

JUDICIAL PRECEDENT IN THE LATE  
EIGHTEENTH AND EARLY NINETEENTH  
CENTURIES: A COMMENTARY ON  
CHANCELLOR KENT'S *COMMENTARIES*

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INTRODUCTION

This Article takes the form of a commentary on a single paragraph from the third edition of Chancellor James Kent's (1763–1847) *Commentaries on American Law*, published in 1836. The structure of the Article follows very much the format one might encounter in commentaries on various literary, legal, or even sacred works. It considers each sentence and phrase of the paragraph, seeking to explain it, put it into context, and derive meaning from the whole.

One might ask why Chancellor Kent should be singled out for this focus. Kent was among the founders of American law; he taught at Columbia University in the 1790s and returned there following his retirement from the bench; he also served briefly in the New York legislature, where he worked closely with John Jay.<sup>1</sup> It would be his friendship with Jay that led to Kent's appointment to the New York judiciary in 1798.<sup>2</sup> He thereafter spent most of his productive career as a New York judge, serving on the state supreme court but

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1. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 37 (1976).

2. *Id.*

performing his most notable service as state chancellor in charge of the state equity system.<sup>3</sup> According to G. Edward White:

At his maturity Kent was a leading jurist of his day. He had come to dominate the Supreme Court of New York to such an extent that [Chief Justice John] Marshall felt compelled, on overruling him in *Gibbons v. Ogden*, to praise his reputation. He had single-handedly revolutionized equity practice in New York...and with the publication between 1826 and 1830 of his *Commentaries* he had emerged as the first of the great treatise writers of the early nineteenth century.<sup>4</sup>

In his judicial outlook, Kent was broadly conservative and looked to the English common law as an inspiring force for American courts.<sup>5</sup> His writings reveal a deep and rich acquaintance with the main lines of legal history and philosophy. He was a strongly committed believer in natural law who did not shy away from utilizing a naturalist vocabulary to allow for justice in particular cases, even in the absence of statutory authority. His breadth of knowledge, felicity of expression, and commanding position in American law make him a uniquely well-suited subject for a study of this sort.

The purpose of this Article is twofold. At its most basic level, it attempts an exegesis of a passage in Chancellor Kent's *Commentaries*. As an exegetical work, this Article will begin with Kent's language but then proceed to examine his larger frame of reference. Elements of this larger frame of reference include: the cases he would have encountered during his time on the bench, including English antecedents; the philosophical presuppositions he held in common with the lawyers and judges of the late eighteenth and early nineteenth centuries; and the writings of leading lawyers and judges of the seventy-five years preceding Kent's words. Casting my search widely, I hope to obtain a clear and comprehensive understanding of what *stare decisis* meant to Kent. This work is fundamentally historical in its ambitions; it seeks to reconstruct and to contextualize. It is not intended as a jurisprudential defense of the doctrine of *stare*

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3. *See id.* at 38.

4. *Id.* at 39.

5. *See* Charles J. Reid, Jr., *Kent, James (1763-1847)*, in *AMERICAN CONSERVATISM: AN ENCYCLOPEDIA* 468, 468-69 (Bruce Frohnen et al. eds., 2006) (Kent's *Commentaries* "stressed the strong historical connectedness between American law and English and European antecedents.").

decisis that Kent and his contemporaries followed, nor does it seek to justify the natural law postulates that supported this doctrine. That is not to say that his positions cannot be defended. Rather it is only to point out that my effort is fundamentally historical and not philosophical in scope.

The second, and larger, purpose this Article serves is to elucidate the doctrine of *stare decisis* as it was held by members of the Founding era. Kent was not quite old enough to be a member of that Founding generation, although he was active in New York politics and a protégé of John Jay by the early 1790s. In many respects, however, Kent's work represents the apex of the legal achievements of the Founding era. He moved freely among those Founders still alive when he flourished, knew their work, and shared their political viewpoints. Focusing on Kent's work thus opens a window to the prevailing "thought-world" of the Founding era, as seen through the eyes of the next generation.

### I. TEXT AND COMMENTARY

In the third edition of his *Commentaries on American Law*, published in 1836, Chancellor Kent wrote the following:

But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to [be] examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.<sup>6</sup>

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6. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 476 (New York, Clayton & Van Norden, 3d ed. 1836).

In the fashion of medieval writers, whether the authors of the Midrash or the glossators and commentators on the medieval canon law, I shall use paraphrases of the text itself as the basis of my analysis, and the organization of the Article will be structured around particular clauses of the text.

A. *“But I wish not to be understood to press too strongly the doctrine of stare decisis . . . .”*

In this paragraph, Kent marks a transition from his previous paragraph, which had endorsed in ringing terms the “inviolability of precedents.”<sup>7</sup> “If judicial decisions were to be lightly disregarded,” Kent had written in the prior paragraph, “we should disturb and unsettle the great landmarks of property.”<sup>8</sup> “It would . . . be extremely inconvenient to the public, if precedents were not duly regarded, and pretty implicitly followed.”<sup>9</sup> By these remarks, Kent signaled his fidelity to the doctrine of precedent. Yet, by placing the paragraph upon which we are commenting immediately after this ringing endorsement, Kent wished to demonstrate that he was not an absolutist with respect to precedent. He wanted to ensure that his readers received a properly qualified and nuanced understanding of the way in which stare decisis should work in a healthy legal order. Stare decisis was to be respected as serving the purpose of stability in the law over time, but other values of judicial and legal order also required respect: stare decisis, in short, was one principle among several competing principles and values that required weighing and balancing. The commentary below explores how Kent—and his sources—engaged in this weighing and balancing process.

The term stare decisis requires further explication. Of course, in Latin, its literal meaning is “to stand upon the decisions.”<sup>10</sup> But by the time Kent used this term, it had acquired a substantial, specialized meaning as well. One might turn to the treatise writers and the legal commentators for assistance. The obligatory starting point, of course,

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7. *Id.*

8. *Id.* at 475.

9. *Id.*

10. *Stare* is the infinitive of the verb *sto*, “to stand.” OXFORD LATIN DICTIONARY 1823–24 (P.G.W. Glare ed., 1983). *Decisis* is the plural past participle of *decido*, “to decide,” and is placed in the dative case, signifying that upon which one is standing. *Id.* at 490. It has its origin in an old common law maxim: *stare decisis et non quieta movere* (“To stand by things decided, and not to disturb settled points.”). BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

is William Blackstone, whose *Commentaries on the Laws of England* was widely read in America as well as in England. Indeed, legal education in the United States for many years commenced with a careful reading of Blackstone's work.<sup>11</sup>

What did Blackstone teach regarding stare decisis and precedent? First of all, he stressed that the prior decisions of courts were not themselves law, but "the principal and most authoritative evidence" of law.<sup>12</sup> Grasping the significance of this distinction is crucial. Such a statement, of course, implied a preexisting body of "law" that reflected a transcendent reason that stood outside and above the positive enactments of legislatures and the particular decisions of judges, and that courts might discover but could not make.<sup>13</sup> But, even more importantly for our purposes, if judicial decisions were evidence of law, they were necessarily subject to the rules of evidence: they might therefore be subject to further evaluation, scrutiny, consideration, and deliberation to ascertain their fidelity to fundamental legal principles and also to the higher law.<sup>14</sup> They might even be rejected as an inadequate statement of the law.<sup>15</sup> Blackstone himself allowed ample room for this conclusion when he wrote: "So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law."<sup>16</sup>

Two further postulates implicitly exist in this evidentiary theory of stare decisis and natural law: (1) that reason, aided by long experience in the forms and substance of the common law and deep exposure to the classic works of moral and political theory, was capable of guiding us to correct answers; and (2) that these answers, once arrived at, could command the assent of lawyers and judges generally. As Zephaniah Swift of the Connecticut Supreme Court of

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11. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 25 (1938) ("Blackstone continued to be the student's first work in the law office and in most law schools until the end of the nineteenth century . . .").

12. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*69.

13. See Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 71-72 (2006).

14. See Joseph C. Cascarelli, *Is Judicial Review Grounded in and Limited by Natural Law?*, 30 CUMB. L. REV. 373, 415 (1999-2000).

15. See Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1155 (2003) ("[P]recedents were 'evidence' of law that courts should follow absent an affirmative showing of unreasonableness.").

16. 1 BLACKSTONE, *supra* note 12, at \*71.

Errors put it in 1810: “The foundation of the law . . . has been pronounced by the greatest jurists, to be the perfection of reason—not of every man’s natural reason, but an artificial perfection of reason, gotten by long study, observation, and experience.”<sup>17</sup>

Blackstone’s treatment of the authoritativeness of precedent must be read as bounded and guided by these parameters. To be sure, the decisions of the judges represented part of the “custom as shall form a part of the common law.”<sup>18</sup> A judicial decision had the effect of “solemnly declar[ing] and determin[ing], what before was uncertain, and perhaps indifferent,” or, to put Blackstone’s point in more modern language, of resolving an open question about the law.<sup>19</sup> Such a resolution, however, required fidelity to the law understood not merely as the positive enactments of the state, but also as the ageless wisdom of transcendent truth.<sup>20</sup>

Judges—who Blackstone stated could not exercise “private judgment” or follow “private sentiments” when ruling from the bench—were obligated to give due respect to the previous decisions of the English courts.<sup>21</sup> This did not mean, however, that prior cases were absolutely binding upon subsequent judges or courts. Indeed, judges, even while they consulted precedent, were simultaneously obligated to exercise their God-given gift of reason when arriving at their judgments. As Blackstone put it, “this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law.”<sup>22</sup> Again, to put this point in more modern language, judges, when confronted with errant precedent (what Blackstone called a “former determination”), were obligated to correct this deviation from the true law and to restore to the body of decisional law its reason and conformity with the higher law, even including conformity to the divine will. Blackstone observed, concerning judges engaged in restoring the law to its purity:

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17. *Church v. Leavenworth*, 4 Day 274, 280 (Conn. 1810) (Swift, J.).

18. 1 BLACKSTONE, *supra* note 12, at \*69.

19. *Id.*

20. *Id.* at \*70 (“[O]ur lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.”).

21. *Id.* at \*69.

22. *Id.* at \*69–70.

But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.<sup>23</sup>

Blackstone followed this statement by declaring as a general principle: "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust . . ." <sup>24</sup> Absurdities, on this analysis, are statements that violate the fundamental principles of reason or that perpetuate injustices, understood as transgressions against the higher law and the will of God.<sup>25</sup>

Blackstone's understanding of *stare decisis* and precedent, and the role of reason in determining the soundness of prior judicial decisions, was widely reflected in the legal literature of the period between Blackstone and Kent. One can thus consider the writings of James Wilson. Wilson was an early leader in the cause for American independence, a signatory of the Declaration of Independence, a principal draftsman of the United States Constitution, and an original member of the United States Supreme Court, appointed by President George Washington.<sup>26</sup> He was widely regarded as perhaps America's finest legal mind. In addressing the doctrine of *stare decisis*, as it was understood in the earliest days of the American republic, Wilson posed a pair of profound questions:

It may be asked—why should a point be received as law, merely because one man or a succession of men have said it is law, any more than another point should be received as reason, merely because one

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23. *Id.* at \*70.

