony Mauro, *Difference of Opinion; Should Judges Make More Rulings Available as Precedent?: How an Obscure Proposal Is Dividing the Federal Bench*, LEGAL TIMES (Apr. 12, 2004), *available at* http://www.nonpublication.com/mauro.htm ("Unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys . . . ." (quoting Judge Kozinski) (internal quotation marks omitted)). In his letter to the committee, Judge Kozinski stated:

> There is simply no time or opportunity to fine-tune the language of the disposition. . . . When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.

Id. (quoting Judge Kozinski) (internal quotation marks omitted).

nonprecedential opinions] track,"[130] Judge Jones's nonchalance seems unmerited. It would beg questions of fitness for office were it merely so dismissive of the interests of the citizens the judiciary serves. When there is evidence that the binary practice of precedent she rationalizes causes injustice, including that staff-processed appeals are disproportionately decided against citizen-appellants and the merits, then the binary system of precedent seems unconscionable.[131] The inconsistencies—between the justification and admission of the price to justice that nonprecedential status rules and the associated adjudicatory practices exact—do not end there.

The Fourth Circuit's Judge Wilkinson pointed in 1994 to the "critical" "need" to have "[federal] judges unswayed by electoral pressures adjudicate matters of fundamental civil rights and liberties . . . ."[132] And Judge Wald's skepticism about the D.C. Circuit's radical shift from its practice of "rarely if ever dispos[ing] of a criminal appeal without an opinion," to (in 1995) disposing of 72% that way, "some . . . deal[ing] with issues not clearly controlled by prior precedent," seems well-taken.[133]

Witness, too, public addresses by two United States Supreme Court Justices that point to the necessity for safe appellate adjudication, in particular in the criminal justice arena: Justice O'Connor's 2001 acknowledgement that, "[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed" and Justice Kennedy's indictment of "inadequacies" and "injustices" in the United States carceral complex, drawing attention to the over-representation of African-Americans in United States prisons.[134]

Yet the federal appellate bench repeatedly makes clear the low value it assigns to getting criminal appeals right. In the 1990 and 1992 questionnaires, the United States Judicial Conference, benchmarking desirable circuit judge numbers against a standard of 255 merit dispositions per judge per year, *weighted prisoner appeals at 0.5 of a merits disposition in any other case.*[135] The impoverishment of criminal defense in the United States has

130. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1376 (1995).

131. *See id.* at 1374.

132. *See* Wilkinson, *supra* note 52, at 1157.

133. *See* Wald, *supra* note 130, at 1374.

134. *See* Op., *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, (quoting Justice O'Connor) (internal quotation marks omitted), *available at* http://www.nytimes.com/2001/07/05/opinion/justice-o-connor-on-executions.html; *see also* Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), transcript *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03.

135. *See Are Federal Prosecutors Located Where We Need Them?: Hearing Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 82–83 (1993) (emphasis added), transcript *available at* https://archive.org/details/arefederalprosec00unit; *see also id.* ("In August 1991, the chairman of the Subcommittee on Judicial Statistics sent a questionnaire to each chief judge to use in making and justifying requests for additional positions. . . . That primary mea-

inevitable effects on its quality, as James Forman Jr. forcefully shows.[136] But selectively impoverished *adjudication* is less well-understood and at least as damaging in its impact on criminal justice. Not only is the logical correlative of impoverished criminal defense and adjudication a proliferation of (non-frivolous) post-conviction appeals, but it is also one of the things against which the binary system of precedent is supposed to provide a prophylactic.

One vignette offered by Forman in his troubling picture of contemporary criminal defense is especially noteworthy in context: client load and legal representation funding for New Orleans was such that in 1993 "the Louisiana Supreme Court held that lawyers in New Orleans were to be presumed ineffective."[137] Yet it came to light in 2009 that in Louisiana's Fifth Judicial District (which covers Gretna, just across the river from New Orleans) from 1994 to 2009, every single pro se prisoner appeal was processed by a staffer who (and whose suicide note exposed the corruption), at the direction of the circuit's then-chief judge, stamped "denied" on each of them, even though Louisiana law required that each appeal be determined by a three-judge panel.[138]

Every judge and central court staff member I ever speak to about delegated adjudicatory practices always complains that prisoner appeals make them necessary. They usually follow with some version of "prisoners (and, by inferences, their appeals) are crazy." Let's put aside for a moment the high levels of mentally ill and developmentally disabled persons who end up incarcerated as a result of the policy of closing state institutions to house them and the failure to adequately fund the community-based care that was supposed to replace such institutions, let alone what a basic acquaintance with the work of Michel Foucault might suggest about the relationships between the asylum and the prison as institutions of biopolitical population control. Let's turn, once more, to what emanates from the mouths of those who speak and act for our institutionally tripartite federal government.

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sure is the estimated number of cases which would require disposition on the merits; after applying a weighting factor of 0.5 to all prisoner appeals, the Subcommittee used a standard of 255 merits dispositions per judgeship to determine the number of judgeships required in each court.").

136. *See* James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 363–67 (2009). Tobias advances a version of the repeated story that prisoners have time on their hands and a propensity to lodge frivolous appeals. *See* Tobias, *New Certiorari*, *supra* note 47, at 1274. Even if Tobias is correct, the result should be that judges can deal with such cases expeditiously rather than consigning them to third-class treatment.

137. *See* Forman, *supra* note 136, at 365.

138. *See* James Gill, *In a Suicide Note, Reflections on Guilt*, TIMES-PICAYUNE, Oct. 10, 2008, *available at* http://blog.nola.com/jamesgill/2008/10/in_a_suicide_note_reflections.html (noting allegations that Judge Edward A. Dufresne Jr. instituted policy to automatically deny all pro se appeals).

As part of the discourse of justifying what harsh treatment at Guantánamo did to the mental health of detainees, Rear Admiral Mark Buzby, the Commander of the Joint Task Force Guantánamo, argued that Bureau of Prisons inmates are twice as likely to need mental health services as Guantánamo detainees.[139] That is, even if prisoners are not mentally ill or developmentally disabled when they are incarcerated, the distinctive brutality of United States carceral systems may well make them that way. Finally, a personal experiential note: I spent five years of my professional life in my native Australia investigating misconduct in the police force and in corrections institutions, and one of many things that experience taught me is that a present or former inmate's actual or perceived mental illness does not mean he has no valid complaint about either his prosecution or the conditions under which he is incarcerated; the opposite may in fact be more likely to be true.

Or, perhaps most saliently, compare Judge Holloway's belatedly published dissent with the (more or less) public statements of the leading judicial theorist of the binary system of precedent, Ninth Circuit Chief Judge Alex Kozinski. Judge Kozinski has not only called the notion that his circuit's nonprecedential opinions are the reasoned work of judges fraudulent[140] and labeled nonprecedential opinions "not safe for human consumption,"[141] but has also described in the clearest publicly-available detail the material practices that produce nonprecedential opinions:

> Ninth Circuit judges generally have four law clerks, and the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening"—oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition. After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.[142]

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139. *See* Teleconference: Department of Defense Bloggers Roundtable with Rear Admiral Mark Buzby, Commander, Joint Task Force Guantanamo (Fed. News Serv., May 21, 2008, 9:29 A.M), *available at* http://www.defense.gov/dodcmsshare/BloggerAssets/2008-05/05210815074020080521_RearAdmBuzby_transcript.pdf.

140. *See* Kozinski, Letter to Alito, *supra* note 50, at 7; *see also* Stras & Pettigrew, *supra* note 44.

141. *See* Mauro, *supra* note 129 (quoting Judge Kozinski).

142. Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFS. (Jan.–Feb. 2005) [hereinafter Kozinski, *Appearance*], *available at* http://www.legalaffairs.org/issues/January-February-2005/argument_kozinski_janfeb05.msp.

Elsewhere the judge has revealed that these oral screenings dispose of 100 to 150 cases, that is, approve 100 to 150 nonprecedential opinions in the space of two or three days.[143] Apparently paradoxically, given his concession that judges on his circuit do not read the record in approximately 40% of their merits decisions, a matter confirmed by independent research,[144] nor do they research the law before deciding appeals, Judge Kozinski has also conceded:

> Once in a while, . . . what looked like an easy case is actually quite difficult, because of a small fact buried in the record or a footnote of a recent opinion. . . . I have found no way to separate the sheep from the goats, except by taking a close look at each case.[145]

Nonetheless, he has, some would say remarkably, insisted that judges on his court are "very careful to ensure that the *result* we reach in every case is right . . . ."[146] As to precedential opinions, Judge Kozinski has revealed that it "generally takes many days (often weeks, sometimes months)" to prepare them and that it is not unusual for an opinion to go through "70–80 drafts."[147]

IV. Doctrine

"If what is important about law is that it functions to 'legitimate' the existing order, one starts to ask *how* it does that."[148]

So much, then, for Judge Kozinski's account of the contemporary practice which undergirds the binary doctrine of precedent. What of the theory? Some additional history is in order at this point. Judge Kozinski's most extended theorizing of the binary doctrine of precedent is in *Hart v.*

143. Alex Kozinski & Stephen Reinhardt, *PLEASE DON'T CITE THIS!: Why We Don't Allow Citation to Unpublished Dispositions*, Cal. Law., June 2000, at 43–44 (noting disposition through oral hearings of 100–150 cases); *see also* Kozinski, Letter to Alito, *supra* note 50 (noting disposition in two-to-three days).

144. *See* Cohen, *supra* note 127, at 69.

145. Kozinski, *Appearance*, *supra* note 142.

146. *See* Kozinski, Letter to Alito, *supra* note 50, at 5.

147. *See id.* at 9. A former Kozinski clerk revealed to the author in a private conversation that the highest number of drafts of a single Kozinski opinion the clerk had worked on was in excess of 120. This allocation of resources seems all the more disproportionate given that the Ninth Circuit's organizational protocols mean that one panel may exert all this time and squander all these resources only to find for the first time that another panel of the same circuit has beaten it to the punch on issuing a precedential opinion on the issue in question.

148. Brook Thomas, Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville 5 (1987) (quoting Robert W. Gordon, *New Developments in Legal Theory*, *in* The Politics of Law: A Progressive Critique 281, 286 (David Kairys ed., 1982)) (internal quotation marks omitted).

Massanari, a 2001 published Ninth Circuit opinion.[149] The opinion's disquisition on the doctrine of precedent was impelled by *Anastasoff v. United States*,[150] an Eighth Circuit opinion issued the previous year and authored by Judge Richard Arnold, at that time perhaps the most public judicial critic of the binary system of precedent.

In *Anastasoff*, the Eighth Circuit was responding to the appellant-taxpayer's argument that it was not bound to follow a previous unpublished Eighth Circuit opinion in deciding her appeal against a district court judgment that had denied her claim for a tax refund.[151] That refund claim, while made on time, was received a day late.[152] Through what must have seemed to Faye Anastasoff a maddening peculiarity of federal statutory interpretation, the district court had held it thus was not entitled to be saved by the mailbox rule, which only applies to claims *made* late, not those made on time and *received* late.[153] The basis for Anastasoff's argument was the Eighth Circuit rule that provided that its unpublished opinions were not precedent.[154]

Judge Arnold's opinion spends most of its time reasoning in support of its holding that the nonprecedential status rule was unconstitutional, a holding which has attracted a significant amount of scholarly commentary.[155] The unconstitutionality argument, anchored in an originalist theory of the metes and bounds of Article III power, is strongly oriented around a theory of judicial identity and emphasizes sources that speak to adjudicatory expertise rather than judicial authority.[156]

The opinion's discourse on precedent, disentangled from the constitutional question, proceeds as follows. Its emphasis is on facticity—which orients the judge towards the litigants who are the subjects of adjudication—and interpretability: "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law," which is "authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."[157] Judge Arnold is sharply critical, and implicitly skeptical, of both the argument that circuit judges do not have time to competently adjudicate all appeals, and that which holds the poor quality of nonprecedential opinions justifies the binary system of precedent.[158] Nonprecedential status rules are character-

149. *See* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

150. 223 F.3d 898 (8th Cir.), *vacated on reh'g en banc by* 235 F.3d 1054 (8th Cir. 2000).

151. *See id.* at 899.

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* at 900–05.

156. *See id.* at 899–902 (citing THE FEDERALIST NO. 78, 81 (Alexander Hamilton)).

157. *See id.* at 899–900.

158. *See id.* at 904.

ized as "exceed[ing] the judicial power, which is based on reason, not *fiat*."[159]

Apparently anticipating the argument made in response by Judge Kozinski, Judge Arnold explores the idea that precedents can bind "eternal[ly]," making the explicit case for changes in legal rules and an implicit one for interpretive change, as rules are applied to new factual situations.[160] He also addresses the contemporary elephant in the United States precedential room, constitutional precedent, noting "even in constitutional cases, courts 'have always required a departure from precedent to be supported by some special justification.'"[161]

A note in passing is in order here about the history of precedent anxiety I will chart in Part VI. In *Planned Parenthood v. Casey*, site of one of the most pitched battles over constitutional precedent, once again in the terrain where the Due Process and Equal Protection Clauses beg for interpretation and jostle for salience in the nation's long struggle over whether liberty or equality stand at the head of aspirational constitutionalist values, Justice Scalia heaps withering scorn on reasoned judgment and characterizes precedent as no law at all.[162]

During Judge Kozinski's (ultimately unsuccessful) no-holds-barred (and as the following quotation suggests, often surreal) attempt to prevent the passage of Federal Rule of Appellate Procedure 32.1, so that his circuit could retain its citation ban on so-called unpublished, formally nonprecedential opinions, Kozinski testified that

> [a]ttempting to defraud the court in one's pleadings is the kind of conduct that may be punished [by sanctions subsequent to breaches of citation bans by lawyers], even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance.[163]

Elsewhere, however, he conceded that his own circuit had issued nonprecedential opinions with enough information to mislead lawyers into

159. *See id.*

160. *See id.* at 904–05.

161. *See id.* at 905 (internal quotation mark omitted).

162. *See* Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 833, 978–1001 (1992) (Scalia, J., dissenting).

163. *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 37 (2002) [hereinafter Kozinski, *Hearing*] (statement of Hon. Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit), *available at* http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0.HTM; *see also* Hangley, *supra* note 31, at 679 (citing Kozinski).

treating them as precedent.[164] As this might suggest, it is difficult to know how seriously to take the theory of precedent advanced in *Hart v. Massanari*, which explicitly seeks to justify the status of the alpha portion of the binary body of precedent. The opinion itself does not make evaluation of the judge's good faith any easier.

Hart v. Massanari is replete with attempts at rhetorical sleights of hand in the putative performance of law office history[165] and in elaborate justification of nonprecedential status rules.[166] It also makes crude (or perhaps merely opportunistic) arguments such as the comparativist harnessing of the quite different system of British case reporting.[167] It is similarly remarkable for some egregious revisionist history, which seeks to establish that binary systems of precedent are as old as the doctrine of precedent itself, all the while taking pains to emphasize that the contemporary United States federal courts issue strict binding precedents, characterized as "rigid constraint[s]," of an authoritativeness unknown to history.[168]

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164. *See* Sorchini v. City of Covina, 250 F.3d 706, 709 (9th Cir. 2001). For Hangley's blistering critique of Judge Kozinski's inconsistent statements, and of the approach to precedent they revealed, see Hangley, *supra* note 31, at 677–79.

165. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1169 (9th Cir. 2001). These attempts include Judge Kozinski's (palpably inaccurate) claim that West's Reporters were ever "comprehensive" and citing a King's Bench case from the mid-eighteenth century as authority for the proposition that "[i]n determining whether it is bound by an earlier decision, a court considers not merely the 'reason and spirit of cases' but also 'the letter of particular precedents,'" when pages earlier he had claimed that only Exchequer Chamber issued binding precedent. *See id.* at 1166–70. It is worth noting that the judge's grasp of pertinent precedential history is far from sure: his claim that "no case prior to *Anastasoff* ha[d] challenged the constitutional legitimacy" of nonprecedential status rules is to overlook the *Tenth Circuit Rules* case. *See id.* at 1163.