24. *Id.*

25. It was sometimes said that a law in direct contradiction to the law of God must be struck down. Thus we find, in an 1808 reprint of William Noy's (1577–1634) book on the maxims of English law, the following: "If an act be made directly contrary to the law of God, as for instance, if it be enacted that no one shall give alms to any object in never so necessitous a condition, such an act is void." WILLIAM NOY, *THE GROUNDS AND MAXIMS, AND ALSO AN ANALYSIS OF THE ENGLISH LAWS* 1–2 (Connecticut, Riley 1808).

26. For biographical information on Wilson, one can still profitably consult Charles Page Smith's book, *James Wilson: Founding Father, 1742–1798*. For an important account of Wilson's contributions to the drafting of the Constitution, see Garry Wills, *James Wilson's New Meaning for Sovereignty*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 99 (Terence Ball & J.G.A. Pocock eds., 1988).

philosopher or a set of philosophers have said it is reason? In law, as in philosophy, should not every one think and judge for himself? *Stare decisis* may prevent the trouble of investigation; but it will prevent also the pleasure and the advantages of improvement.<sup>27</sup>

Wilson answered these questions with a compromise: one should neither adhere strictly to prior decisions, nor disregard them lightly.<sup>28</sup> Wilson summarized his compromise in antique but poetic language: “Though authority [i.e., precedent] be not permitted to tyrannize as a mistress; may she not be consulted as a skilful guide? May not respect be paid, though a blind assent be refused, to her dictates?”<sup>29</sup>

The early Massachusetts lawyer Nathan Dane, who served in the Continental Congress and was among those responsible for drafting the Northwest Ordinance, moved within this thought-world when he wrote in his digest of American law: “That the law may be settled and certain, as far as practicable, all judges are bound to respect prior judicial decisions, regularly made, and to presume the courts making them, had good reasons for so doing, where the contrary does not appear.”<sup>30</sup> In writing in this way, Dane can best be read as establishing a presumption, in the same way Blackstone had before him, in favor of prior judicial decisions; but this was a presumption that might be overturned where a prior opinion was shown to be lacking in reasoned support.

Other early treatise writers in both America and Great Britain took an even more flexible view of *stare decisis* and precedent by

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27. 2 JAMES WILSON, *Of the Constituent Parts of Courts—Of the Judges*, in THE WORKS OF JAMES WILSON 157, 159–60 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

28. Wilson was known for his compromises. He was one of the principal exponents and supporters of one of the more infamous compromises in American constitutional history: the “three-fifths” compromise, by which slaves were to be accounted “three-fifths” of free persons for purposes of representation. Wilson introduced the motion that would ultimately become this clause. About Wilson’s role, Paul Finkelman wrote:

Here for the first time was an example of cooperation between the North and the South over slavery. Significantly, Wilson was known to dislike slavery and came from a state, Pennsylvania, which had already adopted a gradual emancipation scheme. Nevertheless, harmony at the Convention was more important to Wilson than the place of slavery in the new nation.

Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 437 (1999).

29. 2 WILSON, *supra* note 27, at 160.

30. 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 424 (Boston, Cummings, Hilliard & Co. 1823).

entertaining the possibility that prior cases might be overturned where social benefits might be derived from so doing. For instance, Nathaniel Chipman (1752–1843)—Revolutionary War veteran, United States senator from Vermont, and chief justice of the Vermont Supreme Court—distinguished what he understood to be an overly rigid system of English precedents from what he hoped would be a more flexible American model. He then proposed that all precedents had to be contextualized according to place and time in order to be properly understood and applied.<sup>31</sup> Chipman wrote:

A number of precedents, in point, however obscure, or uncertain the principles, upon which they were founded, have been held, fully decisive of a similar question; and yet many of these precedents were made at a time, when the state of society, and of property, were very different, from what they are at present . . . .<sup>32</sup>

Under a doctrine of the sort Chipman proposed, judges were free not only to measure precedents against a standard of reasonableness but even to take into account the needs and development of society in order to determine their continuing vitality.<sup>33</sup>

The many practical treatises that were written in order to guide practitioners in the day-to-day practice of law made similar statements about the nature and function of precedent. In introducing his book, entitled *The American Pleader and Lawyer's Guide*, William Hening wrote that he included a great variety of cases from all sorts of sources and jurisdictions within his compendium.<sup>34</sup> “[A] number of precedents,” he wrote, “have been translated from

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31. NATHANIEL CHIPMAN, *A Dissertation on the Act Adopting the Common and Statute Laws of England*, in REPORTS AND DISSERTATIONS, IN TWO PARTS, pt. 2, 117, 123 (Rutland, Vt., Haswell 1793).

32. *Id.* at 124.

33. One gains a sense of the richness of Chipman's theory of historical development when he goes on to write:

Society was in a state of melioration. Manners and sentiments progressed towards refinement. Intercourse between individuals, as well as nations, began to be extended, and in some measure, secured, the rights of property, and the rights of commerce were investigated, and better understood. The clouds, which had long hung over the reasoning faculties, began to be dispersed; principles were examined, and better established.

*Id.* at 125–26.

34. 1 WILLIAM W. HENING, *THE AMERICAN PLEADER AND LAWYER'S GUIDE*, at preface (New York, Riley 1811).

*Rastell, Coke*, and other approved books of entries, which never before appeared in the *English* language.”<sup>35</sup> They were thus included for the first time in an American practitioners’ handbook. Hening did not hope to be comprehensive; he hoped, rather, to provide a number of cases and authorities sufficient to allow a skilled lawyer to be able to frame his pleadings intelligibly.<sup>36</sup> He was searching, in short, for the reason and principles that undergirded particular doctrines of law. What Hening could not have had in mind, furthermore, was anything like the modern understanding of precedent, in which courts consider themselves particularly bound by prior decisions of their own jurisdiction while regarding all other decisional authority as merely persuasive.

The theory of precedent embedded within Hening’s stated goals, of course, is very different from our own. As with Blackstone, Hening’s doctrine of precedent reflects a jurisprudence that believed, fundamentally, in the existence of a transcendent body of principles and right reason that constitutes the source of all law. The skilled practitioner might draw his cases from any jurisdiction—even from the foreign legal sources that Hening conveniently translated. What mattered was the congruence of precedent and right reason.<sup>37</sup>

This point was made well in James Ram’s treatise, *The Science of Legal Judgment*.<sup>38</sup> Written by an English barrister and intended to serve as a guide to the proper uses of judicial precedent in the English courts, this book gained usage in the United States. Writing on why judges might depart from precedent, Ram stated:

One decision may not be a binding authority, if the principle or reason on which it is grounded, or some other cause, makes it

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35. *Id.*

36. *Id.*

37. One sees something of this sort also in the preface to the American edition of Edward Lawes’ *A Practical Treatise on Pleading in Assumpsit*. Lawes acknowledges that some of his authorities contradict one another. Lawes also acknowledges that he had no choice but to exercise some editorial judgment in the face of these evident contradictions: “The author’s object has been to collect, and not to criticize the quotations he has made; though he has not failed to mark those which he thought doubtful, and to state the change of practice where any has taken place.” EDWARD LAWES, *A PRACTICAL TREATISE ON PLEADING IN ASSUMPSIT*, at viii (Boston, Burditt & Co. 1811). Like Hening, Lawes proposed that one must consider the cases chronologically, in their own place and time: “He has also, where several cases have been determined at different periods on the same point, stated them in the chronological order of their determination, with such observations as seemed best calculated to connect and elucidate them.” *Id.*

38. JAMES RAM, *THE SCIENCE OF LEGAL JUDGMENT* (Philadelphia, Littell 1835).

defective. In an after case, the soundness of the earlier decision may be inquired into, and if on examination it is in the mind of the Court thought to be unfit to stand, that decision it is allowed to reject as a binding authority. A decision may be so disregarded, —if it is contrary to reason and common experience, and . . . it “outrages all reason and sense . . . .”<sup>39</sup>

This understanding of *stare decisis* helps to put into focus the meaning of the first half of the clause of Kent's commentary that I am commenting upon: “I wish not to press too strongly.” This statement can only be understood as reflecting a way of thinking about judicial authority that comes before, not after, the rise of the strict doctrine of precedent, which took root and flourished in the latter half of the nineteenth century. Unlike the doctrine of precedent that held sway in the eighteenth century and continued to command allegiance in Chancellor Kent's own time, the strict doctrine of precedent insisted that “the holding of each case, narrowly defined as the rule for which the case stands, is binding on courts in future analogous cases.”<sup>40</sup> By introducing the qualifying language, “I wish not to press too strongly,” Chancellor Kent clearly implied the possibility of flexibility where *stare decisis* is concerned.<sup>41</sup> Indeed, Kent had a keen appreciation of the need for the flexible application of precedent from his judicial work.<sup>42</sup> By his willingness to qualify the strict application of precedent, Kent was thereby bringing his readership into a

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39. *Id.* at 72 (footnotes omitted).

40. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 514 (1996).

41. *See id.* (“The strict doctrine had replaced the earlier more flexible doctrine, which usually looked for a line of cases that established a principle, rather than a single case ‘on all fours’ with the instant case . . . .”).

42. One of Kent's earliest opinions, *People v. Croswell*, 3 Johns. Cas. app. at 337 (N.Y. 1804), illustrates the degree of flexibility Kent was willing to countenance. The prosecution in *Croswell* was pursuant to a seditious libel law that allowed for the criminal prosecution of a person who made derogatory remarks about the President of the United States. Kent looked back to English precedent, which might countenance such prosecutions as a form of libel, but he found that “[t]he English decisions on the subject of libels have not been consistent in principle.” *Id.* at 379 (Kent, J.). This observation became the foundation for a searching inquiry into the history of criminal libel and the role of the jury in judging law and fact as it related to libel. The prosecution had sought to exclude from jury consideration the defense of the truth of the libelous statements. Kent found that English precedent on this point was “unsettled and at variance.” *Id.* at 389. But if one went back to a time before the sixteenth-century Star Chamber, the precedents clearly allowed the defense of truth. *Id.* at 390. This conclusion, furthermore, cohered with the principles of ethics and moral philosophy. To support his conception of moral reasoning, Kent cited the work of the Anglican theologian William Paley. *Id.* at 378. Kent would thus allow the defense of truth to be part of jury deliberations.

thought-world that was already beginning to vanish around him. It was a thought-world that still accepted the possibility of the law conforming to principles of natural justice and equity and that understood prior judicial decisions as articulating binding rules only to the extent that they reflected larger, transcendent principles of justice. Precedents—indeed, the doctrine of *stare decisis* itself—were valid, under this analysis, only to the extent that they served the larger purposes of the law: the discovery of truth and the doing of justice.