166. *See, e.g.*, *id.* at 1163. Judge Kozinski makes rhetorical hay with the declaratory theory of law, which is invoked as authority for the proposition that English common law judges did "not make law as we understand that concept," and a short time later harnesses, with an anachronistic and naïve comparativist deployment of "opinion" to mean something like "written adjudicatory text," to prove that "precedent" and "law" are different things. *See id.* at 1163, 1165. Judge Kozinski also employs similar sleight of hand with terminology when he invokes modern English law "reports," which refer to the reports of decisions that, since the establishment of modern English court reporting in 1865, have been chosen for their relatively authoritative status not by the judges who issue them, but by the independent Incorporated Council of Law Reporting for England and Wales, together with a quotation from an early twentieth century Chancery case to justify "censorship of reports." *See id.* at 1166 nn.16 & 17. Such selection of more or less authoritative or apparently significant decisions is not the same thing as a court itself, for reasons which it does not publicly disclose, stripping most of its output of precedential status ex ante because it is the poor quality work of staff rather than judges.

167. *See id.* at 1169. The British courts do not decide, and have not decided, since the development of modern, more or less verbatim law reporting in the mid-nineteenth century which of their opinions will be reported. *See* INC. COUNCIL L. REPORTING FOR ENG. & WALES, http://www.iclr.co.uk/ (last visited Sept. 3, 2015).

168. *See Hart*, 266 F.3d at 1174–75. A similar move is made, implicitly, in the rationalization that the enormous amounts of resources channeled into the few published opinions that are in fact largely judicial work product can be justified because they are required to "[m]aintain[ ] a coherent, consistent and intelligible

Yet the opinion also bears subtle textual traces of the judge's admissions elsewhere about the reasons for nonprecedential status rules that are in direct contrast with this claim in the opinion: "[t]hat a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented."[169] Both consideration and analysis, it is implied, are conducted by judges. The *Hart* opinion does not mention staff attorneys, and the opinion goes on to cite Federal Judicial Center authority on the responsibility of the *judge* in generating unpublished opinions to "provide a statement so that the parties can understand the reasons for the decision" and an announcement not only of the "result [but of] the essential rationale of the court's decision."[170]

In *Hart*, Judge Kozinski also wrote:

> It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them. The Supreme Court certainly does not. Rather, it uses its discretionary review authority to limit its merits docket to a handful of opinions per justice, from the approximately 9000 cases that seek review every Term. While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end: They select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished dispositions or judgment orders.[171]

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body of caselaw . . . ." *See id.* at 1179; *see also* James R. Stoner Jr., *Natural Law, Common Law, and the Constitution*, *in* COMMON LAW THEORY, *supra* note 2, at 171, 174 ("[T]oday a common law jurisdiction is defined as one where precedent has the force of law. This was true in the early days as well, though it bears repeating that precedents then were thought not to have introduced new law but to have given evidence of what the law was understood to be. . . . [I]t was assumed that a precedent that ran against reason need not be followed. When a common lawyer like Coke spoke of rooting out what went against reason from the common law, he meant resolving contradictions, ensuring a general consistency in the law."). *But see Hart*, 266 F.3d at 1167 (citing accounts of Coke's reporting as authority for proposition that "[c]ontrary to *Anastasoff*'s view, it was emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected. Rather, case reporters routinely suppressed or altered cases they considered wrongly decided. Indeed, sorting out the decisions that deserved reporting from those that did not became one of their primary functions.").

169. *Hart*, 266 F.3d at 1177.

170. *See id.* at 1178.

171. *Id.* at 1177 (footnotes omitted); *see also id.* at 1179 (registering "inadvertent . . . conflicts" between unpublished opinions); *id.* at 1179 n.38 (threatening "less judicial involvement in precedential opinions" if judges are "prevent[ed] [ ]from determining which of their opinions will be citable as precedent").

This effectively admits that the circuit courts are evading the legislature's mandating of appeals as of right and substituting a system of discretionary appellate jurisdiction de facto.[172] Unlike the Supreme Court, the legislature has not given them the power to grant or withhold that (other) ancient prerogative writ—certiorari. Thus, Judge Kozinski's aside both elides the crucial facts that the legislature has not conferred discretionary appellate review jurisdiction on the circuit courts, and that their error-correcting responsibility is not equally shared by, and their lawmaking power more circumscribed by, the Supreme Court. Judge Kozinski's justification also fails to withstand the scrutiny that might lend it credibility given the inscrutability of many nonprecedential circuit court opinions. Take, for example, what I turned up in fifteen odd minutes spent in the company of a volume of the federal appendix: unpublished decisions so brief and circular as to be meaningless[173] and one-word opinions,[174] only a fraction of which are cited here.

Several additional features of the opinion and the theory it advances are worth emphasizing. First, the contrast in procedural posture between *Anastasoff* and *Hart* is tutelary. Rather than holding itself bound by a previous unpublished opinion of the circuit in the face of an appellant's argument, based on the circuit's nonprecedential status rule that it was not so bound—as held in *Anastasoff*—*Hart* makes a decision about whether counsel who cited an unpublished Ninth Circuit opinion in the face of its then-citation ban should be disciplined and uses it as an occasion to opine on the binary doctrine of precedent.[175]

"Strict binding" precedent is here characterized as rule-bound, thus suggesting it only applies to cases that lay down some naïve version of "positive law," rather than, for example, to cases that are most evidently the basis of analogical reasoning, applying established rules to novel factual situations.[176] Yet it is not presented as a by-product of the binary system of precedent. Rather, it is constructed—with a measure of banal redundancy[177] and internal incoherence[178]—as capable of foreclosing the employment of "strict binding precedent" by those future lawyers who will

172. *Compare* 28 U.S.C. § 1291 (2012) (granting statutory right of appeal), *with* Richman & Reynolds, *supra* note 37, at 293–94.

173. *See, e.g.*, United States v. Keating, 297 F. App'x 205 (4th Cir. 2008) (finding "no reversible error" and affirming "for the reasons stated by the district court," as done by five opinions printed immediately before it); United States v. Smith, 297 F. App'x 219 (4th Cir 2008); Durr v. Merit Sys. Prot. Bd., 297 F. App'x 966 (Fed. Cir. 2008).

174. *See, e.g.*, Abbott Labs. v. Johnson & Johnson, Inc., 297 F. App'x 966 (Fed. Cir. 2008); Barlow v. Dep't of Veterans Affairs, 297 F. App'x 965 (Fed. Cir. 2008).

175. *See Hart*, 266 F.3d at 1159.

176. *See id.* at 1172, 1175 (differentiating "controlling" from "persuasive" precedent).

177. In its gesturing towards the Goldilocks meaning of fact description.

178. In its admission that judges may choose which "rule" to follow but may constrain how their own "precedent" is followed.

not be able to anticipate or escape the exacting boundaries of the authoring judge's (paranoid) foresight:

> In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.[179]

Those inclined to take Judge Kozinski's claims for the legal and institutional necessity of scores of drafts over timespans that may stretch into months might, with profit, peruse the judge's *oeuvre*, which includes precedential opinions like *United States v. Poehlman*,[180] where however many drafts as were expended were directed at embellishing a difference of appellate opinion about whether a trial court had rightly or wrongly applied a settled rule of federal law thus:

> Mark Poehlman, a cross-dresser and foot-fetishist, sought the company of like-minded adults on the Internet. What he found, instead, were federal agents looking to catch child molesters. We consider whether the government's actions amount to entrapment.
>
> After graduating from high school, Mark Poehlman joined the Air Force, where he remained for nearly 17 years. Eventually, he got married and had two children. When Poehlman admitted to his wife that he couldn't control his compulsion to cross-dress,

179. *See Hart*, 266 F.3d at 1176–77 (citation omitted).

180. 217 F.3d 692 (9th Cir. 2000).

> she divorced him. So did the Air Force, which forced him into early retirement, albeit with an honorable discharge.
>
> These events left Poehlman lonely and depressed. He began trawling Internet "alternative lifestyle" discussion groups in an effort to find a suitable companion. Unfortunately, the women who frequented these groups were less accepting than he had hoped. After they learned of Poehlman's proclivities, several retorted with strong rebukes. One even recommended that Poehlman kill himself. Evidently, life in the HOV lane of the information superhighway is not as fast as one might have suspected.[181]

One might also (registering that the real rhetorical thrust of *Hart* is justifying why "kids that are just out of law school"[182] who cannot be trusted to produce work that the judge has colorfully characterized as "[fit] for human consumption"[183] may be entrusted with most of what goes out into the world under the judge's name, although, for those in the know, not with his imprimatur) consult the judge's non-professional *oeuvre*, such as his video-game reviews.[184] Or ponder the considerable expenditure of his judicial energy on the failed campaign to stop the passage of Federal Rule of Appellate Procedure 32.1,[185] or on sabotaging government electronic security policies.[186] Likewise discernible to the skeptical reader is the high irony of his evoking the dangers of common law method in the context of what Justice Scalia famously called "Common-Law Courts in a Civil-Law System"[187] and the contemporary populist dis-

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181. *Id.* at 695.

182. *See* Pether, *Sorcerers*, *supra* note 13, at 6 (internal quotation marks omitted) (citing COHEN, *supra* note 127, at 177).

183. *See* Mauro, *supra* note 129 (quoting Judge Kozinski).

184. *See* Pether, *Take a Letter*, *supra* note 13, at 1583.

185. *See id.* at 1556.

186. *See* Alex Kozinski, *Pulling the Plug: My Stand Against Electronic Invasions of Workplace Privacy*, 2002 U. ILL. J.L. TECH. & POL'Y 407 (2002).

187. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 3 (Amy Gutmann ed., 1997); *see also, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1169 (9th Cir. 2001) (conceding, narrowly, that "[f]ederal courts today do follow some common law traditions," and locating the use by federal courts of doctrine of precedent as incident of bureaucratic and structural necessity and policy choice); *id.* at 1173 ("The various rules pertaining to the development and application of binding authority do not reflect the developments of the English common law. They reflect, rather, the organization and structure of the federal courts and certain policy judgments about the effective administration of justice."); *id.* at 1175 ("[T]he principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy."). Such fear is as commonplace a characteristic of judges resisting pressure to provide reasons for their decisions as complaints about workload and (unsubstantiated) efficiency rationales. *See also* Dyzenhaus & Taggart, *supra* note 2, at 149 ("A recurrent fear is that any reasons given will be picked over by lawyers and appellate courts, and busy judges will be held to unreasonably high standards by their judicial 'bet-

course on "judicial activism," as when Judge Kozinski characterized *Anastasoff* as requiring "federal judges . . . to *make* law in every case," rather than "follow[ing]" it.[188] Authoritarian anxiety is as marked in the text, as is precedent fear.[189] Specifically, the forward-looking face of precedent troubles Judge Kozinski.[190] The authority of what Peter Goodrich calls the "monologic" text of the law[191] is repeatedly invoked,[192] and there are

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ters' who suffer neither the time nor resource constraints of the lower judiciary."); *id.* at 150 (registering that judges may resist reasoned decisions "to retain some room for maneuver so that unmeritorious litigants cannot exploit a hard-edged rule to avoid otherwise unpalatable results"). Lauren Robel, a critic of nonprecedential status rules, signally calls ours "a deeply common-law [legal] system." *See* Robel, *Practice of Precedent*, *supra* note 31, at 400.

188. *See Hart*, 266 F.3d at 1160; *see also id.* at 1163 (invoking authority of English common law judges who "did not make law as we understand that concept"). Dean Robel notes that all publication plans adopted by the circuits used criteria that "attempt[ed] to distinguish in advance between opinions that make law and those that merely apply it." Robel, *Practice of Precedent*, *supra* note 31, at 403.

189. *See, e.g.*, *Hart*, 266 F.3d at 1162 (noting critiques of historical practice of juries deciding questions of law as well as fact, of seriatim opinions, and of historical practice of appeals benches including district judge whose decision had been appealed).

190. *See, e.g.*, *id.* at 1159–60 (characterizing *Anastasoff* as opining that "exercise of the 'judicial Power' precludes federal courts from making rulings that are not binding in future cases" and arguing that nonprecedential status rules enable "courts of appeals to determine whether future panels . . . will be bound by particular rulings"). Judge Kozinski also claims, without registering the limits on "binding precedent" of qualifiers like "on point," that "caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect." *See id.* at 1170. And at the same page, again without registering the irony that nonprecedential status rules make what follows as effectively deeply ironic, Judge Kozinski states, "[b]inding authority must be followed unless and until overruled by a body competent to do so." *See id.* at 1170, 1172 ("Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed."); *id.* at 1176 ("Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well."). As Dyzenhaus and Taggart note, the "reasoned decision," like appellate review itself, is inherently, and functionally, forward-looking. *See* Dyzenhaus & Taggart, *supra* note 2, at 147; *see also* Kozinski, *Hearing*, *supra* note 163, at 34 ("If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns.").

191. *See* Peter Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L.J. 331, 352 (1986) [hereinafter Goodrich, *Legal Interpretation*]; Peter Goodrich, *Law and Language: An Historical and Critical Introduction*, 11 J.L. & SOC'Y 173, 175 (1984).

192. *See, e.g.*, *Hart*, 266 F.3d at 1162 n.6 (privileging "kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court"); *id.* at 1170–71 (arguing that "when crafting *binding authority, the precise language employed is often crucial to the contours and scope of the rule* announced" (emphasis added)).

related traces of authoritarian communitarian ideology in the style of Justice Scalia.[193]

Interpretation and lawyers' harnessing of interpretive work and advocacy are constructed as having no place in making law,[194] and the facticity

193. *See id.* at 1171 n.26. Justice Scalia's contempt for common law adjudication sits neatly with his avowed original meaning constitutional hermeneutic commitments, to the extent that Hobbes's account of critics of his equally disparaging view of the common law was that their defense was based in and largely reducible to the norm of trial by jury. *See* Stoner, *supra* note 168, at 175 (citing THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 70 (Joseph Cropsey ed., 1971)). Such communitarian custody of the common law sits equally neatly with the acceptable resources for "evolving standards of decency" he canvasses in the juvenile death penalty cases, for example, and likewise suggests how original meaning textualists might regard federal appellate common law making as deeply suspect. *See* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (internal quotation mark omitted) ("[T]he Court having pronounced that the Eighth Amendment is an ever-changing reflection of 'the evolving standards of decency' of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"). Judge Kozinski shares Justice Scalia's hermeneutic commitment to original meaning textualism. *See* 2 ASPEN L. & BUS., ALMANAC OF THE FEDERAL JUDICIARY 18, 19 (2002-2 Supp. 2002) (citing Alex Kozinski & J.D. Williams, *It Is a Constitution We Are Expounding: A Debate*, 1987 UTAH L. REV. 977, 977–85 (1987)) (noting that in speech delivered in 1987 at University of Utah, Judge Kozinski had argued that "[t]o the extent we depart from the document's language and rely instead on generalities that we see written between the lines, we rob the Constitution of its binding force and give free rein to the fashions and passions of the day" and "offer[ed] three principles of [constitutional] interpretation to guide judges: (1) textual fidelity (interpretations should be grounded in the words actually used in the Constitution); (2) consistency (phrases of similar generality should be construed more or less the same way); and (3) completeness (provisions actually found in the Constitution should not be ignored or emasculated)" (internal quotation marks omitted)). As Goodrich notes, "[t]he will of the people embodied in practice, custom and usage is . . . [not], in its origin as law, especially democratic." GOODRICH, READING THE LAW, *supra* note 62, at 62–63.

194. *See Hart*, 266 F.3d at 1177–78 (claiming that if unpublished opinions were citable courts would have to cease giving reasons, because "[w]ithout comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions"). Citing unpublished opinions would usher in a parade of horribles (which is (i) less than transparent about the authors of nonprecedential opinions; (ii) both revelatory and conclusory about what, rather than adjudication, say, or error-correction, the judge takes to be the primary responsibility of appellate judges; and (iii) even more revelatory about the poverty of the contention that unpublished opinions are products of either reasoned or reasonable adjudication):

> Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future

that is the bedrock of analogical reasoning is to be silenced by the judges.[195] This latter is insisted upon, despite the many reasons Judge Kozinski has made available in the *Hart* opinion and elsewhere, to conclude how little the judges are to be trusted with transparent and good faith handling of matters of fact.[196] But perhaps that is precisely the point: the "canonical text" that codification promises "reduces, even if it cannot eliminate, the scope for argument."[197]

Significantly for my culminating argument in this Article, that judicial backlash against *Brown*'s constitutional mandate lies at the roots of the binary system of precedent. Common law constitutionalism is repeatedly represented as illegitimate.[198] In this vein, inevitably, *Planned Parenthood v. Casey* is invoked in the interests of suggesting the risks of "binding authority," with a gesture towards a representative of the cadre of contemporary scholarly and judicial constitutional flat-earthers for whom common law constitutionalism invites accusations of instrumentalist heterodoxy which, in following precedent, "violate[s] the Constitution."[199]

> cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions. This new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.

Id. at 1178 (footnote omitted).

195. *See id.* at 1179 ("Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority.").

196. The most notable example is the proliferation of one-word opinions ("affirmed" or "denied") issued by federal courts of appeals. *See supra* note 51.

197. *See* T. R. S. Allan, *Text, Context, and Constitution: The Common Law as Public Reason*, *in* COMMON LAW THEORY, *supra* note 2, at 185, 187. The binary system of precedent, of course, seeks to stifle the argument of both "undeserving" appellants and lawyers in future appeals.

198. *See, e.g.*, *Hart* 266 F.3d at 1163 (discussing "danger of giving constitutional status to practices that existed at common law," which is characterized as instrumentalist); *id.* (locating legitimate constitutional meaning in mind of Framers); *see also id.* at 1167 ("[I]t is unclear that the Framers would have considered our view of precedent desirable. The common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance. . . . Embodying that custom into a binding decision raised the danger of ossifying the custom . . . ." (footnote omitted)); *id.* at 1171 ("[B]inding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must.").

199. *See id.* at 1175 n.31 (citing Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994)).

V. Critical Histories

"Whenever a code is unveiled, disencrypted, made public, the mechanism of power produces another one, secret and sacred, 'profound.'"[200]

A. *Normative Scholarship*

How radical is the binary doctrine of precedent? And what are we to make of it beyond registering it—as I will go on to do—as part of a historical shift in discourses on precedent that turn on what I will call (aware both of anachronism and of spectrality) the anticipation and reception of *Brown*, as well as other critical sites of the epic battle over what the United States Constitution means: *Erie Railroad Co. v. Tompkins*,[201] *Lochner*, *Griswold v. Connecticut*,[202] *Roe*, and *Casey*? How should we account for its United States "prehistory"?

As to the first of these questions, consider Douglas Edlin's recent descriptive account of the dual function of precedent:

> Common law judges attempt to do "justice in the individual case" while also understanding and, in some sense, proffering the individualized judgment as a statement of a rule or proposition that can be applied through the doctrine of precedent to a generalized category of similar cases.[203]

Let me set aside the fact that no other (more or less) common law country has ventured to establish a vast class of formally nonprecedential appellate opinions,[204] and for now, the question of the extent to which the United States can even be called a common law country, given its constitutional and federal structure, the historical record discoverable in its distinctive legal texts and practices associated with them, and the codification drive most evidently visible in the Restatements and model national (yet state-based) laws like the Uniform Commercial Code. The distaff side of the binary system of precedent that has developed in the United States falls short of Edlin's paradigm in a range of ways.

Mass processing by non-judicial personnel of specific classes of cases on the basis of their subject-matter and the type of litigant involved, or both, and in some cases, perhaps many or most, in the absence of a review of the materials necessary to safe and meaningful appellate adjudication,

200. Jacques Derrida, *Scribble (Writing-Power)*, 58 Yale French Stud. 117, 138 (Cary Plotkin trans., 1979).

201. 304 U.S. 64 (1938). Often said to mark the end of faith in the declaratory theory of common law judgment in the United States, the *Erie* doctrine is still promoted by Justice Scalia. *See, e.g.*, Rogers v. Tennessee, 532 U.S. 451, 472–73 (2001) (Scalia, J., dissenting).

202. 381 U.S. 479 (1965).

203. Douglas E. Edlin, *Introduction* to Common Law Theory, *supra* note 2, at 1, 1 (footnote omitted).

204. *See* Pether, *Scandal*, *supra* note 13, at 1439, 1536 (discussing Britain, Canada, Australia, and New Zealand).

does not provide "individualized judgment" as a categorical matter.[205] Insofar as nonprecedential opinions are produced by a system that produces explication of a bare *result*—or of no reasoning at all, or none that is meaningful, or "unsafe," or willfully or recklessly (in that the judges are aware of the risk of error given their assessment of the competence of staff) get the law "wrong"—they are excepted from any such principled practice as applying "individualized judgment as a statement of a rule or proposition . . . through the doctrine of precedent to a generalized category of similar cases."[206]

And rules cases—"strict binding precedent cases"—somehow at once avoid the cardinal transgression in this age of populist jurisphobia by "not making law" and yet also lay down law that resists interpretive appeal and thus the kind of application of the general to the factual particular of which Edlin writes.[207] Replicating positivism's at once acquiescent and authoritarian impulse to transpose itself from place to place, neither Judge Kozinski nor other judicial apologists for the binary system of precedent frankly and publicly disclose in court rules or decisions, say, the adjudicatory work of staff, or the practices of screening, which largely determine how those matters in which nonprecedential opinions are generated are actually selected at the portal to the courthouse. They do so, rather, in places where only the (interested) scholar is likely to go—transcripts of public speeches and journal essays.

This is, to deploy the philosopher Gerald Postema's analysis, antithetical to "common law analogical reasoning['s] *demand*[ ]" that judges engage across the system, and not selectively, in "[c]onsidered judgment" that is both "reflective and reflexive."[208] Or, as the then Fourth Circuit Judge and Federal Judicial Center board member J. Harvie Wilkinson III put it almost two decades ago, registering the increasing delegation of adjudicatory work to clerks and central staff attorneys:

> The diminishing involvement of the judge in the actual business of judging can only be deplored. It deprives the parties of their right to have the designated decision-maker be one who is fully engaged. . . . Where the endproducts of a system are little more than boilerplate, the sense of obligation to them may diminish. . . . [T]he judge's impersonal obligation to the rule of law does not preclude an intensely personal effort to explain in the given case why that law has been properly interpreted and applied.

205. *See* Edlin, *supra* note 203, at 1; *see also* Pether, *Scandal*, *supra* note 13, at 1492 (discussing absence of review necessary for meaningful adjudication).

206. *See* Edlin, *supra* note 203, at 1.

207. *See id.* at 2 (confirming common law judgments as "general rule[s]" applicable to "similar or analogous circumstances").

208. *See id.* at 10 (discussing Gerald J. Postema, A Similibus ad Similia: *Analogical Thinking in Law*, *in* COMMON LAW THEORY, *supra* note 2, at 102, 102–33).

> Caseload growth, then, is undermining the very source of federal judicial authority—namely that decisions be, above all, carefully reasoned and explained.[209]

This essential characteristic of any understanding of precedent other than cynical sham is lost when underlings use boilerplate language, work unsafely or unsupervised, or are delegated the task of generating "dispositions" without reasons. Further, the system itself explicitly, by congressional mandate, promises appellate adjudication, implicitly by Article III judges, who, on the public record constituted by their judgments and under cover of rules establishing appeals as of right, represent themselves as taking responsibility for those judgments.[210] At the same time, those judges reveal, even in that public record, the traces of the material practices by which those judgments—or *decisions* is a more apt term—are actually rendered, which practices are accounted for with breathtaking arrogance in less public texts.[211]

This contemporary United States system of adjudication and its simulacrum of lawmaking (rather than a recognizable lawmaking practice, unless raw fiat is what we understand as law) lays down, on the one hand, *rules* as conceived by the most naïve of positivists, rather than *reasons* for judgment.[212] And on the other hand? A more or less arbitrary admixture of decision by fiat (at its barest, no more than "[a]ffirmed" or "[r]eversed"); or such decision by fiat accompanied by circular or meaningless simulacra of reasoning that merely underscore the refusal of accountability of the genre "AWOP" (Affirmed Without Opinion), or apparently reasoned judgments that are likely merely "explications" of "decisions," made more or less carefully or competently by the system's shadow adjudicatory personnel. It thus makes no "contribution to ongoing public debate," nor yet "articulation of public standards of governance,"[213] except to the extent that the latter standards are embodied in a binary system of appellate justice that treats "haves" differently from "have-nots" and makes perfunctory and bad faith attempts to claim that it does otherwise.

There is, of course, the question of whether a "doctrine of precedent" as riddled with cynicism and disingenuousness as that theorized by Judge Kozinski merits serious treatment.[214] This Article proceeds on the premise that it does. Why? First, precisely because to fail to do so is itself to yield to cynicism. And second, because, for all the disingenuousness of its

209. Wilkinson, *supra* note 52, at 1171–72.

210. *See, e.g.*, 28 U.S.C. § 1291 (2012) (providing for appeals as of right from final decisions, inter alia, of district courts).

211. For example, refer to *supra* notes 126–27, which contain the remarks of Judge Edith Jones.

212. *See* Edlin, *supra* note 203, at 3 ("Common law judges do not just say what the law is, they explain why the law is that way.").

213. *See id.* at 2.

214. *See generally* Kozinski, Letter to Alito, *supra* note 50.

rationale and the unreflecting irresponsibility of its architects and the cynicism or denial that largely characterizes its practitioners today, it is the *practice* as well as the *theory* of the doctrine of precedent practiced in the federal appellate courts in this putative "nation of laws."

What norms, then, to use Edlin's unexceptionable language, are engaged in the United States' egregious contemporary binary doctrine of precedent? Manifestly off the table is what Edlin calls "intersubjective validity," that is, the thesis or desire or fantasy (especially marked in much contemporary United States constitutional law discourse) that "common law" is sufficiently principled and stable to be applied in the same way to yield the same results in the hands of different adjudicators.[215] While unreliability of the subjects who—and material practices which—produce decision, rationale, or both, is at the heart of the institution of nonprecedential opinions, the record is also littered with exemplary cases, beginning with *Knight v. Coiner* and the *Jones* decisions, manifesting complete and unselfconscious arbitrariness in rule application;[216] and "strict binding precedent" assumes deal-making as an integral part of both decisional and drafting process.[217]

Similarly, the stifling of reasoning by which "judges [ ] defend as well as define the normative standards that are formulated and refined in the course of resolving legal disputes"[218] in orthodox common law theorizing of practice is achieved through the terseness of the "one word opinion," or through *ipse dixit* formulae masquerading as reasoning, or through the denial of precedential status to a clerk's or staff attorney's "explication" of a decision made ex ante, or by means of classificatory logic, or formally and ex post by the putative decisionmaker. Additionally, such adjudicatory practices and the texts they produce are in a critical sense private, constituting an exercise of the barest because the most tenuous of state power, rather than partaking in "the [public] justification for a common law norm [ ] as important as the norm itself, because in an important sense the justification of the common law norm *is* the source of its ongoing authority."[219]

For "rule model" theorists of precedent, such as Larry Alexander and Emily Sherwin, precedential rules keep judges from human fallibility, translated as moral error. They also produce "doctrinal and systemic stability."[220] These latter are claims likewise made for the binary system of precedent, which otherwise seems to run afoul of Alexander and Sherwin's requirement that judicial decisions should be contained in "pub-

215. *See* Edlin, *supra* note 203, at 3 (discussing "intersubjective validity").

216. *See* Part II, *supra* notes 64–116 and accompanying text.

217. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1164, 1172–75 (9th Cir. 2001).

218. Edlin, *supra* note 203, at 3.

219. *See id.*

220. *Id.*

lished, reasoned opinions" and promise "consistency (in guiding future actors by the results achieved in prior cases)."[221]

There is, further, well-grounded opinion to the effect that nonprecedential opinions in fact contribute to appellate volume by rendering the law *less* predictable. As (then) Judge Wilkinson put it:

> As the law of the circuit becomes murkier, litigation is increased. Such litigation in turn may produce what Judge Irving Kaufman has termed "the uncertainty of outcomes resulting from a cacophony of differing opinions [that] can act as a catalyst" for yet more appeals.[222]

Judge Wilkinson also suggested, however, that the circuit system, roughly echoing the nation's federal structure, fundamentally challenges the business of maintaining a known (and thus more or less predictable) *corpus juris* and providing meaningful access to it by circuit judges,[223] let alone litigants (other than well-resourced repeat players, as I have argued elsewhere), and makes its manipulation by repeat players likely.[224] Litigation has become "a game of chance . . . [rather than] a process with predictable outcomes."[225] He concludes:

> Citizens throughout the circuit are left to guess as best they can about what conduct might avoid future litigation. With law dependent on the luck of the panel draw, there is even more incentive for some plaintiffs to bring suits for their settlement value.

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221. *See* Edlin, *supra* note 203, at 4. Judge Wilkinson echoes this same sentiment. *See* Wilkinson, *supra* note 52, at 1175 ("[A] coherent and definable body of circuit law [ ] performs several vital functions. . . . [including] to provide potential litigants with clear rules to which they can conform their conduct[, and] . . . to permit actual cases to be resolved under the guidance of precedent before the benefits to the parties are overwhelmed by the sheer costs of litigation.").

Disappearing opinions, by making them not meaningfully searchable on court websites or not providing them to the online commercial databases, transubstantiating them into "not precedent" when they actually bear the hallmarks of reasoned decisionmaking, or strangling them at birth by giving no meaningful reasons for decision does not have this effect. Rather, it creates a Wild West where anything is worth a shot; where courts can and do hide what they are doing and authorize themselves to decide identical cases differently to cover their own institutional ineptitude, who knows what combination of patronage, politics, or sheer chance might make an appeal successful.

222. Wilkinson, *supra* note 52, at 1175 (alteration in original).

223. *See id.* at 1176–77 (registering that "as a matter of probability, there is a much greater chance on a smaller circuit that a sitting panel will contain at least one judge who sat on a prior case that is under discussion, and is familiar with that case and committed to it"). Research protocols for judges and courts staff are thus critical; nonetheless, even the best practices in this area will be undermined if the *corpus juris* is unknowable or rendered nonprecedential by fiat, if meaningful appellate review is not conducted safely, or if those actually adjudicating are not up to the job.

224. *See* Pether, *Scandal*, *supra* note 13, at 1474–83.

225. Wilkinson, *supra* note 52, at 1176.

> Other plaintiffs may refrain from seeking to vindicate their just rights in court because of the greater uncertainty of recovery. As the predictability of law and the consistency of justice declines, public cynicism about the judicial process may increase. Indeterminacy in the end robs the rule of law of its dignity and majesty. Far more than that, it robs citizens of their rights as the day comes when less and less can be asserted in a court of law with certainty.[226]

All this is of course exacerbated by the imbrication of the material practices of panel-based adjudication as it is currently practiced in the United States with nonprecedential status rules, unreasoned opinions, or unsafely delegated adjudication.

While the binary system of precedent apparently meets Alexander and Sherwin's third standard for judicial decisions, that of case-based "reliance [ ] binding the litigants to the result and achieving finality for their dispute,"[227] it fails to do so to the extent that systematically biased, summary disposition of legal claims both invites disrespect for the judicial system and encourages rather than discourages further attempts to seek their principled adjudication.[228] So, too, the apparent stability offered by the binary system of precedent is undermined.

Similarly, the binary system of precedent confounds what Melvin Eisenberg calls common law reasoning's promise that "courts [ ][will] engage in a form of legal reasoning that is familiar to and may be reproduced by the legal profession," thus enabling "lawyers to advise clients with some confidence and success about the state of the law and the legality of clients' actions."[229] There is no good faith nor yet legally expert explanation of "why the law is" what it is said or merely ruled to be in the significant majority of the circuit courts' putative merits decisions; alongside that absence goes the neglect of any felt obligation to "demonstrate, or attempt to demonstrate, to the public . . . the law's claims of legitimacy," and indeed of its parallel claim to authority, to the extent that authority depends on anything other than bare power, selective blindness, and contempt.[230]

We have, then, inherited a judiciary and a theory and practice of precedent radically detached from what Gerald Postema identifies as "com-

226. *Id.*

227. *See* Edlin, *supra* note 203, at 4.