B. *"I recollect that there are one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application."*

Chancellor Kent was here building upon the first sentence commented on in the immediately preceding section. As noted earlier, Kent did not wish "to be understood to press too strongly the doctrine of *stare decisis*."<sup>43</sup> In the second sentence he offered his first explanation for his reluctance: historically, it is a proven fact that courts can reach and have reached the wrong decisions. Kent, accordingly, always wanted to leave enough flexibility in the system to correct such errors.

This understanding begs the following question: upon what basis did "the English and American"<sup>44</sup> courts correct their erroneous decisions? To ask this question of both the English and American legal sources of the eighteenth century is to enter into a lost world of legal reasoning—a world that continued to believe that law was an expression of divine will and natural reason and that admitted the possibility that lawyers and judges might know and serve the causes of equity and natural justice.<sup>45</sup> To be sure, a particular case or line of

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43. 1 KENT, *supra* note 6, at 476.

44. *Id.*

45. One might take as representative of this view Zephaniah Swift (1759–1823), who served in the United States House of Representatives and as chief justice of the Connecticut Supreme Court. Regarding the connection of earthly law and divine justice, he wrote:

Tho our imperfect natures disqualify us, to reconcile all events that come within our knowledge, to the attributes of the Deity; yet if we could scan the universe, and discover the final result of all things, there is no doubt but that we should be delighted at the glorious manifestations of justice, and the liberal diffusion of felicity.

1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 6 (Arno Press Inc. 1972) (1795).

cases might be adjudged as no longer sound for many reasons—they might have become outdated, or have proven to lack utility or conformity with the common law. But the system as a whole remained viable precisely because of the connection its adherents drew with natural law and divine and universal truth.<sup>46</sup>

Blackstone commenced his work, *Of the Nature of Laws in General*, with an account of natural law steeped in the Christian tradition of which he was a part.<sup>47</sup> “Man, considered as a creature,” Blackstone wrote, “must necessarily be subject to the laws of his creator, for he is entirely a dependent being.”<sup>48</sup> The Creator’s laws, Blackstone continued, are called the natural law:

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.<sup>49</sup>

Embedded in this statement are the basic principles of natural law that both empowered and restrained the judges of Blackstone’s era: the human person was a created being, subject to the rules of the Creator; humankind was granted free will, but this did not constitute a license to do whatever one pleased; indeed, the natural law contained restraints and regulations that served as natural limitations on human misconduct; and, it simultaneously conferred on those assiduous enough to cultivate it, “the faculty of reason to discover” the scope and force of its commands and prohibitions.

Eighteenth-century English and American judges were quite willing to employ these principles in the course of their written opinions and to bring them to bear in their analysis of precedents. In

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46. *Id.* at 5 (“[Law] in its most extended sense . . . may be defined to be a rule of action, applicable to animate and inanimate nature, and comprehending all the general principles of action, that are established in the system of the universe.”).

47. 1 BLACKSTONE, *supra* note 12, at \*39.

48. *Id.*

49. *Id.* at \*39–40.

the famous case of *Ashby v. White*,<sup>50</sup> Lord Chief Justice John Holt (1642–1710)<sup>51</sup> wrote: “Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and *ubi eadem ratio, [i]bi idem jus* [where the reason is the same, there the law is the same].”<sup>52</sup> Thus, on Holt’s account, it is not precedent that makes law, but reason which finds its proper expression through correct judicial decision making. The clear implication is that where the judge’s reasoning process is flawed, there is no consequent obligation to follow it.

One finds the same point made in other eighteenth-century English opinions. Writing seventy years after Lord Holt, William Murray, a native Scotsman better known as the first Lord Mansfield,<sup>53</sup> declared:

The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich[ard] I to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty’s sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of the law.<sup>54</sup>

Lord Mansfield was unafraid to invoke natural law in some of the most important cases of the day. In *Moses v. Macferlan*,<sup>55</sup> which

50. 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1702). A search of the Lexis database reveals that, as of June 2006, *Ashby v. White* has been cited nearly 200 times in American judicial opinions. The case involved infringements on the right to vote in parliamentary elections.

51. On Holt, see C.L. BRIGHTWELL, MEMORIALS OF THE EARLY LIVES AND DOINGS OF GREAT LAWYERS 87–96 (London, Nelson & Sons 1866).

52. *Ashby*, 2 Ld. Raym. at 957, 92 Eng. Rep. at 138 (Holt, C.J.) (emphasis added) (brackets indicating author’s translation of Holt’s Latin).

53. William Murray, Lord Mansfield (1705–1793), ranks among the greatest of all British judges, even though he was denounced by some of his contemporary critics as someone who “made it the study and practice of his life to undermine and alter the whole system of jurisprudence in the court of King’s Bench.” C.H.S. FIFOOT, LORD MANSFIELD 198 n.1 (1936) (quoting Letter of Junius (Oct. 5, 1771)). Lord Mansfield taught that the English system was grounded upon “six principal foundations,” the first two of which were “*The Law of Nature, anglice*, the Law of Reason” and “*The Revealed Law of God*.” *Id.* at 198–99. The most recent biography of Lord Mansfield can be found in the opening two chapters of James Oldham’s 2004 book *English Common Law in the Age of Mansfield*.

54. *Jones v. Randall*, Lofft 383, 385, 98 Eng. Rep. 706, 707 (K.B. 1774).

55. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

continues to provide one of the great historic foundations for the law of unjust enrichment,<sup>56</sup> he spoke of obligations that arose “from the ties of natural justice,”<sup>57</sup> and proclaimed that the requirement of restitution for unjustly taken funds arose “*ex aequo et bono* [from justice and the good].”<sup>58</sup> And, Lord Mansfield had occasion to declare slavery outlawed in England as a matter of natural law in *Somerset v. Stewart*.<sup>59</sup> Stare decisis and precedent, on this reading of Lord Mansfield, must clearly be understood as being in service to the larger cause of natural equity and justice.

As Blackstone made clear, reason was one of the attributes of the natural law.<sup>60</sup> Indeed, it was the principal means by which one came to know, obey, and enforce the natural law. Furthermore, it was reason that provided the means by which one sought to understand and apply the general principles that lay behind and animated the cases.<sup>61</sup> Indeed, prior cases were only of value to the extent that they shed light on the reasonable principles and transcendent natural justice that supported the law. This much was a constant theme of Lord Mansfield’s judicial career, as an extended summary of his cases found in C.K. Allen’s book, *Law in the Making*, illustrates:

[I]n *Fisher v. Prince* (1762), 3 Burr. 1363, he said: “The reason and spirit of cases make law, not the letter of particular precedents.” And again in *Rust v. Cooper* (1777), Cowp. 629: “Perhaps there is no case exactly parallel to this in all its circumstances. . . . But the law does not consist in particular cases, but in general principles, which run through the cases and govern the decision of them”; and in *R. v.*

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56. Robert Chambers, *Milestones in the Law of Unjust Enrichment*, 42 ALBERTA L. REV. 575, 576 (2004) (book review).

57. *Macferlan*, 2 Burr. at 1008, 97 Eng. Rep. at 678.

58. *Id.* at 1011, 97 Eng. Rep. at 680 (brackets indicating author’s translation of Mansfield’s Latin).

59. Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772):

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law.

*Id.*

60. See *supra* text accompanying note 49.

61. Thus Blackstone wrote that God laid down “the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.” 1 BLACKSTONE, *supra* note 12, at \*40.

*Bembridge* (1783), 3 Doug. 327: “The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases.”<sup>62</sup>

Lord Mansfield was not the only judge of his era to connect precedents, principles, and reason in this manner. Sir Lloyd Kenyon (1732–1802)<sup>63</sup> wrote in 1787: “I cannot help wishing that the cases had been more looked into upon this occasion, for although probably none would have been found directly in point, yet principles might have been collected from them which would have been of considerable assistance to me.”<sup>64</sup> A year later, he elaborated upon this theme: “The use of cases is to establish principles; if the cases decide different from the principles, I must follow the principles, not the decisions.”<sup>65</sup> As one final example, in 1796, Sir Soulden Lawrence (1751–1814), Puisne Justice of King’s Bench, described the relevant precedent in a case over which he was presiding as “being founded on the reason and justice of the case.”<sup>66</sup>

This mode of thinking and talking about the law crossed the Atlantic Ocean and can be found in the English colonies of the New World and—at a slightly later date—the new United States of

62. CARLETON KEMP ALLEN, *LAW IN THE MAKING* 216–17 (7th ed. 1964). Decades after his death, Lord Mansfield’s memory was still invoked in reference to his fidelity to principles and the clarity they brought to the law. Writing of the law of evidence, Chief Justice Best declared in 1828:

Lord Mansfield, speaking many years ago against subtleties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain broad principles, such as, not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules.

*Strother v. Barr*, 5 Bing. 136, 153, 130 Eng. Rep. 1013, 1019 (1828) (Best, C.J.).

63. Lord Kenyon served as both a chancery judge and as chief justice of the King’s Bench. He was the subject of a generally flattering biography. See GEORGE T. KENYON, *THE LIFE OF LLOYD, FIRST LORD KENYON, LORD CHIEF JUSTICE OF ENGLAND* (London, Spottiswoode 1873). One can gain a sense both of the flattering quality of the biography and of Lord Kenyon’s own character in a passage such as this: “The sterling honesty and inflexibility of character, which even his opponents could not but respect, had made him a great favourite with the people, who felt secure that under his presidency the administration of justice would be free from the slightest taint of corruption or partiality.” *Id.* at 174.

64. *Evans v. Llewellyn*, 1 Cox 333, 339, 29 Eng. Rep. 1191, 1193 (1787).

65. *Duke of Leeds v. Corp. of New Radnor*, 2 Bro. C. C. 338, 340, 29 Eng. Rep. 189, 190 (1788).

66. *Higgs v. Warry*, 6 T. R. 654, 656, 101 Eng. Rep. 755, 756 (K.B. 1796) (Lawrence, J.).