228. *See* Dyzenhaus & Taggart, *supra* note 2, at 148 (adding that *unexplained* decisions, which shield courts from accountability of review, "both encourage appeals and make it difficult, even impossible, for the appellate court to determine whether the lower court erred"). Summary dispositions are thus, in a sense, doubly dysfunctional.

229. *See* Edlin, *supra* note 203, at 7 (discussing Melvin A. Eisenberg, *The Principles of Legal Reasoning in the Common Law, in* COMMON LAW THEORY, *supra* note 2, at 81, 81–101).

230. *See id.* at 3.

mon law analogical reasoning['s] demand[ ] [for] constant evaluation . . . . [and] [c]onsidered judgment [that] in the common law tradition is reflective and reflexive" and thus does not permit the kind of delegatory practices that are institutionalized in this nation.[231] How did this happen? Why?

Having articulated the material history, the practice, let me turn first to the "prehistory" of the binary United States doctrine of precedent and offer some brief observations on its constitutional structural matrix, and next to some recent theorizing of precedent: first by scholars whose descriptive and normative accounts of the common law I have just drawn on, and then to (i) a genealogy of scholarly writing on precedent generated as our system of precedent became binary; (ii) a shifting of the strata of constitutional soil in which that change was nurtured; and (iii) the discourse of precedent fear which emerged from it.

B. *Precedent's American Prehistory*

Morton Horwitz locates the prehistory of competing discourses on an institutional self-consciousness about precedent in the early nineteenth century, contending that "[a]t precisely the moment that the codification movement of the 1820s and 1830s produced the first sustained challenge to the democratic legitimacy of the common law, there arose a countervailing movement to defend the non-political character of judge-made law."[232] He then identifies a similar opposition in the "merg[ing] of law and equity," finalized in the United States by 1848, which functioned as an artifact of rule of law discourse positioned in opposition to instrumentalist jurisprudence.[233] Horwitz's more general theme, then, is that social change engenders legal change, and he goes on to argue that

> [a]fter the trauma of the American Civil War, amid heightening social conflict produced by immigration, urbanization, and industrialization, orthodox legal thinkers and judges sought ever more fervently to create an autonomous legal culture as part of their "search for order." Through a process of systematization, integration, and abstraction of legal doctrine, they refined and tightened up what had previously been a loosely arranged, ad hoc system of legal classification.[234]

He also makes the case that between the Revolution and the Civil War, a jurisprudence of enforcing natural rights encountered and gave way to common law's instrumentalist "implicat[ion] in the process of pro-

231. *See id.* at 10 (discussing Postema, *supra* note 208).

232. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 10 (1992).

233. *See id.* at 17.

234. *Id.* at 10 (footnote omitted); *see also id.* at 4 (theorizing that social change engenders legal change).

moting economic growth," preparing the ground for the *Lochner* era.[235] There, the common law adjudication proved inadequate for emerging legal practice, as the focus of litigation moved from adjudicating private rights to public ones, the perception of its obsolescence becoming sharpened during the period of Realist critique.[236] Likewise in the Progressive Era of the early twentieth century, analogical reasoning from precedent had become a target of intellectual critiques of Classical Legal Thought.[237]

Kunal Parker, by contrast, makes the case that it is not "until the very end of the nineteenth century" that the common law's role in the national legal-political structure is challenged.[238] He shares with Horwitz and other leading United States legal historians, however, a consciousness of the critical role played by Holmes in destabilizing the legitimacy of common law's method.[239] Parker's critical insight is framing Holmes's fundamentally modernist intellectual project as understanding "history [a]s the heretical or iconoclastic practice of revealing the merely temporal origins of [the common law] in order to dismantle [its] foundations . . . ."[240]

The ground thus cleared, law could be collapsed into politics.[241] For both Holmes and the "Progressive Era thinkers [who] followed [him] in attacking the common law's [ ] traditional backward orientation [and] its commitment to repeating the past," the common law, thus unmoored from traditions both praxiological and grounded in the local and particular matrix of English constitutional theory, came to be understood as "something that had to be made in the present, with full awareness of its contingency, provisionality, and revisability."[242] Thus, the intellectual soil for future-oriented precedent fear was prepared.

To the extent that precedent begins its modern status as highly contested, and that it fragments over the threatened crisis in redistribution of what I will call "national goods," centered on what constitutional courts would make of the Equal Protection and Due Process Clauses, it is no surprise that we see this occurring during the massive industrialization of the United States that began in the late nineteenth century. And in the present, it has bifurcated over the claims of "haves" and "have-nots" to judicial attention. As Horwitz puts it,

> the dislocating forces of urbanization, massive immigration, and industrialization triggered unprecedented levels of social strug-

235. *See id.* at 112.

236. *See id.* at 205–06.

237. *See id.* at 203.

238. *See* KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 1 (2011).

239. *See* HORWITZ, *supra* note 232, at 142.

240. *See* PARKER, *supra* note 238, at 7.

241. *See id.* at 7–9.

242. *See id.* at 9.

> gle. This, in turn, placed enormous stress on the traditional legitimating ideal of equality of opportunity as practiced within a market system that was thought to distribute rewards more or less fairly according to the value of one's economic contribution. In particular, an increase in social and economic inequality drew into question the dominant old conservative commitment to the ideal of a neutral, non-redistributive state. The assault on Classical Legal Thought cannot be understood independently of struggles over the meaning of social justice and challenges to the moral foundations of individualism that had emerged by the turn of the century.[243]

Against this account of the prehistory of the politicization of precedent it is unsurprising to find a line of state court cases in the latter half of the nineteenth century uncannily prefiguring *Hart*. *Baker v. Kerr*[244] construed an Iowa statute requiring that

> the opinions of the court on all questions reviewed on appeal, shall be reduced to writing, and filed with the clerk, that the court must decide on each error assigned, and that no case is decided until the opinion in writing is filed with the clerk.[245]

In so doing, the court rationalized disobeying the statute in almost identical terms to the justification of unpublished opinions in *Hart*: achieving both "speedy administration of justice, [together with] the proper and careful determination of all the causes submitted in this court" is "practically impossible," thereby justifying affirmances without written reasons "when [the matter] was unimportant, involved no new question, and when an opinion would be but repetition and tend to unnecessarily encumber our published reports."[246] The opinion also decried the volume of litigation, and vexatious or frivolous appeals, while rationalizing the necessity to carefully craft written opinions in legally important cases.[247] It concluded with the Kozinksi-esque claim that

> [i]f, at any time, there is a seeming departure, [from the statutory requirement of written opinions], it will be with a consciousness on our part that the particular case has received none the less of our care and attention, and that neither parties litigant, counsel, or the public, can have just cause of complaint.[248]

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243. HORWITZ, *supra* note 232, at 4.
244. 13 Iowa 384 (1862).
245. *Id.* at 386 (citations omitted).
246. *See id.*
247. *See id.* at 386–87.
248. *Id.* at 388.

It also cites to an 1857 Indiana case, *Willets v. Ridgway*,[249] which justified defying a *constitutional* command to publish opinions in all cases.[250] *Willets* also (eerily anticipating the language of *Jones II*) criticized the quality of lawyering as necessitating this breach, and admitting poor quality judging, the nineteenth century version of "sloppy language," responsibility for which is laid at the feet of lawyers.[251]

In 1889, *In re Griffiths*[252] held unconstitutional an Indiana statute providing that

> [o]pinions involving no disputed provisions of law or equity or rule of practice, and no question except as to whether the verdict or decision is sustained by sufficient evidence or is contrary to the evidence, shall be printed in brevier type, without analysis or syllabus. The index and tables of cases shall be subject to the supervision and direction of the supreme court. It shall be the duty of the supreme court to make a syllabus of each opinion, except as hereinbefore provided.[253]

Reasoning that the separation of powers would be breached by the requirement in the statute that judges perform the (nonjudicial) duties of the reporter, that is making syllabus and headnotes, it cited *Houston v. Williams*[254] for the proposition that a constitutional court's "constitutional duty is discharged by the rendition of decisions."[255] But that case held that giving reasons for judgment was discretionary, and that a decision of the court comprised its judgment and that its opinion was constituted by the reasons for that decision.[256] *Griffiths* based its decision on Indiana constitutional provisions (Article VII, Sections V, VI), which provided as follows:

> The supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the court thereon. The general assembly shall provide, by law, for the speedy publication of the

249. *See id.* at 387 (citing Willets v. Ridgeway, 9 Ind. 367 (1857)).

250. *See Willets*, 9 Ind. at 369–70.

251. *See id.* at 369 (referring to "frivolous [ ] points" and "points only slightly argued").

252. 20 N.E. 513 (Ind. 1889).

253. *Id.* (internal quotation marks omitted).

254. 13 Cal. 24 (1859).

255. *See Griffiths*, 20 N.E. at 514 (internal quotation marks omitted) (citing Houston v. Williams, 13 Cal. 24, 25 (1859)).

256. *See Houston*, 13 Cal. at 26–27 ("The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. . . . A decision of the Court is its judgment, the opinion is the reasons given for that judgment.").

> decisions of the supreme court made under this Constitution; but no judge shall be allowed to report such decisions.[257]

Thus, explicitly constitutionalist anxieties about precedent are evident in the latter half of the nineteenth century,[258] but the conventional common law conception of precedent, with its diffuse temporal orientation, and grounded in the material practice of plenary adjudication, complete with oral argument, still dominates.[259] The days of precedent, understood as legitimate and not politically charged, were numbered, however, and the Realist and Sociological Jurisprudential schools of Progressive Legal Thought sharpened the crisis.[260] "Interpretativist" and instrumentalist thought, geared to using legal discourses and institutions as engines for social change, itself became institutionalized.[261]

Let me return briefly to late nineteenth-century battles fought by courts against mandates for providing litigants with reasons for judgment. The late nineteenth-century constitutional disputes over what exactly should be in judicial opinions were not confined to Indiana. In one of the earliest scholarly exemplars of overt contempt for precedent, appellants, and constitutional mandates that courts give reasoned decisions—the last of which also apparently relayed judicial frustration with the evident desire of the polity for reasoned judicial decisionmaking—Max Radin, writing late in the *Lochner* era, addressed Article VI, Section II of the California constitution, which provided that "[i]n the determination of causes [by the Supreme Court], all decisions of the court in bank or in department, shall be given in writing, and the grounds of the decision shall be stated."[262] Radin trenchantly justifies contemporary judicial refusal to en-

257. *Griffiths*, 20 N.E. at 514 (citation omitted) (internal quotation marks omitted).

258. *See* D.H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 125–26, 128, 130 (1889) (canvassing and rejecting argument that constitutional cases demand more rigid doctrine of precedent than private law cases).

259. *See id.* at 125 (positing that "[a] deliberate or solemn decision of a court or judge, made after full argument on a question of law fairly arising in a case and necessary to its determination, is an authority or binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented; but the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible." (internal quotation marks omitted)).

260. *See* HORWITZ, *supra* note 232, at 4–5 (explaining Classical Legal Thought in crisis, with ideal of "declaring pre-existing law" under attack).

261. *See id.* at 6 ("'[L]aw in books' was out of touch with the 'law in action' . . . .").

262. *See* Max Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486, 486 (1930) (alteration in original) (quoting California constitution) (internal quotation marks omitted); *see also* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10

force that provision of the 1879 California constitution, which had contemporary equivalents in the constitutions of eight other states, noting that the history of that California provision lay in the above-mentioned *Houston v. Williams*, which had held unconstitutional on separation of powers grounds a statute that provided substantially what the 1879 provision enshrines.[263]

Radin covers much familiar ground: there is too much court-generated legal authority, and producing reasoned opinions causes too much delay.[264] He documents a history (1859–1879) of "brief and summary opinions [in the reporters], sometimes reversing and sometimes affirming. . . . [as well as] [a] certain number of cases [ ] decided without opinion and several of these were reversals," while conceding that

> [e]vidently there was a gathering objection to the practice. It is hard to believe that it was a popular objection. But there was always a popular and persistent rancor against the judiciary as an institution and lawyers who had any reason for attacking it would be fairly sure of obtaining popular support.[265]

There is here, too, evidence of a strong distaste for litigants and likewise for their demands on the courts, and an explicit disparagement of appellants judged, in my words, "vexatious."[266] There is the binary between cases that do and do not require careful review. And some forty-five years before the emergence of modern nonprecedential status rules, Radin anticipates their language.[267]

Radin ironizes a contribution to the constitutional convention debate, which makes the case for more judges and panel disposition so that written reasoned opinions could be given in all cases and revealingly notes that the Supreme Court of the United States "decides many appeals with a mere memorandum of affirmance."[268] Conceding that reversals merit written opinions, in part because of "discourtesy to the court below," he justifies the largest number of appellate decisions without opinion—affirmances without opinion—as follows:

> [T]hey are at the present affirmed after a judge of the Superior Court and generally two or three judges of the District Court of Appeal [then the intermediate appellate court in California] have already fully considered and determined the matter and

(2003) (suggesting "*Lochner* era" "unofficially began in 1897 with *Allegeyer v. Louisiana* and ended in 1937 with *West Coast Hotel v. Parrish*" (footnotes omitted)).

263. *See Radin, supra* note 262, at 486–87 (citing Houston v. Williams, 13 Cal. 24 (1859)).

264. *See* Radin, *supra* note 262, at 486.

265. *See id.* at 487.

266. *See id.* at 492.

267. *See id.* at 494 (discussing Baker v. Kerr, 13 Iowa 384, 386 (1862)).

268. *See id.* at 488–90 & n.8.

> usually after a fairly extensive opinion in writing has already been filed and published.[269]

This is thus a case for discretionary appeal rights in what is evidently often, but not always, the paradigm of a first instance, reasoned decision followed by a reasoned initial appeal as of right, with the jurisdiction's court of final appeal seeing its role as like that of the United States Supreme Court. Radin's article documents a situation where citizen demands for reasoned adjudication led to its constitutional mandating; where lawyers complained when judges failed to deliver reasoned opinions; and where judges defied a constitutional mandate, justified that defiance, and were joined by others in their defiance.[270] This suggests the charged grounds on which nonprecedential status rules were sown and locates significant aspects of its justifications in the era of constitutional precedent for which *Erie* might be held to signal the intellectual ground,[271] *Lochner* might be said to initiate, *Brown* consolidate, and the reproductive rights cases push towards crisis. Radin's article, a species of canary in the coal mine of (scholarly) precedent jurisprudence, is charged with the rhetoric of judicial authoritarianism.

This was echoed six years later, when, in a reaction against the Legal Realist and Sociological Jurisprudential Thought which had eviscerated the case for a principled common law method, Roscoe Pound convened a "Conference on the Future of the Common Law" at Harvard.[272] Pound's address at that conference signals a critical turn in the way the common law had come to be understood as a tool of judicial power:

> [The common law] is not, then, any body of fixed rules established at any fixed time or by any determinate authority, it is not any body of authoritative permanent or universal premises for legal reasoning, it is not any body of legal institutions, which we may believe is to have a long and distinguished future as an agency of justice among English-speaking peoples. It is rather a taught tradition of the place of adjudication in the polity of a self-governing people. It is rather a taught tradition of voluntary subjection of authority and power to reason whether evidenced by medieval charters or by immemorial custom or by the covenant of a sovereign people to rule according to declared principles of right and justice.[273]

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269. *See id.* at 490.

270. *See generally id.* at 488–86.

271. In that it articulated the break with the declaratory theory of the common law.

272. *See* PARKER, *supra* note 238, at 284–85.

273. *See* Roscoe Pound, *What Is the Common Law?*, *in* THE FUTURE OF THE COMMON LAW 3, 10–11 (1937).