America. As early as 1657, one finds a Massachusetts case declaring: "That no custome or precedent ought to prevayle in any morall case, that may appear to be sinfull in respect of the breach of any law of piety against the first table, or of righteousness against the second."<sup>67</sup>

A century later, through a process of deductive reasoning, James Wilson concluded that it was logically necessary that there be a superior, which is set above the positive enactments of the state, and that the superior must be the natural law.<sup>68</sup> Wilson looked to God as the source of this natural law,<sup>69</sup> and he challenged Blackstone's defense of legislative supremacy on this basis.<sup>70</sup> The corollary to this chain of reasoning is clear: like legislation that violated the fundamental dictates of the natural law,<sup>71</sup> precedent that stood against the natural law was equally unsound.

One continues to encounter this sort of reasoning in works contemporary with Chancellor Kent's *Commentaries*. One might thus consider the *Legal Outlines* of David Hoffman (1784–1854), the European-educated professor of law at the University of Maryland. To a greater extent than had Blackstone, Hoffman adopted an essentially theistic account of natural law, asserting that "there [are] no other conceivable moral laws than those expressly revealed to us by God; or such as are dictated to us by the light of reason and conscience."<sup>72</sup> The human person, Hoffman argued, was born with "an innate admiration of virtue and truth, independently of any immediate reference to their convenience to the purposes and

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67. Giddings v. Brown, 2 Hutchinson Papers 1 (Mass. County Ct. 1657), reprinted in READINGS IN AMERICAN LEGAL HISTORY 232, 233 (Mark DeWolfe Howe ed., Beard Books 2001) (1949) (the two tables being referred to are, of course, the Decalogue).

68. 1 JAMES WILSON, *Municipal Law*, in THE WORKS OF JAMES WILSON 159, 196–98 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

69. *Id.* at 196–97.

70. *Id.* at 200 (labeling Blackstone's theory of legislative supremacy as "unsound and dangerous").

71. See generally Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15 (1998) (revealing that early American judges often relied on the natural law as a source of judicial review when considering the constitutionality of legislative enactments).

72. DAVID HOFFMAN, *LEGAL OUTLINES* 253–54 (William S. Hein & Co. 1981) (1836). Elsewhere, Hoffman defines the natural law: "The law of nature, we remember, is said to be a body of rules convenient to human conduct, and enforced by the God of nature by penalties . . ." *Id.* at 307–08. Cf. *id.* at 306–07 (considering two competing schools of thought—those who view natural law as entirely and completely grounded in divine law, and those who prefer to look to reason and a knowledge of transcendent and immutable truth). Hoffman himself did not intend to resolve this tension entirely in his own work, although he favored the theistic. *Id.* at 307.

happiness of life."<sup>73</sup> The person, furthermore, was impelled by an "internal obligation" to seek the virtuous and the true and to apply the insights so gleaned in his own life.<sup>74</sup> The presence of these moral norms, one's internal obligation to search for them, and one's inborn desire to know and live the virtues, collectively give individuals the basis for discerning true from false in the law. Indeed, in a directly relevant passage, Hoffman wrote that "any custom which seeks justification from general prevalence, and long use; must be practically mischievous."<sup>75</sup> What mattered was conformity to principles of truth and right order, not longevity.

In both England and America, one sees this sort of reasoning playing a role in assessing the ongoing validity of particular cases and precedents, although the two nations' cases differ considerably in form and tone. The English opinions reversing prior case law tended to be narrowly drawn and on the whole respectful of the authority that they were overturning. Thus, in *Dyer v. Dyer*, decided in 1788, the following language exists, in reference to a prior case:

With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time, or the opinion of learned men; and Lord *Kenyon* has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation . . . .<sup>76</sup>

One finds similar language in the case of *Ex parte Young*: "The Difficulty in this Case arises upon the Decision of *Doddington v. Hallet* by Lord *Hardwicke*; which is directly in Point. That Case is questioned by Mr. *Abbott*; who doubts, what would be done with it at this Day; and I adopt that Doubt."<sup>77</sup>

In each of these cases, the judges nodded deferentially toward the authority not only of prior cases but also of the judges who decided them; but, in neither case did the judges feel themselves obliged to follow earlier cases where those cases seemed to lack a reasoned basis. The judges sensed the need, in cases where precedent was about to be

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73. *Id.* at 307.

74. *Id.*

75. *Id.* at 348.

76. *Dyer v. Dyer*, 2 Cox 92, 98, 30 Eng. Rep. 42, 45 (Exch. 1788).

77. *Ex parte Young*, 2 V. & B. 242, 243, 35 Eng. Rep. 311, 311 (Ch. 1813) (citation omitted).

overturned, to voice their own profound respect for the intelligence and seriousness of their predecessors who had crafted the older opinions. In this way, institutional integrity might be preserved even as judges prepared to move doctrine in new directions.

Whereas English judges employed deferential and carefully qualified language when they chose to disregard precedent, American judges at this early stage were more willing to assert the presence, directly and bluntly, of a connection between precedents and natural justice, even if it meant the reversal of previously decided authorities. They always kept present in their minds, sometimes implicitly and sometimes explicitly, the logical corollary that prior decisions in violation of the natural law ought not to stand. Thus, one sees United States Supreme Court Justice Smith Thompson (1768–1843) writing in dissent in 1834 that the judicial precedents of the common law could only properly be interpreted in the light of natural justice:

A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases.<sup>78</sup>

The year before, in 1833, the Supreme Court of Indiana declared:

Since those days, civil society and the relations, duties, and transactions of men, have undergone an entire change. . . . The great excellence of the common law exists in its flexibility; in its being a science which can always adapt itself to every situation of society, and apply the rules of common sense, sound policy, and natural justice, to the transactions of men.<sup>79</sup>

The Supreme Court of Pennsylvania in 1821 declared: “[I]n the construction of these rules, usage, when it is not repugnant to the principles of natural justice, ought to be greatly respected.”<sup>80</sup> The implication was clear: where usage did not conform to natural justice, it was unsound. Custom and precedent might enjoy a presumption of

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78. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 671 (1834) (Thompson, J., dissenting).

79. *Johnson v. Baird*, 3 Blackf. 182, 189 (Ind. 1833).

80. *M’Connell v. M’Coy*, 7 Serg. & Rawle 223, 225 (Pa. 1821).

correctness but it was never more than a presumption. One can find this presupposition governing the outcomes in particular cases at the very time of the Founding era. Thus, the Pennsylvania Supreme Court in 1786 wrote:

A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law.<sup>81</sup>

The elder Theophilus Parsons (1750–1813)—son of a clergyman, member of the drafting commission of the Massachusetts Commonwealth Constitution of 1780, and chief justice of the Supreme Judicial Court—made similar points in an undated case involving divorce on the grounds of adultery.<sup>82</sup> Noting that the authorities seemed to be in the process of changing, Parsons stated: “It is not easy to assign a good reason for this change of opinion. . . . Independent however of any positive authority, the rule ought to be received because it is founded on sound reason and natural equity.”<sup>83</sup> Parsons went on to note that any other result “would be injustice to the wife, and immoral [to] the husband.”<sup>84</sup> A published decision of the Supreme Judicial Court of Massachusetts, dating to 1807, made a similar point: the court chose to follow the settled rule because it was “the rule [that] will most frequently do justice.”<sup>85</sup>

A review of arguments of counsel makes it clear that not only judges, but lawyers, too, knew how to draw the connection between natural justice, on the one hand, and the soundness or unsoundness of precedent, on the other. In the New York seditious libel action discussed earlier,<sup>86</sup> counsel representing the defendant challenged the

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81. *Kerlin’s Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (Pa. 1786). Caleb Nelson notes that this quoted language had its origin in Chief Justice John Vaughan’s opinion in *Bole v. Horton*, Vaughan 360, 124 Eng. Rep. 1113 (C.P. 1673). Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 16 n.48 (2001).

82. Anonymous, *reprinted in* THEOPHILUS PARSONS, COMMENTARIES ON AMERICAN LAW 305–07 (New York 1836).

83. *Id.* at 306.

84. *Id.*

85. *Gray v. Portland Bank*, 3 Mass. (1 Tyng) 364, 390 (1807).

86. *See supra* note 42.

precedent: "That the doctrine being against reason and natural justice, and contrary to the original principles of the common law, enforced by statutory provisions, the precedents which support it deserve to be considered in no better light than as a *malus usus* [evil practice], which ought to be abolished."<sup>87</sup> Similarly, in an 1809 North Carolina case, counsel alleged: "If any adjudged case in this country, ought to have any validity as a precedent, it must be because it has been *rightly adjudged* . . ."<sup>88</sup> And, again, we find in a North Carolina case from 1796:

Our common law is the same common law that the English nation have, the different parts of which have been ascertained by judicial determinations at different periods, and preserved in the books of Reports; or are contained in maxims and general principles which supply the means of making a proper decision, where none hath hitherto been made. These principles or maxims have their foundation in natural equity, and are adapted to the physical situation of mankind. They are the solid pillars upon which the whole structure of the common law stands. These maxims will always point out a proper decision . . . and the Judges are at liberty to resort to them to correct the improprieties, or supply the imperfections of decisions already made.<sup>89</sup>

Thus, precedent was only good to the extent that it conformed to transcendent principles of justice. Indeed, precedent might never be more than mere evidence of these larger principles.<sup>90</sup> Precedent did not itself make law.<sup>91</sup> Courts devised various ways to express these ideas when they sought to limit or overturn particular precedents. Thus courts might allege that precedents lacked a proper foundation in legal principle; or that they had fallen into disrepute because of continued judicial criticism; or that they were rejected outright by

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87. *People v. Croswell*, 3 Johns. Cas. 337 app. at 361 (N.Y. 1804) (argument of counsel) (brackets indicating author's translation of the defense counsel's Latin).

88. *Hill v. Moore*, 5 N.C. (1 Mur.) 233, 246 (1809) (argument of counsel).

89. *Young v. Erwin*, 2 N.C. (1 Hayw.) 323, 326 (1796) (argument of counsel).

90. And courts sometimes felt free to use the claim that precedent was nothing more than evidence of law to reject decisions from the highest tribunals. Thus, the Kentucky Supreme Court rejected a decision of the United States Supreme Court as "evidence of law" that "can only be treated as persuasive." *Eubank v. Poston*, 21 Ky. (5 T.B. Mon.) 285, 294 (1827).

91. Thus, the Circuit Court of the District of Columbia, in explaining the source of a rule of law, wrote: "If cases made the law, instead of being merely evidence of the law, this would be true . . ." *Fleming v. Foy*, 4 D.C. (4 Cranch) 423, 426 (1834).

some of the great judges of the past and so were unsuitable today; or that they constituted violations of natural reason, or justice, or equity.<sup>92</sup>

Before moving on to the next Section, I would like to call attention to Kent's remark that "there are one thousand cases to be pointed out in the English and American books" that have been or are subject to this sort of reversal. A thousand is a large number for a new republic, such as the United States in 1836, at the time of Kent's third edition. Kent, quite clearly, was letting judges know that they should not be afraid to exercise their reason and their moral sense in judging cases, and not be overly deferential to the poorly reasoned opinions of the past.