Criticizing the administrative state, he opposed it to a creative, juriscentric theory of judicial power working to find in the texts of precedent desirable resolutions for contemporary social problems, characterizing the common law as "a traditional technique of finding the grounds of deciding controversies by applying to them principles drawn from recorded judicial experience."[274]

For Horwitz, historicizing what Radin prefigures and Pound evidences, "[t]he constitutional revolution of 1937 was itself the culmination of a generational revolt against a structure of legal thought that had crystallized over more than a century since the American Revolution."[275] That revolt included (i) the first flowering of what came to be called substantive due process, the development of which was yoked to the effects of a radical rereading of the Equal Protection Clause; (ii) the emergence of regulation as a large and rapidly expanding third genre of law; and (iii) Realist skepticism about the project of precedent. These three strands of thought unite, then, radically to destabilize conventional accounts of precedent. They also enable the conceptual fissuring of the United States doctrine of precedent and its instantiation in the contemporary binary doctrine. This move ultimately involves an abandonment of theorizing a principled common law legal disciplinary discourse or method in favor of a developing dogma of political agency.[276]

Legal Realism provided the bedrock for this instrumentalist view of precedent that enabled its development. First, it normalized the claim for frankly undisciplined, ideological, and instrumentalist judicial decisionmaking. Next, and perhaps most significantly, its reliance on social science to account for judicial decisionmaking eviscerated and thus stunted the development of an account of a distinctively legal method in the fertile hybrid soil of United States law, drawing as it does both on the authority of the code and the method of the common law. The Realists also manifested a marked, if not yet hardened, consciousness of the forward-orientation towards precedent that has since come significantly to characterize United States discourse on precedent, both scholarly and judicial. Llewellyn, for example, argued that judges have a "responsibility for the precedents which their present decisions make."[277] In the wake of the court-packing controversy, and articulating an ethical consequentialist variant of Realist legal theory, Felix Cohen famously and unsurprisingly meditated on paradigms for interpreting "due process" and generated a critique of the synchronic representation of law offered by legal science and the case

274. *See id.* at 11 (criticizing the administrative state by remarking that "judging holds the chief place" in the common law tradition, "not administering").

275. *See* HORWITZ, *supra* note 232, at 7.

276. *See* PARKER, *supra* note 238, at 285.

277. *See* Karl N. Llewellyn, *Case Law*, *in* 3 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 249, 249–51 (Edwin R. A. Seligman ed., 10th prtg. 1953).

method, conceiving of law as a "social process," [marked by] "temporal processes, [ ] cause and [ ] effect, [ ] past and [ ] future."[278]

By the fifties, the jurisprudential discourse had shifted significantly. Eugene Rostow, writing in 1952—during the antecedent stirrings of the due process innovation that was shortly after to mark the Warren Court's criminal procedure jurisprudence[279] and in the foment of the incorporation revolution[280] and of the crises in United States over race relations[281] and civil rights[282]—made an assertive case for transformative constitutional common law.[283] In the wake of *Brown*, Llewellyn, too, in much the same way as his intellectual rival Pound, shifted ground on the common law. In his 1960 text, *The Common Law Tradition*, Llewellyn responded to what Parker acutely identifies as "a special kind of twentieth-century threat, namely the erosion of lawyers' faith in 'any reckonability in the work of our appellate courts, any real stability of footing for the lawyer.'"[284] Along with the loss of lawyers' faith came an equally significant attitudinal threat to justice: appellate judges, federal and state, have developed since the late nineteenth century the habit of breaking statutory and even constitutional accountability requirements upon them.

C. *Constitutional Matrix*

If one of the characteristics of the doctrine of precedent that tended towards stability in the *corpus juris* was that "no single judge could ultimately change the law, and a series of judges could only do so over time

278. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 818, 844 (1935).

279. *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 196 (1952) (citing Rochin v. California, 342 U.S. 165, 173 (1952)). *Rochin*, in its turn, cites to Brown v. Mississippi. *See Rochin*, 342 U.S. at 173 (citing Brown v. Mississippi, 297 U.S. 278, 285–86 (1936)). Rostow invokes "the right of habeas corpus, the central civil liberty and the most basic of all protections against the authority of the state" and "constitutional review . . . for searches and seizures without warrant." *See* Rostow, *supra*, at 206. He further argues that "[l]awless police action has not yet been banished from American life, but the most primitive police sergeant is learning that third degree methods may backfire." *Id.* at 209.

280. *See Rostow*, *supra* note 279, at 197 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

281. *See id.* at 202 (referencing "politically impotent minorities"); *id.* at 206 (criticizing "deny[ing] the possibility of constitutional review by the courts for laws denying the vote to Negroes"); *id.* at 207–09 (invoking 'relocation camps' at issue in *Korematsu* and *Hirabayashi*); *id.* at 208 (identifying "the Negro problem as a constitutional . . . obligation" (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 208, 210 (1944))); *id.* (registering that "[t]he Negro does not yet have equality in American society, or anything approaching it. But his position is being improved, year by year. And the decisions and opinions of the Supreme Court are helping immeasurably in that process.").

282. *See id.* at 202, 207 (arguing that Thayerian restraint is anachronistic).

283. *See id.* at 204–05 (engaging Hand's critique of common law).

284. *See* PARKER, *supra* note 238, at 287 (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3 (1960)).

and in response to changed events or to changed attitudes in the people,"[285] and if that legal method limited the powers of what were in the English system (and became in the United States federal courts) unelected judges, then the ideological background against which precedent operates changes significantly given the necessity of interpreting a written constitution, as much if not more than it does as a practical matter given the phenomenon of panel adjudication and the advent of the rule of the circuit.

The shift in ideological matrix is especially marked when that constitution (on some accounts) is predicated on judicial review as an integral part of the separation of powers. And yet, given the exigencies of appellate hierarchies, constitutional precedent and judicial review institutionalize the possibility of radical legal change with an apparently antidemocratic caste that was not checked by legal institutions and discourses in the same (doctrinal) way, say, that the "technique of reading strictly statutes in derogation of the common law" in English jurisprudence had been.[286] *The Federalist Papers* famously speaks to the synecdoche of judicial power that is precedent: in *Federalist No. 78*, Hamilton conceived of precedent as constraining judicial power.[287] Madison, by contrast, even against a contemporary Blackstonian legal matrix that envisioned law and judicial decision as not necessarily congruent,[288] anticipated *Brown*: the case that may justifiably fracture the doctrine of precedent.[289]

The various kinds of contextual tension fissuring the United States doctrine of precedent are intensified when the interstices in the English constitutionalism in the Framing Era are considered: a matrix of unwritten or rather textually scattered constitutional documents, a nascent and contested claim of authority of judicial review of both Royal prerogative and (at least in its administrative law variant) legislative competence, all understood against a discourse of "the Ancient Constitution" and a theory of rights popularly possessed unless and until legitimately infringed upon. The widespread national tradition of an elected judiciary likewise provides authority for departing from precedent that is foreign to common law nations with an appointed judiciary. If an elected court establishes a precedent, and then a differently-constituted elected court which follows it takes the view that its election reflects a citizen mandate to correct earlier precedent and sees in their own election an equality of democratic legitimacy

285. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982).

286. *See id.* at 15.

287. *See* THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

288. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (Dawsons of Pall Mall 1966) (1765) ("So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing . . . .").

289. *See* Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 442 (Gaillard Hunt ed., 1910).

with the elected branches,[290] then precedent becomes a different creature from that theorized by Postema, Sherwin, and other United States scholars of precedent working in normative paradigms.

One other way to approach the conditions precedent for the fissured national specificity of the United States doctrine of precedent is through Eskridge's prescription for three levels of deference to precedent:

> Common law precedents enjoy a strong presumption of correctness. The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine. Statutory precedents, on the other hand, often enjoy a super-strong presumption of correctness. In some cases, the Court says it will overrule statutory precedents only under the most compelling circumstances, such as new constitutional developments.[291]

That is to say that if the contents of the Constitution are conceived as being more or less immanent within the document's fabled "four corners," there is a brake on making constitutional precedent. If the court itself has got it wrong, then the court has more leeway, viewed from a perspective twinning legitimacy with comparative institutional competence, to change precedent.

This tension becomes more complex when the provisions of the Constitution most critical to the development of the contemporary binary doctrine of precedent, the open-textured Due Process and Equal Protection Clauses of the Fourteenth Amendment (and eventually, the Due Process Clause in its Fifth Amendment housing), are in play than in many other United States constitutional interpretive contexts. Writing in 1982, Calabresi laid the blame for contemporary jurisphobia at the foot of judges seeking to keep the law clean of anachronistic statutes, but, arguing against the flight to equal protection as a means to rationalize the increasing body of statute law, he also made the case for a conceptual connection

290. *See, e.g.*, Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 361 (Tex. 1987) (Mauzy, J., concurring); *see also* Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277, 278 (2004).

Nonetheless, in his largely sympathetic commentary on the effects of judicial election on judicial attitudes towards precedent, Justice Jefferson of the Texas Supreme Court makes a fairly conventional case for common law legal development; what that inevitably means, of course, is that if precedent is to operate in good faith, reasoned choices must be made about "when a timeworn rule no longer serves the needs of society" and merits judicial change, which is to say that precedent is inevitably, pragmatically, an engine of legal change. *See* Wallace Jefferson, *Stare Decisis*, 8 TEX. REV. L. & POL. 271, 273–75 (2004) (quoting Guitierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979)).

291. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

between precedent and the constitutional doctrine of equal protection.[292] Another insight he offered is the upward effect of administrative decisionmaking mores and practices, from which ground the majority of appeals resulting in nonprecedential opinions emerge, on the instability of appellate court decisional practices. He registered that the advent of the New Deal and the concomitant institutionalization of the administrative state meant the delegation of decisionmaking about allocation of governmental resources, or the administration of government institutions, such as prisons, was itself an attempt to provide for common-law like flexibility in the development of certain kinds of legal rules or standards.[293] One of the fruits of such delegation is judicial deference to administrative decisionmaking.[294]

The discourse of "reliance interests" critical to legitimating precedential change in the common law (and classically private law) context is likewise rendered complex in what I will call the "test cases" for a good faith understanding of precedent in this distinctive constitutional structure. Even a scholar as hostile to nineteenth century Holmesian common (private) law reform as Stephen Presser saves his most vigorous fulmination for twentieth century (economically) redistributive justice precedent, which he characterizes as involving "social policy" and as "forward-looking."[295] He also classes this illegitimate constitutional precedent with what the "Warren court did in equal protection, 1st Amendment [in the interest of rendering the Religion clauses more secularist], and criminal procedure cases . . . ."[296]

Alexander and Sherwin's model of common law theory thus offers a useful insight into the distinctively American and explicitly constitutional jurisphobia dressed in the discourse of precedent fear.[297] Their normative, rule-based account of precedent depends, in Edlin's words, on "the judicial process as an authoritative public forum for concluding interpersonal disputes in a plural society consistent with widely shared societal

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292. *See* CALABRESI, *supra* note 285, at 7, 13–15.

293. *See id.*

294. *See id.* at 7.

295. *See* Stephen B. Presser, *The Development and Application of Common Law*, 8 TEX. REV. L. & POL. 291, 291–93 (2004); *id.* at 297 (characterizing judge's "job primarily as the protection of property and person as that protection has been traditionally understood. You do not redistribute wealth. That is not your job."); *see also* Robert P. Young, Jr., *A Judicial Traditionalist Confronts the Common Law*, 8 TEX. REV. L. & POL. 299, 303–4 (2004) (finding "American common-law tradition, [in which] one is advised that one's actions do or do not comport with the law only *after* action has been taken, presumably in reliance on legal rules that were thought to have been in effect when the action was taken," to be "incontinent"); *id.* at 304 (confessing that "I have found that it is particularly difficult, even when I am in my zone of comfort (when anchored to and involved in construing statutory or contractual texts), to anticipate the unintended consequences of my decisions.").

296. *See* Presser, *supra* note 295, at 293 (footnotes omitted).

297. *See* Edlin, *supra* note 203, at 4 (discussing Alexander and Sherwin).

commitments to fairness and equal treatment."[298] The binary system of precedent that has come to characterize the United States courts since the mid-twentieth century was, rather, the product of a fractured polity, driven by top-down legal instantiation of civil rights across racial lines that had come with only relatively minor exceptions to track lines of material prosperity, of access to literal as well as symbolic capital, in a move which seemed to promise large-scale redistribution of access to both kinds of social goods.[299] This social fracturing, then, echoed the instability produced in the wake of the distinctively precedential constitutional doctrine of substantive due process that had threatened the New Deal.

Eisenberg's thesis, in Edlin's phrasing, that in common law adjudication, "[d]octrinal rules should be applied and extended where they are substantially consistent with social propositions, but doctrinal rules should not be applied and extended if they are not substantially congruent with social propositions," likewise suggests why precedent should become such a charged and nakedly politicized field in such a fractured sociocultural context with a contextual constitutional specificity such as that in the United States, in particular from the *Dred Scott* era onwards, with renewed significance in the Black Codes and Jim Crow era, as represented by *Plessy v. Ferguson*.[300] So too Gerald Postema's praxiological account of common law analogical reasoning's higher order or "reflective assessment level" operation suggests why marked, socially-contested developments in constitutional precedent of the United States equal protection or due process stripes, in the latter's "substantive" mode,[301] criminal procedural, or claims for access to the "social safety net" variants should produce anxiety:

298. *See id.*

299. Judge Wilkinson is especially insightful on the historical contexts in which delegated adjudication and the growth of federal appellate caseload emerged. Concluding in 1994 that "the basic character of an important public institution has been altered," he attributes the rise in adjudicatory demand on federal courts to the cultural "nationalization" of subjects as transportation, communication, and technological advances detached the populace from locality to the emergence of the (federal) administrative state, beginning with the New Deal, and its arguable apogee in the era of the emergence of the "wars" on poverty (1964), crime (early 1970s, with origins in the 1960s), and drugs (1971). *See* Wilkinson, *supra* note 52, at 1147, 1149–51, 1154; *see also* Forman, *supra* note 136, at 344 (making similar point about effect of wars on crime and drugs on incarceration rates). Wilkinson also cites the "Supreme Court's abandonment of nondelegation doctrine" and "discard[ing] restrictive interpretations of the Commerce Clause," and highlights trends in the practices of electoral politics that resulted in increasing federal legislation, the increase in private federal causes of action, the sums to be gained and lost through their exercise, and, in particular, the federalization of gun and drug crime. *See* Wilkinson, *supra* note 52, at 1152–54 (footnote omitted).

300. *See* Edlin, *supra* note 203, at 8 (discussing Eisenberg, *supra* note 229). *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sandford, 60 U.S. 393 (1857).

301. I accept David Bernstein's claim, following James W. Ely, Jr., Gary D. Rowe, G. Edward White, and Morton J. Horwitz, that the phrase *substantive due process* is used no earlier than the 1950s. *See* Bernstein, *supra* note 262, at 2 n.3.

> The practical success of law depends on the social capacities of citizens and the extent to which law's guidance is accessible to these capacities. But these capacities are more likely to function well with relatively concrete matters where practical pressures for conciliation are present and recognizably common materials are ready to hand. . . .
>
> Typically, analogical thinking in law is more concerned with workability on the ground than with coherence of broad moral vision. . . . It is more concerned with coherence of legal doctrine with the activities, practices, and lives of the citizens whose interactions it seeks to guide than with more distant theoretical coherence of legal doctrine. The reason for this is obvious: It is from the former that pressures toward conciliation and practical coherence arise.[302]

By contrast, the decision in *Brown*, like the "strict binding" aspect of the binary precedential practice the Fourth Circuit engendered in its aftermath, is notably monologic, performing a rhetoric of coherence, of a manifest *imaginary* even if configured as constitutionally aspirational national consensus that its reasoning only weakly undergirds.[303] It likewise plays dismissive lip service to the doctrine of precedent in its mere citation of the higher education equal protection cases that marked the path from *Plessy*, rather than doing the analogical work that might have manifested faith in constitutional common law, turning rather to social science "authority" which was the Realist's legacy, and which operated to delegitimate the common law method.[304] *Brown* as a common law text, then, breaks sharply with the precedent of *Plessy*, although it does not need to do so.[305] Relying on citation rather than analogical reasoning, it fails to make the available precedential case derivable from the higher education desegregation cases to public school education, an issue over which its enforcement audience was obviously sharply divided and substantially oppositional to the rule the Court announced—the practical context in which it sought to intervene was the material reality of segregated schooling. The "appeal to analogy," then, in Postema's terms, failed, engendering the Court's movement to "the broader perspective," which in turn was sharply contested.[306]

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302. *See* Postema, *supra* note 208, at 132.

303. *See* Pether, *Scandal*, *supra* note 13, at 1526.

304. *See* Brown v. Bd. of Educ., 347 U.S. 483, 491–94 & n.11 (1954).

305. *See id.* at 492–95.