C. *"It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to [be] examined without fear and revised without reluctance . . . ."*

In an important early essay on the history of judicial precedent, William S. Holdsworth noted the existence of a number of judicially created devices that allowed courts to avoid the full impact of prior decisions. The most important, and one which we have discussed above, is the assertion that precedents did not really make law but only constituted evidence of law.<sup>93</sup> The significance to be attributed to prior decisions thus was always subject to further evaluation,<sup>94</sup>

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92. One senses the flexibility the courts were willing to import into the doctrine of stare decisis by considering closely the language used in the following statement: "If, in any case, the courts of this country are bound to receive a long and uninterrupted course of decisions of the *English* courts as evidence of the law, it is peculiarly proper that they should be so considered in questions relative to commerce . . . ." *Baxter v. New England Marine Ins. Co.*, 6 Mass. (5 Tyng) 277, 294 (1810). Thus, precedent had to be "long" and "uninterrupted." Even then, it may not apply: the clause, "[i]f, in any case, the courts . . . are bound," suggests that there are instances where the courts are not bound. The line of authority, should it be discovered, constitutes merely "evidence of the law." *Id.* And such a line of cases may only be relevant in "questions relative to commerce." *Id.* The Supreme Judicial Court, in short, had crafted a carefully written sentence designed to maximize its discretion in determining which lines, if any, of English authorities were applicable in Massachusetts even while voicing its fidelity to stare decisis.

93. William S. Holdsworth, *Case Law*, 50 L. Q. REV. 180, 184 (1934).

94. *Id.* at 185 ("If the cases are only evidence of what the law is the Courts must decide what weight is to be attached to this evidence in different sets of circumstances.").

particularly, as noted above, in light of the requirements of natural justice, equity, and the principles of natural law.<sup>95</sup>

Another means by which courts discounted prior decisions with which they disagreed was to question whether the former case was incorrectly reported or incorrectly decided.<sup>96</sup> In short, the commentators and judges alike were more than willing to assert that prior cases were so badly mistaken in their statements of the law that not only should they not be followed but that they should even be repudiated.

Blackstone's account of the ways in which mistakes might enter the case reports echoes some of the language Kent himself would use seventy years later: errors might enter the reports "through haste and inaccuracy, sometimes through mistake and want of skill."<sup>97</sup> In these instances, opinions that were "very crude and imperfect" resulted.<sup>98</sup> Blackstone specifically was condemning the reporters who edited cases for publication. Sometimes reporters lacked the capacity to render an accurate account of what the judges said or did. Errors might be further compounded as divergent reports of the same case were handed down from one generation to the next. These were the concerns that Blackstone had in mind.

Judges, for their part, felt themselves obligated not to allow such errors to perpetuate themselves and even denounced their continued survival in the case reports.<sup>99</sup> And certainly it must have sometimes happened that reporters misdescribed cases, omitting important details or distorting particular lines of reasoning. Holdsworth, however, had the sense that these denunciations were also sometimes pretextual—a subterfuge by which courts might display an outward respect for older decisions even while discrediting the accuracy of reported opinions that they wished to reject on the merits.<sup>100</sup>

Blackstone was not alone among the commentators in asserting that a mistake—either in the report of a case or in the legal reasoning of the judges who decided it—might constitute a ground for rejecting

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95. See *supra* Part I.B.

96. Holdsworth, *supra* note 93, at 187–88.

97. 1 BLACKSTONE, *supra* note 12, at \*72.

98. *Id.*

99. See Holdsworth, *supra* note 93, at 187–88 nn.55–56.

100. See *id.* at 187 ("It was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed. Lord Mansfield, when he was pressed by [such] a case . . . was rather too apt to take this line.")

that precedent. Hugh Henry Brackenridge (1748–1816), a justice of the Pennsylvania Supreme Court who had studied divinity before the Revolutionary War and had served as a chaplain in George Washington’s army, addressed comprehensively the second type of mistake—the problem of judges simply misunderstanding or misstating the law or its fundamental principles. Since opinions were not themselves law but merely evidence of the law, it was always possible that they could have been erroneously decided.<sup>101</sup> Brackenridge proposed a rule of thumb for such circumstances: “Where one is shocked by a decision, there is some presumption against it, and if traced it may be found to be an error, and the time *when*, and the place ascertained where it bred.”<sup>102</sup>

Brackenridge himself believed that early Pennsylvania case law was rife with errors.<sup>103</sup> For much of Pennsylvania’s colonial history, Brackenridge wrote, “we shall find the constitution of the courts to have been such that for a length of time a decision could be considered as little more than the opinion of a single mind.”<sup>104</sup> Apparently, in Brackenridge’s judgment, soundness of opinions depended upon a community of qualified judges working collaboratively.<sup>105</sup> And, even after statehood, Brackenridge observed, judges were few in number and appeal was difficult. Because so many errors had crept into the reports, Brackenridge counseled lawyers and judges to be vigilant in identifying them and weeding them out: “I do not think, therefore, that so much weight ought to be attached to decisions in this state; or that the not appealing should be considered as an acquiescence in the reason of them. . . . I do not consider the principles of construction so far settled as to preclude examination.”<sup>106</sup> Brackenridge concluded: “I will admit that much has been done towards building a system of jurisprudence in the state, but I am unwilling to apply the maxim of *stare decisis* to all that has been done.”<sup>107</sup>

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101. HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* 65 (Philadelphia, Byrne 1814).

102. *Id.* at 64.

103. *See id.* (“Be that as it may, I am not prepared to subscribe to our own decisions in all cases as conclusive authority.”).

104. *Id.*

105. *Id.* at 64–65.

106. *Id.* at 65.

107. *Id.*

James Ram, whose book on judicial precedent was widely circulated on both sides of the Atlantic, was equally willing to voice concerns about the danger of relying upon erroneously decided cases. About erroneous reports, Ram wrote that “it is not to be expected, that the reports of different reporters will be of equal credit and authority, and experience proves that this equality does not exist.”<sup>108</sup> Ram followed this general assertion with a critical evaluation of the major English reports, indicating to his readers which ones might—or might not—be trusted.<sup>109</sup>

Ram also made clear that precedents might be relied upon by later courts only where the judges have first satisfied themselves that the earlier decisions were free from mistakes in legal reasoning:

A precedent possesses . . . binding force . . . either if in the mind of the Court it is wholly unimpeachable, on the ground of want of principle, or otherwise; or, if impeachable, the objection to which it is so exposed, is not, in the consideration of the Court, sufficient to exclude its title to be authority.<sup>110</sup>

By this Ram meant to say that earlier courts could well have committed mistakes; and that subsequent courts might therefore rely on older lines of authority only where they have satisfied themselves that the older decisions were not mistaken in their reasoning or otherwise lacked foundation in legal principle.

One can find English and American cases that sought to criticize and correct both types of error—errors in the reporting of cases and errors in legal reasoning. Thus one finds the following statement in an English case dating to 1739:

I own that Carthew is in general a very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think that the Court would give so absurd a reason for their judgment, especially since there is not a word said of it in 5 Modern, where the case and the arguments upon it are very particularly reported.<sup>111</sup>

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108. RAM, *supra* note 38, at 58.

109. *Id.* at 58–66.

110. *Id.* at 67.

111. Tapner v. Merlott, Willes 177, 181–82, 125 Eng. Rep. 1119, 1121 (1739).

We encounter the following statement from a decision of 1743: “The case of *Barker v. Damer* as it is reported in 1 Salk. 80, seems to be an authority as to this point. But that case is reported differently in other books; and it is very doubtful whether in that case any judgment was ever given.”<sup>112</sup> One can encounter a similar statement from a case decided nearly fifty years later: “The words of the report are not quite accurate.”<sup>113</sup> The court went on from this premise to find an alternative account of the case more to its liking.<sup>114</sup>

One should be clear about what the courts were doing in each of these opinions: confronted with inconsistent accounts of previously decided cases, courts were choosing which of several reported versions of particular cases to follow and subsequently justifying these choices by attacking as erroneous the accounts that they wished to reject. The allegation that an error existed in the case reports thus opened the door to the possibility of judicial discretion. Were these efforts, however, merely pretextual, an excuse for judges to evade unwelcome precedent and decide cases on the merits, without really acknowledging what they were doing? Were they merely exercises in raw judicial power? Holdsworth certainly acknowledged that these were possibilities.<sup>115</sup> At our historical remove, it is impossible to answer these questions definitively, but it is not really necessary to do so. What matters for our thesis is the general acknowledgement by the judiciary of the late eighteenth and nineteenth centuries that precedent was not always to be trusted. Far from being absolutely binding, it was a variable thing, subject to mischaracterizations and misstatements, even by the reporters charged with the duty of rendering an accurate account of courtroom proceedings.

English courts and judges, furthermore, were also quick to identify errors in the reasoning of earlier tribunals, even if they were typically deferential toward the judges responsible for the perceived errors. One can take as an example the case of *Purcell v. Macnamara*, involving an action for malicious prosecution and the effort to dismiss the action, known technically as a “nonsuit.”<sup>116</sup> The outcome turned on which of two prior cases, *Pope v. Foster*<sup>117</sup> or *Rex*

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112. *Bailiffs of Litchfield v. Slater*, Willes 431, 433–34, 125 Eng. Rep. 1253, 1254 (1743).

113. *Porter v. Tournay*, 3 Ves. Jun. 311, 313, 30 Eng. Rep. 1027, 1029 (Ch. 1797).

114. *Id.*, 30 Eng. Rep. at 1029.

115. See *supra* note 100 and accompanying text.

116. *Purcell v. Macnamara*, 9 East 157, 157, 103 Eng. Rep. 533, 533 (K.B. 1807).

117. 4 T. R. 590, 100 Eng. Rep. 1192 (K.B. 1792).

*v. Payne*,<sup>118</sup> represented good law.<sup>119</sup> The judges authored their opinions *seriatim*, beginning with Chief Justice Lord Ellenborough, who framed the question: "This nonsuit proceeded on the authority of *Pope v. Foster*: if that case be law, the nonsuit ought to stand . . . ."<sup>120</sup> Ellenborough, however, understood *Pope* to have been mistakenly decided.<sup>121</sup>

Soulden Lawrence concurred with Ellenborough: "I think that the case of *Pope v. Foster* was wrongly decided. . . . The case of *Pope v. Foster* is certainly in point to the present objection; but it seems to have proceeded on some misunderstanding . . . ."<sup>122</sup> In fact, Lawrence added, "the case of *The King v. Payne* is as much in point, in answer to the objection, as that of *Pope v. Foster* is in support of it."<sup>123</sup> Lawrence ultimately decided that technical deficiencies in *Pope* precluded it from counting as good law.<sup>124</sup> Justice Simon Le Blanc, finally, determined that *Pope* misrepresented the line of development that the cases were taking and that the proper path of the law was never given a hearing in *Pope*.<sup>125</sup>

118. It seems that no reports of *Rex v. Payne* survive, but it is mentioned in other cases. See *Purcell*, 9 East at 158 n.(a)<sup>2</sup>, 103 Eng. Rep. at 533 n.(a)<sup>2</sup>.