306. *See* Postema, *supra* note 208, at 130 ("Analogical reasoning may reach an impasse, but repair to the broader perspective works with the materials fashioned at the previous stage of the process.").

Perhaps *Brown*'s most persuasive theoretical vision is based in the vision of robustly egalitarian citizenship it articulates at its closing,[307] but that vision was in acute conflict with precedent inherited from the *Slaughter-House Cases*,[308] as with the "defective"[309] yet characteristic democracy that legislated Jim Crow, *and* that vision is yet to be achieved. *Brown* seeks rhetorically to establish coherence among the lives of all citizens of the racially divided United States through its invocation of the "feeling of inferiority" engendered in black children by segregated school education.[310] But the apparently broadly emotionally resonant appeal to concern for the young had both a practically limited audience and was also undercut by much in the doll studies that the Court invoked but did not analyze.[311] It was also explicitly betrayed by the logic of *Plessy*, which undergirded the social structure of the contemporary South.

Precedent is "fundamentally historical[ ] [a]nalogical reasoning stand[ing] like Janus at the threshold between the past and the future, charged with grounding a decision in the case at hand by looking both backward to the field of examples from which we have come and forward to a projected path into the future."[312] Thus, in casting off the deep historical constraints constituted by *Dred Scott*, the *Slaughter-House Cases*, and *Plessy*, and in—out of necessity—cutting itself loose from the riven and contested enactment history of the Fourteenth Amendment (because it could not orient a coherently communitarian authority for integrated school education), the *Brown* Court laid the groundwork for the discourse on precedent marked with anxiety about the future which developed in its wake. The law made in *Brown* is at once authoritarian—reasoning cast as discarding rather than facilitating analogy[313]—and arbitrary, because it is

307. *See Brown*, 347 U.S. at 495 ("[S]egregation is a denial of the equal protection of the laws.").

308. 83 U.S. 36 (1873) (providing early, and very narrow, interpretation of Fourteenth Amendment).

309. *See* Hans-Jürgen Puhle, *Democratic Consolidation and 'Defective Democracies'* (J.W. Goethe Univ. Frankfurt, Working Paper No. 47, 2005), *available at* https://www.uam.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=content-disposition&blobheadername2=pragma&blobheadervalue1=attachment%3B+filename%3Ddoc10.pdf&blobheadervalue2=public&blobkey=id&blobtable=MungoBlobs&blobwhere=1242698732765&ssbinary=true (stating institutional minimum for democracy is "free and fair, competitive and effective, elections").

310. *See Brown*, 347 U.S. at 494.

311. *See id.* at 494 (citing K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950)) (asserting study as "modern authority," but not discussing). Kenneth and Mamie Clark performed the doll experiments—presenting two dolls, identical except for skin color, to children who were asked which one they liked; the result was that the white dolls were preferred by almost all children—and testified as expert witnesses in *Brown*. *See id.*

312. Postema, *supra* note 208, at 125.

313. *Cf. id.* at 120 ("judgments stand in need of reasons"); *id.* at 125 (discussing "the public and collaborative nature of analogical reasoning").

literally or effectively unreasoned.[314] In this, it is like the dyad of "strict binding precedent" and nonprecedent, hardened over time into the binary system of precedent, and harnessed nowadays to the institutional practices of the panel system, screening, and central court staff.

Let me turn, in concluding this part, from practices to rules. As discussed in Part II above, the practice of the binary doctrine of precedent began in 1962 in the Fourth Circuit, where *Brown* was still contested authority, and in the aftermath of both *Brown* and the cases of the criminal procedural revolution, in which *Jones* itself was a bit-player, including *Miranda v. Arizona*,[315] a critical case in the judicial debate over the status of constitutional precedent, in 1966. Similarly, in the early 1970s, the question about whether federal circuits should have rules governing various aspects of the binary practice of precedent proliferated: criteria for published and unpublished opinions, citation bans, and finally precedential status rules, were debated, recommended, and adopted. As indicated *supra*, the Fourth Circuit documented the binary system of precedent it had developed almost a decade before in 1970.[316] In 1972, the Federal Judicial Center recommended courts adopt publication plans, including citation bans.[317] In 1973, the Advisory Council on Appellate Justice contemplated, but recommended against, the adoption of nonprecedential status rules.[318] By 1978, the First, Second, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits had nonprecedential status rules,[319] which the Circuit Executive of the Tenth Circuit had written, on February 3, 1976, were "the most controversial" of the limited publication rules.[320] He also noted that the circuit had recently changed its nonprecedential status rule to allow

314. *See* Postema, *supra* note 208, at 126 (positing that "normative significance of a case, its 'gravitational force,' lies not in what one particular judge lays down but in what is taken up in the community of judges and beyond. The doctrine of dictum ensures that no individual judge's decision is *ipso facto* authoritative beyond the particular case before her." (footnote omitted)). Compare the history of the negotiating of the monologic decision in *Brown II*, in particular the lengths necessary to persuade Justice Frankfurter to join the opinion, the legacy of which is found in the inclusion of "all deliberate speed," the trace of the community dissension the opinion for the Court sought to elide if not suppress. *See* Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23, 27 (1992); *see also* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

315. 384 U.S. 436 (1966).

316. *See* Part II, *supra* notes 64–116 and accompanying text.

317. *See* COMM. ON FED. COURTS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, APPEALS TO THE SECOND CIRCUIT, RULE 0.23, 249, 249–50 (1983). Such a plan had been adopted in at least the Second Circuit in 1970. *See id.*

318. *See Standards for Publication*, *supra* note 99, at 20 (calling inclusion of such rule "inadvisable" because doing so might lead committee into "morass of jurisprudence").

319. *See* Herbert J. Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A. J. 1245 (1978).

320. *See* Letter from Emory G. Hatcher, Cir. Exec., U.S. Court of Appeals for the Tenth Cir., to Colonel Harold J. Sullivan, Exec. Dir., Okla. Bar Ass'n (Feb. 3, 1976).

unpublished opinions to be cited as precedent and had thus "reconstructed [its] unpublished opinions back to August, 1972."[321] Just as the development of the binary doctrine of precedent coincided with landmarks in the Warren Court theorizing of constitutional precedent, so too did this period of the battle over constitutional precedent: *Eisenstadt v. Baird*[322] was decided in 1972 and *Roe* in 1973.[323]

VI. Institutional Discourses

> "[T]here has always been a close connection in legal history between . . . social struggle and jurisprudential controversy."[324]

If, as Postema posits, the common law was understood by its practitioners as "law lived in and evolved from the practical interactions of daily life . . . in the common law courts,"[325] then [now retired Australian High Court] Justice Michael Kirby's account of the historical emergence of the first instance adjudicatory norm of giving reasons for judgment also suggests how the judicial *habitus* of the United States federal appellate judge might, in its turn, produce adjudicatory practices designed in a range of ways to suppress appeals. Kirby notes that "[the first instance judge in the newly-emergent bench trial of which he writes] must [inter alia] provide at least sufficient exposition of the applicable law to permit a disappointed litigant to . . . exercise any rights of appeal for which the law provides."[326] If, on Pierre Bourdieu's account of professional subject formation, the judicial *habitus*, the embodied experience which makes professional subjects who they are and thus in turn shapes how they make the world,[327] is *transposable*, then crafting appellate decisional texts that foreclose appeals is a result to be expected when appeals from trial courts are perceived as impossibly burdensome.

Let us move, then, to explore another material effect on the understanding of precedent generated by the habitus of the contemporary United States legal subject, its singular obsession with the forward reach of

321. *See id.*

322. 405 U.S. 438 (1972).

323. *See* Roe v. Wade, 410 U.S. 113 (1973).

324. Horwitz, *supra* note 232, at 6.

325. Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 1), 2 Oxford U. Commw. L.J., 155, 167 (2002).

326. *See* Michael Kirby, *On the Writing of Judgments*, 64 Austl. L.J. 691, 692 (1990), *available at* http://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/829-Aus_Conf_on_Literature_and_the_Law_-_On_the_Writing_of_Judgments.pdf; *see also* Dyzenhaus & Taggart, *supra* note 2, at 148–49. Indeed, to the extent that many appellate decisions in the contemporary federal courts may be functionally, if not structurally, certiorari decisions, Dyzenhaus and Taggart note that an area in which judges have been especially resistant to providing reasons for their decisions is in granting or refusing leave to appeal. *See* Dyzenhaus & Taggart, *supra* note 2, at 150.

327. *See* Pether, *Take a Letter*, *supra* note 13, at 1555 & n.17.

precedent. The anxious drive to control the future, evident in Judge Kozinski's account of "strict binding precedent," is both naïve and highly anomalous. It is also the product of a nation and an era. As to future-oriented precedent fear, British theorist of precedent Trevor R. S. Allan, for example, describes the practical complexity of the operation of precedent thus:

> The rule announced by the court in an earlier case may be *relevant* to the current inquiry, yet have little or no force. Its force and scope depend on its *justification*, judged in the light of present circumstances: Its coherence with current doctrine, on the one hand, and its conformity to prevailing moral and social standards, on the other, jointly determine its fate as a criterion of decision making.[328]

He also points to its complex temporal orientation:

> Even when the principle of *stare decisis* applies, the authority of the precedent depends on a subsequent account of its proper explanation and justification and, hence, of its relevance (or otherwise) to present circumstances. Although the terms of an earlier judgment will normally reveal its original grounds, as they were understood by its author, they cannot bind a later court if, in the light of subsequent events or developing doctrine, a better (more persuasive) explanation of the decision can now be given. The overall coherence or reasoned consistency for which the legal order strives is mainly a present, rather than historical, virtue: The rule of law means an order of just governance, according to criteria of justice that can be defended today to inhabitants of the contemporary world.[329]

It is easy to identify a critical difference about the context in which Allan writes as compared with our own. Given an unwritten constitution and a parliamentary system of governance, common law precedent does not engage the rule of law or populist majoritarian democratic anxiety that besets an audience within a written and republican constitutional order in the face of accounts like this:

> Inherently revisable, according to the demands of justice, common law rules obtain their temporary fixity from the needs of their subject matter . . . . The shape and authority of common law rules alike depend on what may be a fragile consensus, at least among the senior judiciary, about the requirements of justice in the standard cases the rules address.[330]

328. Allan, *supra* note 197, at 185–86.

329. *Id.* at 187–88.

330. *Id.* at 188.

A markedly open-textured constitutional text, exemplified by the Due Process and Equal Protection Clauses, is apt to aggravate such anxiety.

As this likewise makes evident, Allan's commitments are liberal and interpretivist, as much as manifesting "common law romanticism."[331] I will flag a contrast here between Allan's normative expectation of reasoned decisions and the nuanced, reasoning skepticism of the leading contemporary United States theorist of precedent, Frederick Schauer, whose positivist analytic jurisprudential work on precedent I will move on to discuss. For Schauer, one of the rare contemporary United States scholars of precedent who registers the fact of "federal courts of appeals dispos[ing] of cases . . . without opinion," and (perhaps thus necessarily) engages the phenomenon of adjudicatory reasoning as mere forms of justification or explanation, reasoned decisions are what we turn to when our decisional authority is weak.[332] For Schauer, too, the judicial textualization of reasons for judgment engages a level of generality that may unwittingly and problematically bind the adjudicator in the future.[333] Allan, by contrast, not only takes reasoning (normatively) seriously, but also places significantly less emphasis on the grasp precedent exerts on the future and is much less exercised by it.[334]

As to the heart of Schauer's account of precedent, we find an orientation to the future and a level of acceptance of the prison cage of words almost as marked as in *Hart*; we also find a binary understanding of two types of precedent, that which is "canonical" and that which is not:[335]

> Thinking about the effect of today's decision upon tomorrow encourages us to separate the precedential effect of a decision from the canonical language, or authoritative characterization, that

331. *See generally* Michael Taggart, *Common Law Price Control, State-Owned Enterprises, and the Level Playing Field*, *in* ADMINISTRATIVE LAW IN A CHANGING STATE: ESSAYS IN HONOUR OF MARK ARONSON 185, 185 (Linda Pearson, Carol Harlow & Michael Taggart eds., 2008).

332. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634–37 (1995) [hereinafter Schauer, *Giving Reasons*].

333. *See id.* at 634, 642–59.

334. *See* Allan, *supra* note 197, at 189 ("Although an earlier formulation of a common law rule is not strictly binding in subsequent cases, it may in practice offer powerful guidance. Without an authoritative statement of the rule, or at least the general principle it embodies, the existence of competing rationales for earlier decisions would leave legal doctrine substantially indeterminate. A higher court's characterization of the facts of the precedent case, and articulation of the grounds of decision, will therefore be highly influential: Its exegesis will normally provide the framework for future deliberation, even if the framework is not itself invulnerable to adaptation and (eventual) reconstruction.").

335. It is of course in any common law country unexceptionable to find decisions regarded as more or less authoritative or canonical; that distinction will derive from matters including the factual and legal context of the case, where the decisional court sits in the court hierarchy, and choices made. In Australia and Britain, for example, autonomous or quasi-autonomous experts decide, rather than the decisional court as to, whether the case belongs in a general or specialized reporter.

> may accompany that decision. Looking at precedent only as a backward-looking constraint may produce a distorted preoccupation with the canonical statements of previous decisionmakers. . . . Dealing with the use of past precedents thus requires dealing with the presence of the previous decisionmaker's *words*. These words may themselves have authoritative force . . . and thus we often find it difficult to disentangle the effect of a past *decision* from the effect caused by its accompanying words. . . . [E]ven a previous decisionmaker's noncanonical descriptions channel the way in which the present views those past decisions.[336]

Elsewhere, in ways that resonate with the text of *Hart*, Schauer explores what is for him the contested relationship between the authoritative decision and the elaborated one, for which reasons or justification are given, and canvasses the distinction between a reason or a justification, on the one hand, and discourse that merely performs the genre of reason or justification, on the other.[337]

Schauer's larger project is, of course, to generate a complex and nuanced analytic and "presumptive positivist" argument about following rules, which is tangential to what concerns me here.[338] What is striking, however, is the extent to which Schauer's *Precedent* is saturated with traces of precedent anxiety[339] and with examples drawn from the constitutional adjudication of the nation's founding inequality.[340] This latter is imbricated in Schauer's account of his positivist method: the "presumptive posi-

336. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 573 (1987) [hereinafter Schauer, *Precedent*] (footnote omitted).

337. *See* Schauer, *Giving Reasons*, *supra* note 332, at 636–37 ("The act of giving a reason is the antithesis of authority. When the voice of authority fails, the voice of reason emerges. Or vice versa. But whatever the hierarchy between reason and authority, reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important.").

338. *See generally* Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 469 (1989) [hereinafter Schauer, *Is the Common Law Law?*] (internal quotation marks omitted) (reviewing MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988)). For a full development of this argument, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (Tony Honoré & Joseph Raz eds., 1991).

339. *See, e.g.*, Schauer, *Is the Common Law Law?*, *supra* note 338, at 455; Schauer, *Precedent*, *supra* note 336, at 579–81, 589 (discussing "articulated characterizations" of decisions and stating that conscientious decisionmakers are "obliged to decide not only today's case, but tomorrow's as well"). *See generally* Schauer, *Giving Reasons*, *supra* note 332 (expressing anxiety about extent to which giving reasons constrains future decisionmakers).

340. *See, e.g.*, Schauer, *Precedent*, *supra* note 336, at 578 (discussing *Skokie* case); *id.* at 574 n.8 (describing changing cultural meaning of *Brown*). Schauer's description of the changing cultural meaning of *Brown* generates considerable tension with Schauer's discussion elsewhere in the article on the distinction between "rules" opinions and "decision according to an unformulated decision." *Compare*

tivist" will deny that precedent binds only in the exceptional case "when and only when the degree of inconsistency" between "a doctrinal proposition and a social proposition. . . . reaches certain magnitudes."[341]

This is the classic judicial restraint proponent's account of *Brown*, and indeed Schauer cites *Brown* as just such a case.[342] Schauer also assumes the cost to individualized justice of "binding precedent," suggesting that "conscientious current decisionmaker[s]" will sacrifice justice in deciding the case before them because they "partially make [ ] future decisions as well."[343] To some extent, these are identifiably positivist anxieties, but the full panoply of positivist concerns with the common law cast much more broadly.[344] Melvin A. Eisenberg's roughly contemporary account of the common law, which has significantly different ideological commitments, is likewise strikingly future-oriented. Eisenberg's account of the common law seeks to justify when "courts . . . may properly establish those legal rules," which on his "generative" account of common law occurs, provided the "institutional principles of adjudication" are followed, when there is congruence between legal rules and the social norms in which they are developed or articulated:

> To determine the content of the common law, courts do not begin with doctrinal propositions adopted in past texts and work backward to determine their validity; they begin with a set of institutional principles and work forward to generate legal rules.[345]

Decades earlier, but in the immediate aftermath of *Brown* and just before the emergence of the binary practice of precedent, Radin's 1930s discourse of ungoverned judicial power also recurs in Kempin's 1959 classical history of the development of the doctrine of stare decisis in the United States, as does evidence of both the constitutional influence on post-*Brown* jurisprudence of precedent as it had come to function publicly and in high profile constitutional cases, and its fissuring in the shadows in

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id., *with id.* at 573 n.5. *See also id.* at 593 & n.45 (citing Loving v. Virginia 388 U.S. 1 (1967) & Korematsu v. United States, 323 U.S. 214 (1944)).

341. *See* Schauer, *Is the Common Law Law?*, *supra* note 338, at 469–70.

342. *See id.* at 470.

343. *See* Schauer, *Precedent*, *supra* note 336, at 590. *But see* GOODRICH, READING THE LAW, *supra* note 62, at 70–71 (providing gloss on Mirehouse v. Rennell). Goodrich reads Justice Parke's opinion in *Mirehouse* as making a similar point to Schauer's, that is, that "predictability and consistency of legal decision-making are accorded greater value than particular justice," but Parke's text signally glances backward at binding authority, inferring that it is in this faithfulness to precedent that injustice may need to be done. *See id.* Schauer imagines the judge laying down the precedent as formulating it in a way, with an eye to binding the future, that sacrifices individualized justice in the case adjudicated. *See* Schauer, *Is the Common Law Law?*, *supra* note 338, at 470.

344. *See* Schauer, *Is the Common Law Law?*, *supra* note 338, at 455–56.

345. EISENBERG, *supra* note 338, 145, 146, 149, 151, 156.

which most of the appellate courts' business had come to be done.[346] Kempin explicitly contrasted the English and United States doctrines, noting that while English courts made no distinction as to the call of stare decisis with respect to the subject matter of adjudication, in the United States things were different: "As applied to the highest courts in each jurisdiction, [ ] stare decisis is purely a matter of policy which is stronger in property and contract cases, where rights have been settled, presumably, on decided cases, than in constitutional cases, where a legislative remedy is not possible."[347]

Kempin's account of stare decisis in the United States makes the following points of salience to this article: (i) that on the question of the "binding" quality of precedents that he attributes to modern English legal thought, he diagnoses an equivocation (years after *Erie*) in the United States attitude on—or avoidance of—the question of whether reported cases are "evidence of the law or the law itself" and thus "whether we are bound or free from [prior cases'] effects"; (ii) that this view was instrumentalist, "enabl[ing] us to look at the law as a moving instrument, changing with the times" and to "act in accordance with the requisites of the case before us"; and (iii) that the volume of reported cases in the then-contemporary United States is in part responsible for the American view that "while the judges 'make' the law, they can remake it from time to time."[348]

This speaks to an attitude towards judicial authority that is now distinctively American. As viewed from Kempin's perspective in the wake of *Brown*, once decisions about modern United States court hierarchy, court reporting—which, unlike its English equivalent, lay in the hands of the authoring judge or panel and their attitudes towards publication of opinions—and westward settlement had combined, progressively, during the early to mid-1800s, to establish a doctrine of stare decisis in the United States, judges had power to control the making of adjudicatory law. The seeds of this attitude can be found in Kempin's analysis of cases marking the emergence of a doctrine of stare decisis in the United States: one finds (i) appeals to a court's position in a jurisdiction's adjudicatory hierarchy as authorizing law-making; (ii) appeals to the virtues of stability of the law; (iii) suspicion about English authority as compared with domestic positive lawmaking by state legislatures and the influence on the development of stare decisis of positive legislative assertions of the authority of judge-made law; (iv) an emphasis on maintaining individual rights and curial authority; and (v) authoritarian discouragement of lawyers who sought to persuade courts to depart from earlier decisions.[349] One also finds in

346. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30 n.4 (1959).

347. *See id.* at 29.

348. *See id.* at 52–54 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149–50 (1921)).

349. *See id.* at 42–44, 46–48, 53.

contemporary rule of law discourse, somewhat paradoxically in light of Kempin's analysis of the United States precedential scene in the late 1950s, that changes in the law are the province of legislatures, not of courts—a reflection of the influence of majoritarian democracy and codification on United States legal thought. Kempin, finally, distinguishes stare decisis as distinct from a doctrine of precedent more generally as having the capacity to designate a "single precedent . . . as 'binding,' or persuasive, authority."[350]

By the 1960s, the reactionary discourse of future-oriented precedent fear had hardened, and went on its way to institutionalization.[351] Wechsler's seminal articulation of his legal process theory conceives of constitutional precedent as a separation of powers problem in the lower federal courts as well as in the Supreme Court and judicial review as productive of instability.[352] He regards it as perhaps especially liable to abuse when it turns on questions of equal protection and due process and of constitutional decisionmaking in cases involving radical inequalities of power between litigants.[353]

While, unlike Schauer, Wechsler does not conceive of reasoned decisions as problematic,[354] he does however engage the discourse of reasoning so "genuinely principled" that it "rest[s] with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[355] And most contentiously, of course, Wechsler falls short in his search for a "neutral principle" that could justify the precedents established in the *White Primary*

350. *See id.* at 30.

351. *See, e.g.*, Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 134 (1972) (theorizing "the characteristic style of Anglo-American legal discourse" as evidencing "a pattern of redundant communication").

352. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 4, 6 (1959).

353. *See id.* at 7, 9, 12 (calling "*ad hoc* evaluation" in favor of "a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist . . . . the deepest problem of our constitutionalism"). His critique sharpens to focus on left instrumentalism. *See id.* at 14.

354. Indeed, Wechsler explicitly criticizes Supreme Court per curiam decisions. *See id.* at 21–24 (including explicitly those that implemented *Brown* beyond public school education context and arguing that early New Deal cases, which invalidated federal legislation, were signally poorly reasoned).

355. *See id.* at 15 (contending that while "[t]o be sure, the courts decide, or should decide, only the case they have before them," they should "decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply[ ] . . . [by] attending to such other cases . . . in evaluating any principle avowed"); *id.* at 16 (arguing for "neutrality and generality" in articulating reasons or constitutional decisions); *id.* at 17 (arguing that neutral principles should apply in judging "relative compulsion of the language of the Constitution, of history and precedent").

Cases,[356] *Shelley v. Kraemer*,[357] and *Brown*, the last-mentioned of which Wechsler explicitly identifies as departing from the precedent of *Plessy*.[358]

Precedent fear or future-orientation is a characteristic, then, of influential contemporary accounts of precedent by an influential group of United States theorists of precedent from the mid-part of the twentieth century on, and Kempin's work is a paradigm of precedent fear's double: the untethering of judicial authority from accountability or governance by distinctively common law legal method. This is not a universal perspective, as Kempin's own treatment of British legal authority suggests, but a distinctively national one.

British scholar Neil Duxbury's recent wide-ranging account of the development and theorizing of precedent engages in passing with the emphasis that the seminal United States scholars of precedent, including Llewellyn and Schauer, place on the forward-looking face of precedent, dismissing the tendency to frame it as a "consequential" or "forward-looking activity" as, while apt, likely to be "over-emphasized."[359] He does not, however, register the national specificity of this orientation to precedent, concluding with a pragmatism that both contrasts sharply with Judge Kozinski's account of the contemporary United States doctrine and takes brisk issue with Schauer's claim that "today's conscientious decisionmakers are obliged to decide not only today's case, but tomorrow's as well,"[360] thus:

> Sometimes we will create precedents, even good precedents, unintentionally; it might even be the case that only in retrospect is a particular action seen to have set a precedent. . . . [I]t is not clear why conscientious decision-makers 'are obliged', [sic] as opposed to likely or minded, to decide with an eye to the future. A decision-maker's priorities might legitimately be in the present . . . . We might, but we do not have to, make decisions with the future in mind; and thoughts about the future might, but do not have to, constrain what we decide to do.[361]

There is, then, a moment at which the United States doctrine of precedent first adopts the future-orientation that I have discussed here. And another at which that future-orientation at once hardens and becomes marked with anxiety. My analysis of historical shifts in leading United States scholarly and jurisprudential accounts of precedent reveals that this perspective

356. *See* Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

357. 334 U.S. 1 (1948).

358. *See* Wechsler, *supra* note 352, at 29–35.

359. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 4 (2008).

360. *See id.* (quoting Schauer, *Precedent*, *supra* note 336, at 589) (internal quotation marks omitted).

361. *Id.* at 5.

becomes fixed, like the binary doctrine of precedent, in the wake of *Brown*.

In the *Lochner* era, majoritarian tyranny "stood for the paramount dangers of redistribution of wealth and of leveling."[362] But with *Brown*, of course, the object of the fear changes. Horwitz notes "the astonishingly hostile academic reactions to the monumental decision of the U.S. Supreme Court in *Brown v. Board of Education*."[363] Thus, it is no wonder that the academic discourse and the judicial discourse on precedent fear, and on justifying nonprecedential status, sharpen in the wake of *Brown* and develop hand-in-hand. It is perhaps unsurprising, too, that we find an early trace of precedent fear in Justice Frankfurter's dissent in *Green v. United States*.[364] Respect for precedent helps courts to remember their institutional role, "transcending the moment."[365] Frankfurter had of course been loath to join the *Brown* decision, believing that the southern states, if left alone by the Court, would eventually "come around," apparently magical thinking in the light of his conclusion that "on the basis of legislative history and precedent, . . . '*Plessy* is right.'"[366]

Frankfurter feared the future that *Brown* would unleash, and that fear is nowhere so clearly inscribed as in his contextually ironic insertion of the phrase "with all deliberate speed" in *Brown II*,[367] a phrase which, as Thurgood Marshall saw, would indeed hold back the encroaching tide of history until the combined pressure of (i) the social movement that was

362. *See* HORWITZ *supra* note 232, at 9.

363. *Id.* at 7.

364. 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

365. *See id.*

366. *See* Michael J. Klarman, Brown v. Board of Education*: Why Was It a Hard Case and How Did the Decision Matter?,* MARQ. LAW., Summer 2010, at 33, 34, *available at* http://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2010-summer/summer2010p32-39.pdf.

367. *See* Tushnet, *supra* note 314, at 27–28 (internal quotation marks omitted).

> [Frankfurter's] innovation, "all deliberate speed," when coupled with southern resistance, transformed constitutional law. "All deliberate speed" disconnected the right violated from the remedy. It made the Constitution a mere instrument to accomplish socially valuable ends, not a commitment to the immediate vindication of fundamental-present and personal-rights. Moreover, it encouraged the federal courts to see themselves as managers of programs of social transformation, programs embedded in what the courts understood to be the requirements of the Constitution.
>
> Thus, when the South resisted and made the desegregationist vision in *Brown* seem unrealistic, the lower courts, aided by the Supreme Court, shifted to *Brown*'s integrationist vision. Accordingly, the ambiguity of *Brown*, the southern resistance to the "all deliberate speed" formula, and the reconceptualization of the relation between right and remedy all combined to make judicial intervention a particularly powerful engine in the daily affairs of government. Frankfurter's restraint, in short, licensed the very activism that he feared.

Id.

the black civil rights struggle, (ii) the creative lawyering of Anthony Amsterdam in what he crafted from the equitable injunction, and (iii) the unlikely heroes of the Fifth Circuit made *Brown* do at least some of the work it promised.[368]

That fear is also encoded in Frankfurter's determination, in 1953, that the case would be rebriefed and reargued on the question of the original intent of the Equal Protection Clause of the Fourteenth Amendment. The law clerk who spent the summer of 1953 determining and writing for Frankfurter said that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting" was Alexander Bickel.[369] And because of an accident of history that changed the Court's composition over that same summer, the death of Chief Justice Vinson and his replacement by the desegregationist Governor of California, Earl Warren, Bickel's determination was unable to prevent what *Brown* did to the doctrine of precedent and to history.

Brown changed history and threatened a redistribution of national power, resources, and goods that the New Deal had also promised, although then much more evidently to America's white poor. That latter promise has now been significantly betrayed by what the doctrine of precedent does to "have-nots" who appeal against agency determinations. This is perhaps especially the case when, as with social security claimants and veterans, those "have-nots" make claims on what, as I worked on this Article in late July 2011, in the shadows cast by the then apparently impending United States government default on creditors, has become a contemporary national article of faith in its denial, a social security net, with "entitlement" claimants on social security benefits being the most popular candidates in many quarters for throwing off the national bus.

For Bickel, writing three years after a case as revolutionary in the future it unleashed of redistributions of (cultural and gender) power in its own right as *Brown*, *Eisenstadt v. Baird*, which made access to contraception by single people a constitutionally protected right, an opinion whose future orientation is signaled by its reframing *Griswold*'s doctrine as a constitutional freedom into government interference "into matters so fundamentally affecting a person as the decision whether to bear or beget a child,"[370] and two years after *Roe*, such future fear revealed a species of anticipated perdition:

> Our recent revolutionists have offered us hatred. . . . They have offered for the future, so far as their spokesmen have been able to make clear, the Maypole dance and . . . a vision of "liberated" masses adjuring profit, competition, personal achievement, and

368. *See* BASS, *supra* note 89, at 17.

369. *See* Klarman, *supra* note 366, at 34 (internal quotation marks omitted).

370. *See* 405 U.S. 438, 453 (1972).

> any form of gratification not instantly and equally available to all.[371]

Roe, in turn, was the harbinger of *Casey*,[372] the most pitched and explicit textual battle over precedent in United States Supreme Court history, the symbol of the culture wars over sexuality whose next phase was joined in *Lawrence*.[373]

For Bickel, that haunted vision of the national future was clearly summoned up by what he saw as the public face of the peculiar United States history of the fragmenting of the doctrine of precedent. As Parker acutely sums it up:

> Like the rationalists almost two centuries earlier, the bane of all common lawyers, the justices were wreaking havoc. For Bickel, the problem with the Warren Court was precisely that—like the French revolutionaries—it was too seduced by "the idea of progress" to pay attention to the fact that it was engendering serious "discontinuity—open or disguised—in specifics." According to Bickel, the Court was guilty of "a striving for fidelity to a true line of progress," one that led it to "imagine the past and remember the future" and to sweep away recklessly all remnants of the past.[374]

When ideas migrate from subject to subject, context to context, they do not invade empty vessels. As "massive resistance" and the Fourth Circuit response to *Brown II* shows, as clearly as does my dissection of the *ur*-text of the binary doctrine of precedent, the Fourth Circuit's decision in *Jones II*, and the earlier documentation of the binary system of precedent it in turn documents, an eviscerated doctrine of precedent in the hands of Earl Warren, Chief Justice of a Court of final jurisdiction with a role that some might acknowledge as constitutional common law-making, becomes available to perform different functions with different ideological ends in interim appellate courts with a responsibility of a rising distaste for error correction.

Let me return, in closing this Part, to the prison. *Jones II* was decided in 1972, and, as Forman notes,

> [i]ncarceration rates were largely steady for most of American History; between 1940 and 1970, for example, the nation averaged about 110 inmates per 100,000 people. The increase began in the mid-1970s and has continued an upward trajectory since. The initial prison growth coincided with a rise in crime, but even as crime declined for nearly fifteen years we continued to send

371. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 140 (1975).

372. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

373. Lawrence v. Texas, 539 U.S. 558 (2003).

374. *See* PARKER, *supra* note 238, at 289 (footnote omitted).