119. See *Purcell* at 159, 103 Eng. Rep. at 534 (analyzing the contradicting case law).

120. *Id.* at 160, 103 Eng. Rep. at 534 (Ellenborough, C.J.).

121. *Id.* at 161, 103 Eng. Rep. at 535 (Ellenborough, C.J.) ("I consider that the case of *Pope v. Foster* ought not to bind us, as having been decided against principle.")

122. *Id.* at 162, 103 Eng. Rep. at 535 (Lawrence, J.).

123. *Id.* at 163, 103 Eng. Rep. at 535 (Lawrence, J.).

124. *Id.* at 162–63, 103 Eng. Rep. at 535 (Lawrence, J.). In addition, after sorting through the earlier cases, Justice Lawrence ultimately concluded that *Pope v. Foster* dealt with a different "material fact" than the case at bar. *Purcell* at 162, 103 Eng. Rep. at 535 (Lawrence, J.).

125. Justice Le Blanc wrote:

We have been pressed with the case of *Pope v. Foster*; and if that had been solemnly discussed, and a rule of evidence there laid down which had been acted upon ever since, the Court might have found themselves distressed by that authority, and it would have been difficult to have gotten rid of it. But it appears that a different rule of evidence had been before that time laid down by the same learned Lord who presided here when *Pope v. Foster* was determined; and no reference was then made to the former decision; but the latter case passed without discussion . . . .

*Id.* at 163–64, 103 Eng. Rep. at 535–36 (Le Blanc, J.). We should, perhaps, explicate what is going on in this passage and, more generally, in the reasoning of the other justices. At stake in *Pope v. Foster* and *Rex v. Payne* were different understandings of the rules of evidence. *Pope* was decided after *Payne* and should ordinarily be deferred to, but for all of the problems Justice Le Blanc and the other justices identified, *Pope* never really "solemnly discussed" the disputed point. Furthermore, as Justice Lawrence observed, the materiality of the facts in *Pope* were disputed. The largest difficulty the judges have to overcome is the fact that Lord Kenyon authored the opinion in *Rex v. Payne* and was also a member of the Court that decided *Pope*. Kenyon was one of the giants of the bench, and

We can say about judicial efforts to limit the scope of precedent through asserting mistakes in previous judicial reasoning what we said about allegations of mistaken reporting of cases: from the distance of 200 years we do not need to concern ourselves with the details of the rules of law argued for or against. Our concern, rather, should be with the processes the judges employed to limit the scope of precedent. In *Purcell*, the judges concluded that determining the rightness or wrongness of *Pope* was a matter of the gravest concern.<sup>126</sup> They expended considerable efforts in answering that question satisfactorily. Precedent clearly mattered to the justices of the era, but preserving the integrity and clarity of the legal order mattered even more. The continued applicability of *Pope* might thus be called into question in the name of these larger concerns.

One sees this attitude in other English cases as well. Confronted with confusion in prior cases, Lord Chancellor Eldon ruled in 1815: “The loose unsettled state of the practice makes it highly necessary that a rule should be laid down once for all; but, at present, I shall decide nothing further than that the rule adopted by the Commissioners in this case is wrong . . . .”<sup>127</sup> In a later seminal case, the court ultimately upheld its precedent, but not before describing the test to be used in determining the validity of past decisions: “If we could have been convinced that a judgment . . . was founded on a mistake of the law, it would have been our duty to have decided contrary to it . . . .”<sup>128</sup> And in a case from 1754, the lord chancellor, invoking the ancient right derived from Roman and canon law to dispense from the obligations of law, stated: “I always held this to be a hard rule, and a very nice distinction . . . . This, I think, is one of the cases where the court ought to dispense with the strict rule.”<sup>129</sup>

The same process can be found replicating itself in early American decisions. At times, American courts condemned inaccurate

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so the Court sought to evade the logical conclusion—that Kenyon had concurred in the adoption of the new rule—by emphasizing the absence of “solemn” discussion of that point. The justices’ effort to limit Kenyon’s role in *Pope* might be described by the old expression: “even Homer nods.”

126. *Purcell* at 157–62, 103 Eng. Rep. at 533–36.

127. *Ex parte Whitehead*, 1 Mer. 10, 15, 35 Eng. Rep. 581, 583 (Ch. 1815).

128. *Williams v. Germaine*, 7 B. & C. 468, 476, 108 Eng. Rep. 797, 800 (K.B. 1827).

129. *Kemp v. Mackrell*, 3 Atk. 812, 812, 26 Eng. Rep. 1264, 1264 (Ch. 1754). Consider, also, a final way in which courts avoided suspect precedent: “Certainly the profession have always wondered at *Dumpor’s case*, but it has been law so many centuries, that we cannot now reverse it. It does not however embrace the present case.” *Doe v. Bliss*, 4 Taunt. 735, 736, 128 Eng. Rep. 519, 520 (1813) (Mansfield, C.J.). The court here simply summarily distinguished the suspect precedent.

reporters. The United States Supreme Court engaged in this sort of reasoning when criticizing English precedent from the seventeenth century.<sup>130</sup> In 1832, the Supreme Judicial Court of Massachusetts, noting the presence of conflicting opinions in the English reports of the middle eighteenth century, similarly concluded that they must be the result of mistaken case reporting.<sup>131</sup> Twenty-two years before, Theodore Sedgwick (1746–1813)—then a member of the Supreme Judicial Court but previously a United States senator from Massachusetts and the fifth speaker of the United States House of Representatives—disagreed with the majority opinion in a case allowing for recovery on a promissory note in a slave-trading case.<sup>132</sup> Sedgwick premised a portion of his dissent on an analysis of English cases that took account of a reporter who “was mistaken in what he supposed that the court seemed to think.”<sup>133</sup>

Much more common than condemning reporters' errors, however, were the efforts to find mistakes in the legal reasoning of prior decisions so as to avoid the full impact of *stare decisis*. A classic example of this process is found in an opinion authored by Edmund Pendleton (1721–1803), a leading figure in Virginia politics and law, both before and after the Revolutionary War.<sup>134</sup> Admonishing his colleagues on the Virginia Supreme Court to accept precedents only after careful scrutiny, he wrote:

Uniformity in the decisions of this Court, is all important. We have, however, progressed but little from the commencement of our

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130. *Inglis v. Trs. of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, app. at 491–92 (1830) (Story, J.) (“There is some reason to question, if the language here imputed to Lord Northington be minutely accurate. . . . What therefore is supposed to have been stated by him as being the practice *before* the statute, is probably founded in the mistake of the reporter.”).

131. *See, e.g., Whiting v. Smith*, 30 Mass. (13 Pick.) 364, 368–69 (1832); *see also United States v. Smith*, 27 F. Cas. 1192, 1224 (C.C.D.N.Y. 1806) (argument of counsel) (attributing discordant treatments of a legal issue to “some mistake in this reporter”).

132. *Greenwood v. Curtis*, 6 Mass. (6 Tyng) 358, 361–77 (1810) (Sedgwick, J., note of an argument). Judge Sedgwick left the bench before the opinion in this case was pronounced, but, at his request, the reporter included the argument he had intended to deliver.

133. *Id.* at 368 (Sedgwick, J., note of an argument). *See also Belt v. Belt*, 1 H. & McH. 409, 418 (Md. 1771) (argument of counsel) (“A manuscript case is relied on, to which I give no credit.”), *quoted in* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 38 (1959); *Morgan v. Elam*, 12 Tenn. (4 Yer.) 374, 397 (1833) (argument of counsel) (“I must be permitted to say with becoming deference, that they mistook the precedents. . . .”).

134. *See generally* 1 & 2 DAVID JOHN MAYS, EDMUND PENDLETON, 1721–1803: A BIOGRAPHY (1952).

existence; and, if in any instance, we should recently discover a mistake in a former decision, we should surely correct it, and not let the error go forth to our citizens, as a governing rule of their conduct.<sup>135</sup>

Virginia counsel quickly followed Justice Pendleton's lead.<sup>136</sup> We thus encounter the following in an 1810 case:

Neither is it a *binding precedent*. The Court, it is true, ought not to retract its decisions, except on such grave and weighty grounds as apply to this case. But those decisions ought not to be irrevocable and irreversible, however erroneous. This Court must be conscious of not being exempt from the lot of humanity; and the country would be better satisfied, if it should pursue the course of correcting its decrees when discovered to be certainly wrong.<sup>137</sup>

By the "lot of humanity," the court clearly meant the human tendencies toward sinfulness and imperfection. Such shortcomings, the court suggested, affected judges as much as anyone else, and where a judgment is found to have failed or fallen short, a subsequent court should not hesitate to make the necessary correction.

The Virginia high court and the counselors who practiced before it were not the only ones who insisted that mistakes be corrected rather than to be allowed to flourish out of a misguided and overly scrupulous reliance upon precedent. Hugh Henry Brackenridge, whose treatise we have already had occasion to consider,<sup>138</sup> had the opportunity to apply his teaching on precedents in the case of *Brown v. Phoenix Insurance Co.*:

I do not consider myself bound by the case of Watson and Paul; not merely on account of this impracticality, or my not acquiescing in it, but because it involved a consequence which the judges who decided it did not contemplate, the blowing up the whole doctrine of abandonment. It was in fact an oversight as I thought at the time,

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135. *Jollife v. Hite*, 5 Va. (1 Call) 301, 328 (1798) (Pendleton, P.).

136. *See Lomax v. Hord*, 13 Va. (3 Hen. & M.) 271, 275 (1809) (argument of counsel quoting Pendleton's remarks found in *supra* text accompanying note 135).

137. *Dilliard v. Tomlinson*, 15 Va. (1 Munf.) 183, 190 (1810) (argument of counsel). The report of *Dilliard* goes on to note that "[o]n the other side it was urged that . . . precedents when once established are obligatory upon the Court." *Id.* at 191.