> more and more people to prison every year. Indeed, by 2002, the nation's violent crime rate had declined to 1970 levels, yet the incarceration rate was almost seven times what it had been in that year.[375]

That increased incarceration rate has taken an especial toll on the black community.[376] It is commonplace that much of that toll has to do with the "war on drugs" and the racial inequality its body count signifies. And the increase in arrests that produced the modern United States carceral complex stemmed in significant part from a massive increase in arrests and prosecutions for drug crimes that began in the 1960s.[377] Thus, it is no surprise that the Warren Court's criminal procedural revolution in part provoked the strange fruit that is the contemporary United States binary system of precedent, precedent for us and them, in which appellate courts are rules unto themselves, just as the distaste for the misrule symbolized by instant "gratification" threatened Alexander Bickel with a previously unimaginable future.[378]

VII. CONCLUSION: *READING THE LAW*

> "By contrast, the danger in the Federal Farmer's view was that the federal courts had 'no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.'"[379]

The previous Part VI documents the contemporary United States scholarly discourse of precedent fear and draws out the genealogy of the relationship between our fractured doctrine of precedent and critical developments in constitutional law, the groundwork for which was laid in Part V. It also makes a case for the structural constitutional conditions, including the specific constitutional battles, which made the contemporary United States doctrine of precedent possible. In their own modest way, *Knight* and *Jones*, the cases that mark the federal judiciary's critical decision to fracture the doctrine of precedent in the face of cultivating collective blindness to equality and due process, involve interpretation of the Equal Protection and Due Process Clauses. There, constitutional conservatives—those who come down on the side of their liberty over others' equality in our nation's schizophrenic commitments to these two aspira-

375. Forman, *supra* note 136, at 344 (footnotes omitted) (citing MARC MAUER, RACE TO INCARCERATE 18, 94–95 (2006)).

376. *See id.* at 347.

377. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 46 (2006) (noting that between late 1960s and 2001, United States drug arrest rates increased fourfold).

378. *See supra* notes 371, 375 and accompanying text.

379. Anastasoff v. United States, 223 F.3d 898, 903 n.13 (8th Cir. 2000) (quoting *Letters from The Federal Farmer No. 3* (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing ed., 1981)).

tional constitutional values—locate impermissible attempts at judicial lawmaking.[380]

As Dyzenhaus and Taggart register, reasoned judgments provide "access to information and facilitation of self-government" and thus have a distinctively constitutional value.[381] However, as populist public discourse on federal judging in the contemporary United States might suggest, there is a fundamental debate about the extent to which the common law is consistent with representative (constitutional) democracy.[382] If common law precedent has a Janus-face, then contemporary, future-oriented precedent fear explicitly directed at specifically constitutional precedent might be said to arise from the relationship between the common law and constitutionalism—either aspirational or spectral.[383]

As scholars, including Allan, have registered, constitutionalism and representative democracy are often conceived as being in tension with each other.[384] Compare Judge Kozinski's critique of the interpretation of equal protection and due process in the Brennan mold, for example, with Allan's assessment that "[t]he evolution of common law principle, prompted by changing moral attitudes within society at large, provides for adaptation of traditional values to present conditions. It enables the abstract clauses of a 'written' constitution to acquire new meaning . . . ."[385] More destabilizing still, to the commitment to a hybrid of text-bound authoritarianism harnessed to communitarian ideology which masquerades as a commitment to democratic governance, is the function of common law as England's "'unwritten' constitution."[386]

Common law constitutionalism in the United States constitutional context is a profound threat; the common law judge is a veritable enemy of "the people." If in our constitutional imaginary, legal rules promise certainty, nonetheless "the rigid application of rules to cases where the context makes it inappropriate threatens the essential connection between law and justice."[387] And if the corrective to such disabling rule application is acknowledging and applying rules "but only within the limits of reasonableness, as judged by widely accepted principle of justice and settled expectation and tradition," precedent fragments, if not at the moment of its

380. *See, e.g.*, Stoner, *supra* note 168, at 178 (noting that "modern liberals have used Holmes's redefinition of common law as judge-made law to facilitate a bold program of innovation in the interpretation of the . . . Due Process and Equal Protection [Clauses] and they share the liberal spirit of those in the nineteenth century, and even some in the eighteenth, who thought that human beings could 'cast off natural limitations' in the pursuit of freer and more equal ways of life.").

381. *See* Dyzenhaus & Taggart, *supra* note 2, at 149.

382. *See, e.g.*, Edlin, *supra* note 203, at 14 (questioning whether common law can constrain representative government).

383. *See, e.g.*, *id.* at 17.

384. *See, e.g.*, *id.* at 18–19.

385. *See* Allan, *supra* note 197, at 185.

386. *See id.*

387. *See id.* at 187.

publication, then at least in the realized text of *Brown*, as implemented in the lower federal courts.[388] Thus, if the "chief virtue of common law constitutionalism is its ability to find the correct path between the rival horrors of rule formalism and arbitrary, *ad hoc* decision making," it should come as no surprise what the Fourth Circuit engendered in its reaction against appeals enabled by the civil rights and criminal procedural revolutions.[389] Nor should we be surprised that the post-*Brown* doctrine of precedent was grounded in the radical inequality that for Thurgood Marshall rendered the republic "defective from the start."[390] The fruit of that founding inequality was a doctrine of precedent in the image of the dyad of numb rules and arbitrary actions.[391]

Brown's rupture with the common law's methodological bedrock of analogical reasoning and with precedent's "form of public discourse and accountability," its discordance with the legislative political texts it outlawed and the political power that undergirded them (which cannot be called democratic without reservations that would empty that category) instantiated a crisis; this was because they did not craft a "stable . . . connection to the past," but broke with it.[392]

Having placed what I have argued is a distinctively American practice, accompanied by a scholarly as well as judicial account of precedent in critical historical and comparative context, I will turn, in conclusion, to the British critical legal scholar, Peter Goodrich, whose seminal work on the common law, *Reading the Law*,[393] was published a year before Schauer's *Precedent*.[394]

Allan and Goodrich are both British; Allan works in the liberal tradition and Goodrich in the critical.[395] Like Allan's, however, Goodrich's *descriptive* account of prevailing conventional views of precedent emphasizes its historical orientation, the discovery of precedential meaning by ex post facto reading of precedent cases and interpretive practice.[396] It un-

388. *See id.*

389. *See id.*

390. *See* Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987) (commemorating bicentiennial of Constitution), transcript *available at* http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm.

391. *See* Pether, *Scandal*, *supra* note 13, at 1447 n.50 (quoting Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2036 (2001) (interpreting Derrida and noting that "[g]rammatology, the study of writing systems and the laws of inscription, suggests that we pay particular attention to origins, to initial encounters, to what was historically the first cut")).

392. *See, e.g.*, Edlin, *supra* note 203, at 19.

393. *See* GOODRICH, READING THE LAW, *supra* note 62.

394. *See* Schauer, *Precedent*, *supra* note 336.

395. Although Goodrich is now a faculty member at Benjamin N. Cardozo School of Law at Yeshiva University, *Reading the Law* is a published version of his doctoral dissertation and significantly precedes his migration.

396. *See* GOODRICH, READING THE LAW, *supra* note 62, at 72–78, 141–67.

derstands precedential reasoning as involving "refin[ing] and reformulat[ing] the rule according to the legal definition and evaluation of the facts before the court."[397]

For Goodrich, however, "the process of reading [the law] is an inherently social and political activity, that [ ] constitutes a preferred text and actively selects and privileges meanings and accents."[398] The law's rhetorical insistence on its coherence and "formal unity," achieved through the discourse of doctrine and textual effects like codification or the systematization of precedent, clothe state power and thus make claims for law's distinctness from it.[399] And "hierarch[ies] or indeed grammar[s] of legal sources" of the kind we find in precedent generally, and indeed within hierarchies of precedent, "perpetuate[ ], in a secular form, the essentially natural-law conception of the unity and the reason of the legal order."[400] "It is, in short, an article of faith as much as it is a descriptive account of the workings of the courts," an "institutional discourse—albeit of a formal, highly symbolic and political significance—within a society of diverse institutions and discourses of control."[401] Thus, manipulation of legal texts and interpretive practices is a given: "[L]egal administrative power—in both its formal and its substantive aspects—is much less regulated and far more open to manipulation, negotiation and technique generally, interpretation and abuse, than is admitted by legal doctrine."[402]

If practices of precedent privilege the state, for example, then this should come as no surprise, for "to a large degree [the law] shares its language, methods of self-regulation and techniques of discipline and decision-making with other branches of the State machinery of control."[403] Further, "discretion in rule-usage" in law is as pervasive as acknowledgment of it is silenced, for legal discourse is "a rhetoric aligned to historical and social change" and "should [ ] be read in terms of control—of dominance and subordination—and of social power-relations portrayed and addressed to a far more general audience than that of law-breakers and wrong-doers alone."[404] The rendering occult of law as applied that accompanies the binary system of precedent, yet again, applying Goodrich's critical logic, is but an instantiation of that which the textualization of law always entails, "the democratic motive behind the written law is consistently belied or frustrated by a literary and interpretive practice which treats the written law as an encoding and a veiling of the legal rules."[405]

397. *See id.* at 162.
398. *Id.* at v.
399. *See id.* at 4, 7.
400. *See id.* at 16.
401. *See id.*
402. *See id.* at 17.
403. *See id.*
404. *See id.* at 18, 20 (citation omitted).
405. *See id.* at 21.

What are we then to make of what drives nonprecedential status rules? Is it the twinned drive to stop modernity, or the possibility of justice, in its tracks, and the more or less covert judgment that only some of us, in whose name the Constitution purportedly speaks, merit justice's performance? Attempts to stabilize or codify law are characteristically reactions to revolutionary political and social change, deployed to reinstate elites and to "foster obedience," control the "excesses of the past," and avoid them in the future.[406] They testify to a unified nation.[407] The codifying impulse that precedent represents also pretends to scientism, representing law as "not concerned so much with the resolution of practical problems as with the search for scientific truth, for ultimates and fundamentals . . . ."[408]

Nonprecedential status rules in particular and the binary system of precedent in general, then, entail prescriptions about how to read that accord with the law's exegetical tradition, separating the texts of orthodoxy from those of heresy and directing readers of "strict binding" opinions to read them obediently, not to press them to be read in ways other than those "institutionally authorized."[409] Such modes of exegesis are associated with nostalgia for past legal and national orders.[410] Indeed, Goodrich argues that the development of common law precedent in its identifiably modern form in Britain was both an explicitly national and political discursive project and an example of a broader and older tradition of legal humanism, which for Goodrich entails "the development of a particular method of teaching and of study in the universities of Europe from the mid-sixteenth century until the rise of rationalism in the nineteenth century," a mode of acculturation and fashioning of a legal professional community.[411] The institutionalizing of "strict . . . binding precedent" is monologic; it shuts off contested meanings and represents the law as both complete and internally consistent, in the face of a body of shadow law that belies this.[412] And thus it teaches lawyers and, by extension, the community from which their clients are drawn, to be obedient to an authoritarian state institution which lays down a law that is differential and hierarchical, not egalitarian.[413] The prescribed reading somehow embedded by command in the privileged texts of the binary system of precedent are represented by Judge Kozinski as imposing a form of hermeneutics that imposes docility, not the critical contemporary rhetorical form of reading the law that

406. *See id.* at 33, 34, 36.

407. *See id.* at 61.

408. *See id.* at 39 (citing MAURO CAPPELLETTI, JOHN HENRY MERRYMAN & JOSEPH M. PERILLO, INTRODUCTION TO THE ITALIAN LEGAL SYSTEM (1967)).

409. *See id.* at 92–94.

410. *See id.* at 95–96.

411. *See id.* at 130–35, 144–54.

412. *See id.* at 99–105, 188–207.

413. *See generally id.* at 135–67.

> recognize[s] that the concrete instance is itself never wholly rule governed, that the principles of morality or law are never complete or unambiguous in the individual situation, that it is always necessary to 'creatively supplement' or develop the law, to make a judgment that will apply the rule to the particular case . . . .[414]

For Goodrich, "the rhetoric of legal reasoning hides the complex economic, political and ethical choices that the judiciary are inevitably making in their decisions at to how best to apply the law."[415] What "legal community and . . . value[ ]" does the legal order, established by the binary system of precedent, "exist[ ] to protect"?[416]

In the highly politically—and constitutionally—charged context of post-*Brown* United States adjudication, a marked future orientation towards precedent has bled from the Supreme Court exercising its (partial) role as a constitutional court of final jurisdiction, the place where it makes obvious if not necessary sense, into the federal courts and into national appellate adjudication more generally. Given that jurisdiction of constitutional review is diffuse in the United States, with even the lowest criminal-level trial court adjudicating constitutional issues in the context of evidentiary challenges, for example, the vector via which this bleeding occurred is evident. That it has come to provide discursive cover for systemic lapses of judicial propriety, accountability, ethics, and duty is in part the product of the fear of a different national future, in part of the now-characteristic effects of discourses of authority of office that surround contemporary United States federal adjudicatory discourse—effects from another source of ideological and praxiological transference, this time from a doctrine of judicial review of administrative action (vis-à-vis relatively powerless subjects with claims on the state) that is highly deferential to government. Or as British public lawyers Hood Phillips and Jackson put it:

> [A]dministration is a continuing and mainly informal process aimed at preventing disputes in classes of cases and does not create rights by establishing precedent; adjudication pre-supposes an existing dispute in a particular case, is governed by strict rules of procedure and evidence and tends to create rights by establishing precedents.[417]

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414. *See id.* at 137.

415. *See id.* at 87.

416. *See id.* at 149, 155, 171.

417. *See* O. Hood Phillips & Paul Jackson, O. Hood Phillips' Constitutional and Administrative Law 12 (7th ed. 1987). It is worth noting that many of the "rights" an American public lawyer would source in Constitutional Law, particularly and of salience in context procedural rights, are in Britain and other common law countries located in Administrative Law, which does not function there as a process-free zone, but rather as a site for the robust invocation of judicial power doctrine in the separation of powers context—see, for example, the indefinite detention cases and the way they repeatedly cite to natural justice and fairness.

To draw on Julius Stone's analysis of the effect of the rise of the administrative state on the separation of powers, which posits that "[t]hough in a sense administration subverts th[e] tripartite system [of the separation of powers], it does so only by becoming a distinct kind of focus of power necessary to keep that system going."[418] No wonder, then, that precedent becomes markedly *governmentalist*, in Foucault's terms,[419] functioning to manage populations, and that the problems of such a doctrine of precedent become more visible, as, for example, when appellate judicial orientations to what appellate review of social security entitlement determinations, for example, demand of them, slip over into appellate adjudication of criminal cases, into which sphere, it should be noted, it transfers via the doctrine of habeas corpus, a common law remedy for excesses of executive power. The distinctively American doctrine of precedent anatomized and historicized in this Article is in part due, too, to a constitutional system characterized by hierarchy and a national imaginary "defective from the start" in its highly ambivalent commitment to equality, itself the legacy of what Christopher Tomlins acutely identifies as the "[c]oerced unfreedom" characterizing the early American practices of work relations that literally "forged the nation."[420]

For Goodrich, "[t]he work of the legal analogy is always precarious—it is not itself a logical figure of argument[,] and it is consequently always necessary to enquire precisely what work the precedent cited or quoted does within the instant text."[421] I share this critical understanding of the common law method, and of the space it thus opens up to choose for or against adjudication in good faith. What is clear about the contemporary United States appellate judiciary, however, is that they have largely ceased to heed what Dr. Martin Luther King Jr. asked of the nation: that it—we the people, and above all legal professional actors—"[b]e true to what you said on paper."[422] Whether they frame the system of precedent we actually have as somehow literally mandating the end of common law's history, or confine its representative skeleton to the sites of elite battles in our apparently endless constitutional commitment to culture wars as staving off modernity, our appellate judiciary have chosen liberty over equality. They have done so, additionally, only for themselves, the government to which they increasingly owe allegiance, and the upper echelon of paying customers.

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418. *See* JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 703 (1966).

419. *See generally* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE, 1977–78, at 115, 126–34 (Michael Senellart ed., Graham Burchell trans., 2007).

420. *See* CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865, at 8 (2010); *see also* LINDA COLLEY, BRITONS: FORGING THE NATION 1707–1837 (2d ed. 1992).

421. *See* GOODRICH, READING THE LAW, *supra* note 62, at 198.

422. *See* King, *supra* note 63 (internal quotation marks omitted).