138. *See supra* notes 101–07 and accompanying text.

and error is not to be sanctioned because it has once got a footing. Even had I acquiesced in that decision, I would hold the right to reconsider. It can only be under the idea of originally weighing and subsequently reconsidering by the same or by other judges, that the common law came to be said to be the perfection of reason.<sup>139</sup>

In this quotation from Brackenridge, one can identify two separate strands of thought at work. The first is the idea of judicial error: an earlier court had failed to contemplate the consequences of its decision on something Brackenridge took to be a permanent feature of the law—the doctrine of abandonment. This error required immediate correction, which Brackenridge was attempting to supply. Second, Brackenridge wished the court to think seriously about his desire that every precedent be reviewed with fresh eyes—any other doctrine, he argued, would impede the path of legal development with the accumulating detritus of judicial mistakes. In advancing this claim, Brackenridge did not sound appreciably different from James Wilson, who also proposed that precedents periodically required reexamination.<sup>140</sup>

This mode of reasoning persisted until Kent's own day. Thus we find the Illinois Supreme Court declaring in 1832: "The maxim, *Stare decisis*, is one of great importance in the administration of justice, and ought not to be departed from for slight or trivial causes; yet this rule has never been carried so far as to preclude Courts from investigating former decisions . . ." <sup>141</sup> The Pennsylvania Supreme Court, in a decision of the same year, added:

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139. *Brown v. Phoenix Ins. Co.*, 4 Binn. 445, 478 (Pa. 1812) (Brackenridge, J.).

140. *See supra* notes 27–29 and accompanying text. A 1799 New York decision from the Court for the Correction of Errors posited similar reasoning:

[T]his being a question of commercial concern, the determination of which can have no retrospective influence, nor affect pre-existing rights, I consider myself less restrained by the authority of existing cases. Should we implicitly follow precedents, on occasions like the present, we must hope for little improvement in our commercial code. A single decision, though founded on mistake, would become of binding force, and by repetition, error might be continued, or heaped on error, until the common sense of mankind, and the necessity of the case oblige us to return to first principles, and abandon precedents. These considerations, I think, are sufficient to authorise a freedom of opinion.

*Silva v. Low*, 1 Johns. Cas. 184, 190 (N.Y. 1799).

141. *Bowers v. Green*, 2 Ill. (1 Scam.) 42, 42–43 (1832). The *Bowers* court went on to qualify this assertion by indicating that precedents that had "undergone repeated examination, and become well settled" were entitled to greater respect, but that in the case before the Court the precedent ought to

Though the doctrine of *stare decisis* is of undoubted obligation; yet there seems to be a substantial difference between changing an admitted principle, and overruling a decision which is but evidence of it . . . . [W]hen such a decision has gone to the profession for the guidance of their clients, it ought not to be lightly departed from, even in the same cause. But where it can be sustained only by the sacrifice of a principle, or the overthrow of a decision more consonant to the jurisprudence of the land, it is not the privilege, but the duty of the judges to recur to fundamental principles.<sup>142</sup>

We should pay close attention to the language of this opinion. The court adopted an interpretation of the relationship of precedent and fundamental legal principle closely resembling that found in Blackstone and some of the other commentators discussed earlier.<sup>143</sup> What the court described as “legal principle”—which might alternatively be described with terms like “natural equity” or “justice” or “transcendent reason”—was something that should always prevail, even if it meant reversing an earlier judicial decision.

American tribunals, furthermore, were willing to look to English examples to justify their readiness to overturn mistaken precedent. Thus Brackenridge wrote in the *Brown* decision:

English judges themselves are not so tenacious of their own rules, as not to change them, when experience has shown their inexpedience, or when they are not found to bear the test of reason. They will depart occasionally with a manly freedom from the error of a former rule; for the *stare decisis* is a maxim which must have its limits.<sup>144</sup>

To return to a question I adverted to above, it is possible that the judges who authored these opinions were employing the category of “mistake” or “error”—whether in the reporters or in the legal reasoning of prior decisions—as nothing more than a pretext for exertions of unfettered judicial power. But a review of these opinions suggests that standing behind these claims of mistake were some

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be reversed. *Id.* at 43 (“Under these circumstances, I think it the duty of this Court to revise that decision.”).

142. *Geddis v. Hawk*, 1 Watts 280, 286 (Pa. 1832).

143. *See supra* Part I.B.

144. *Brown*, 4 Binn. at 477 (Brackenridge, J.). *Cf.* *Fitch v. Brainerd*, 2 Day 163, 176–77 (Conn. 1805) (argument of counsel) (arguing that “[n]othing is more common in England, than for judges to declare, that former precedents are not law. Many cases might be cited to prove this . . .”).

consistently held ideas about the nature and function of law. Once again, one should be reminded of the confidence that lawyers and judges in the late eighteenth and early nineteenth centuries had in the possibility of knowing and articulating transcendent principles of law and justice. Errors can be recognized because principles of natural justice might be known through the light of the reason that God has implanted in every individual.

D. *“ . . . rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.”*

This Article already discussed the ways in which Kent's sources evaluated error. The clause upon which this Article shall comment next helps to explain why error was regarded with such extreme disgust: the law, in Kent's mind and the collective mind of his sources, was a system that had its own inner harmony, derived ultimately from a theistic account of the natural law. Error destroyed that harmony and needed not only to be shunned, but also to be corrected whenever possible.

To understand how Kent and his common law sources understood the harmony of the law we might, once again, begin with Blackstone. In defining law, Blackstone commenced with the broadest possible definition: “Law, in its most general and comprehensive sense, signifies a rule of action . . . .”<sup>145</sup> Understood in these terms, law was a fundamental attribute of the entire created order: there were “laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.”<sup>146</sup> There were laws put in place by the Creator of the universe and laws from which the universe itself “can never depart, and without which it would cease to be.”<sup>147</sup> All of God's created order, according to Blackstone, acted in accord with certain fundamental and discernible principles; this was part of what it meant to be created. Taken collectively, it formed a system that was entirely predictable and “guided by unerring rules laid down by the great creator.”<sup>148</sup> God, in this synthesis of creation history and jurisprudence, was the great

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145. 1 BLACKSTONE, *supra* note 12, at \*38.

146. *Id.*

147. *Id.*

148. *Id.* at \*39.

sovereign-lawgiver of the universe, who brought order out of chaos and kept things from falling apart with a body of “laws [that] must be invariably obeyed.”<sup>149</sup>

But, Blackstone continued, law had some more specialized meanings as well. There was, of course, the natural law, discussed above.<sup>150</sup> But there was also, in conformity with the natural law, human law, by which persons regulated the organization of human society:

[L]aws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.<sup>151</sup>

All human law, Blackstone asserted, was derived from the natural law and depended on this origin in the divine order for its own soundness. Indeed, law that did not conform to the natural law could not on any account be described as law:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.<sup>152</sup>

So that we might apprehend and understand the demands of the natural law, God has conferred reason upon us. It is through the exercise of our reason, Blackstone asserted, that we might understand what is demanded of us “in every circumstance of life.”<sup>153</sup> But reason, by itself, is never sufficient for knowledge of the natural law. The human race—Blackstone continued, following standard Christian theology—is a fallen race. Thanks to the sin of “our first ancestor,” our choices and behaviors are now blighted by sin, and our reason

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149. *Id.*

150. *See supra* Part I.B.

151. 1 BLACKSTONE, *supra* note 12, at \*39.

152. *Id.* at \*41.

153. *Id.*

has become “corrupt” and clouded by passion.<sup>154</sup> Thus, Blackstone stated, humankind needs God’s revelation as a final source of law:

The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man’s felicity.<sup>155</sup>

Blackstone then concluded his restatement of what he understood to be the system of the law: “Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.”<sup>156</sup>

One sees in this series of interconnected steps the logic of Blackstone’s system of law: law was part of the fabric of creation itself. The created order would descend into chaos if God suspended the rules by which the created order operated—the laws of motion, or gravitation, or the other natural phenomena Blackstone himself mentioned. Grasping this aspect of the law, however, was merely the first step of Blackstone’s analysis. Law, as it applied to humans, also partook of a divine origin: God had commanded the natural law to come into being; no human law, furthermore, could stand against it, since to violate the natural law meant nothing less than to break the declared will of God. In order that we might know and understand this natural law, God endowed us with reason. Our reason, however, cannot discern God’s will unaided, so finally we were given the assistance of God’s Word, directly revealed to us in Scripture. Blackstone undoubtedly understood the logical steps that comprised this analysis to form a harmony, a system that meshed and worked together thanks to the infinite divine Wisdom that brought it all together. In many respects this summary represented the conventional legal theology of generations of lawyers. What was fresh about it, however, was the systematic way in which Blackstone

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154. *Id.*

155. *Id.* at \*42 (noting that, because of sin, we cannot perceive the demands of the divine precepts of the Bible without the assistance of God’s grace and Holy Writ).

156. *Id.*

described it and his desire that it shape not only the attitudes of lawyers but of the general, literate, reading public.<sup>157</sup>

This summary of the main principles of Blackstone's jurisprudence represents the system of thought that generally prevailed even as late as Kent's own writing. One might thus consider briefly the analysis of the system of law as found in the work of Zephaniah Swift and David Hoffman. Both Swift and Hoffman authored works deliberately intended to be systematic restatements of the law. Like Blackstone, Swift proclaimed at the beginning of his treatise his desire that all citizens should obtain a knowledge of the law.<sup>158</sup> Such knowledge was best obtained through an organized exposition of legal principle: "The best method to diffuse this knowledge thro all ranks, is to simplify, and systematize the laws."<sup>159</sup>

Understanding the law, Swift assured his readers, was really a simple matter.<sup>160</sup> Legal professionals had complicated the process needlessly, Swift claimed, by relying upon case law that was little better than "oral tradition" entrusted to "the transient memory of judges and lawyers."<sup>161</sup> The case law could be understood, Swift averred, only through acquiring knowledge of "those principles and doctrines, which have become law by the usage and practice of the people, and the decisions of courts."<sup>162</sup>

Swift placed at the center of his legal theory a powerful conception of the infinite force and wisdom of God.<sup>163</sup> All law, all order, all principles and doctrines, ultimately come from God and God's plan for the universe.<sup>164</sup> Human beings, Swift continued, were

157. Thus, in the opening pages of his work, Blackstone described how important it was for persons of all ranks to have a grasp of the law—landed gentlemen, clergy, members of juries, and others all needed to "reflect a moment on the singular frame and polity of [England], which is governed by this system of laws." 1 BLACKSTONE, *supra* note 12, at \*6.

158. 1 SWIFT, *supra* note 45, at 1 ("Every citizen in the state, ought to acquire a knowledge of those laws, that govern his daily conduct, and secure the invaluable blessings of life, liberty and property.").

159. *Id.*

160. *Id.* at 2 (proclaiming his purpose in writing was "to make [a] methodical compilation, for the purpose of remedying . . . inconveniences, and unfolding the beautiful simplicity of our excellent system of jurisprudence").

161. *Id.*

162. *Id.*

163. *Id.* at 6. After summarizing a rudimentary knowledge of astronomy, Swift expressed awe at the enormity of it all: "The Supreme Being whose attributes are infinite power, wisdom and goodness, has formed this system upon the most perfect plan." *Id.*

164. *Id.*

formed by God specifically as social beings in need of law for their own self-protection.<sup>165</sup> Law, which is the source of self-preservation, is thus a reflection of the larger divine plan:

Man, when alone, is a feeble defenceless being—incapable of asserting his rights, and redressing his wrongs. The Deity has therefore instamped on his nature the love of his fellow men, invested him with social feelings, and impelled him by the strong principle of self-preservation, to enter into a state of society. The instant we contemplate man as a social being, we behold the germination of that principle that prompts him to adopt and observe those rules and regulations which are necessary to secure the rights of individuals, and preserve the peace and good order of society. Those rules constitute the civil law, and are the subject of these researches.<sup>166</sup>

Ultimately, Swift concluded, religion is the only true guarantor of the law's integrity.<sup>167</sup> And, of all the world's religions, Christianity is the belief system best calculated to succeed at this task, since it provides the clearest statement of the divine law upon which all is grounded:

The christian religion derives the highest credibility from containing a system of morality, infinitely superior in point of excellence and purity, to the theology of Greece and Rome, and the philosophy of Plato and Cicero. From this religion, is derived the revealed or

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Tho our imperfect natures disqualify us, to reconcile all events that come within our knowledge, to the attributes of the Deity; yet if we could scan the universe, and discover the final result of all things, there is no doubt but that we should be delighted at the glorious manifestations of justice, and the liberal diffusion of felicity.

*Id.*

165. *Id.* at 8.

166. *Id.*

167. *Id.* at 9.

Man is a religious being. In every stage of society, and in every country on the globe, this truth has been demonstrated. . . . Mankind will never cease to be religious, till they cease to exist. . . . [I]t is sufficient for our purpose to remark, that in this country we have the blessing of a religion . . . .

*Id.*

divine law, and the observation of it, is sanctioned by future rewards and punishments.<sup>168</sup>

On this account, it was God's divine will and Christian revelation that conferred on law its special harmony and balance. Law might be made into a coherent system because it was so included in the divine plan. It was the task of the lawyer, the judge, and the scholar to master this system, to conserve it, to explain it, and to hand it down to the next generation.

David Hoffman, whom we have already discussed<sup>169</sup> and who recommended in the preface of his *Legal Outlines* that students read his work as an introduction to the *Commentaries* of Blackstone and Kent,<sup>170</sup> was another legal systematizer whose first organizing principle was a theistically grounded theory of natural law.<sup>171</sup> Law, Hoffman wrote, can only be apprehended after one obtains an accurate understanding of the human person.<sup>172</sup> Like Swift, Hoffman understood the human person to be in his essence a religious being: "As man is the only being endowed with reason, and progressive in knowledge, it necessarily follows that he is the only religious animal."<sup>173</sup> The human person is nothing less than "God's animated creation."<sup>174</sup> As such, the person is endowed with certain rights, which "remain with us in society, where they are so guarded and modified as to produce the greatest happiness."<sup>175</sup>

To be sure, Hoffman expressed deep discomfort with the kind of "divine law" reasoning that one found on the Continent: it could altogether too easily be used to justify the reign of absolute

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168. *Id.* at 10.

169. *See supra* notes 72–75 and accompanying text.

170. HOFFMAN, *supra* note 72, at v.

171. *Id.* at 20 (speaking of "the God of nature [who] united every link in the vast chain of his creation," but whose creation was so constituted as to have "its fixed laws, which endure no change from time or circumstance").

172. *Id.* at 10 ("And we think the enlightened jurist of every country will agree with [Cicero], that the code best adapted to any particular nation or community, can only be known by a minute inspection into the *general* and the *adventitious* character of man.").

173. *Id.* at 44. Hoffman maintained that this was a universal truth about the human condition: "Whatever complexion or stature or form, an African sun, or Siberian frosts may have impressed on man, and whatever varieties we meet with in his moral constitution, we find that religion, of some kind, is ever present." *Id.*

174. *Id.* at 102.

175. *Id.*

monarchs.<sup>176</sup> But Hoffman's decision to eschew this ground for political obligation in favor of a consent-based theory that owed much to John Locke did not detract from the Christian principles that undergirded his legal anthropology.<sup>177</sup> Furthermore, Hoffman's definition of law connected these fundamental themes into a single system of thought. Like Blackstone and Swift before him, Hoffman constructed a logically satisfying system of law that integrated a theistic concept of natural law with a human-centered notion of legal obligation:

Law, in its most abstract and comprehensive signification, consists of that system of rules to which the intellectual and physical worlds are subjected; either by *God*, their creator and preserver; or by *man*, when invested with competent authority to do so; by which the existence, rest, motion, and conduct of all created and uncreated entities are regulated, and on the due observance of which their identical being or happiness respectively depends.<sup>178</sup>

Chancellor Kent's theory of law belongs within this tradition. Like Blackstone, Swift, and Hoffman, Kent believed that an essentially theistic, Christian-centered account of the natural law conferred on the law a special sense of wholeness—an integrity, really, that amounted to nothing less than “harmony” and “beauty.” To appreciate the depth of this commitment, one might advert briefly to three different parts of Kent's *Commentaries*—his treatment of the law of nations, of property, and of domestic relations.

Kent commenced his treatment of the law of nations with a review of first principles.<sup>179</sup> The law of nations stood upon two foundations, one consisting in positive law grounded upon “consent and usage;”<sup>180</sup> the other consisting in “the law of nature, applied to the conduct of nations.”<sup>181</sup> Both elements were crucial to the consistency and

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176. *Id.* at 183 (“It would indeed seem infinitely strange, if equal and greater absurdities were not discoverable in every stage of human opinion, that princes should have been deemed the peculiar favourites of heaven . . .”).

177. *Id.* at 189–90 (“Hence you perceive with what reason we pronounce that the right of civil government has its origin in the consent of the governed; and that this is the true, the rightful, and the only source of legitimate political power.”).

178. *Id.* at 270.

179. 1 KENT, *supra* note 6, at 1–20.

180. *Id.* at 2.

181. *Id.*

enforceability of the law.<sup>182</sup> It was natural law that lent to the law of nations the requirement that states behave “with justice, good faith, and benevolence.”<sup>183</sup> Indeed, efforts to separate the law of nations from these naturalistic premises were bound to lead to bad results.<sup>184</sup>

Kent observed that Christianity made a special contribution to the shaping of the law of nations:

[T]he Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves.<sup>185</sup>

If a theistically grounded natural law formed an indispensable part of the law of nations, the same could be said for other branches of the law, such as property and the law of domestic relations. About the origin of property, Kent wrote:

The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigour and maturity among polished nations, forms a very instructive portion of the history of civil society. Man was fitted and intended by the Author of his being, for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature . . . .<sup>186</sup>

And, regarding the origin of the law of domestic relations, Kent declared:

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182. *See id.*

183. *Id.*

184. *Id.* at 2–3.

We ought not . . . to separate the science of public law from that of ethics, nor encourage the dangerous suggestion, that governments are not so strictly bound by the obligations of truth, justice, and humanity, in relation to other powers, as they are in the management of their own local concerns.

*Id.*

185. *Id.* at 3.

186. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 318 (New York, Clayton & Van Norden, 3d ed. 1836).

The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order.<sup>187</sup>

This diffusion of theistically grounded natural law principles throughout various portions of Kent's *Commentaries* helps to put into perspective his discussion of the harmony that must prevail in judicial decisions. At its heart, Kent stressed, the common law was something that existed apart from legislative enactment: "The common law includes those principles, usages, and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."<sup>188</sup>

The courts, Kent continued, were responsible for discovering the principles of the common law. The courts, however, did not simply make these principles up out of thin air.<sup>189</sup> Rather, they derived these principles from sources outside the law, chiefly "the application of the dictates of natural justice, and of cultivated reason, to particular cases."<sup>190</sup> One might even, in a particular case, find oneself compelled to consult the sources of Christian faith. Thus, in upholding a blasphemy prosecution in the absence of an express statute on the subject,<sup>191</sup> Kent declared that Christianity was a part of the common law and that an attack upon it constituted an attack upon nothing less than society itself.<sup>192</sup>

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187. *Id.* at 75. In his treatment of polygamy, Kent adopted an explicitly Christian perspective of marriage: "The direct and serious prohibition of polygamy contained in our law, is founded on the precepts of Christianity, and the laws of our social nature, and it is supported by the sense and practice of the civilized nations of Europe." *Id.* at 80.

188. 1 KENT, *supra* note 6, at 471.

189. *Id.* ("A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference.")

190. *Id.*

191. Looking to English sources, Kent wrote: "The authorities show that blasphemy against God, and contumelious reproaches and profane ridicule of Christ or the Holy Scriptures . . . are offences punishable at common law, whether uttered by words or writings." *People v. Ruggles*, 8 Johns. 290, 293–94 (N.Y. Sup. Ct. 1811).

192. *Id.* at 294.

This discussion gets to the heart of Kent's theory of law and thereby helps to explain his treatment of stare decisis and precedent. The law truly had a harmony and a beauty to it, thanks to the beneficence of God and our own capacity to discern and apply the precepts of the natural law in the organization of society. Kent, like many if not most of the common lawyers of his day, entertained a jurisprudential theory deeply indebted to classical, Christian patterns of reasoning about the nature and function of law. His theory of precedent and of stare decisis must be fitted within this larger jurisprudential framework. Error, for Kent's understanding of how the system of law cohered together, must be corrected in order to preserve the integrity of the system. Individuals can know when error has been committed, and they can know how to repair the integrity of the system through reason and reflection, which can lead to a deeper understanding of the principles of natural justice and transcendent truth.

E. *"Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."*

This statement represents the final sentence of the paragraph that I have been analyzing. Kent's intent in this paragraph is to summarize his argument that we should not be too rigid on the subject of stare decisis. One might begin with an observation on the first clause, up to the semicolon: in this clause, Kent returned to the idea with which he commenced the paragraph—his belief that judicial precedent might represent nothing more than the evidence of what the law really is. And since it is merely evidence of the law, and not itself the law, not only individual precedents but even entire lines of precedent might be subject to further review and revision, depending on a variety of factors.

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The people of this state, in common with the people of this country, profess the general doctrines of christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order.

*Id.*

We have already reviewed a number of the factors that were understood to permit the reversal of previous decisions. These factors, as discussed above, included fidelity to principle, respect for natural law and natural justice, and a concern that previous reporting errors or misstatements of law be corrected. Since this material has already been covered, we might do well at this point to defer our observations on the first clause of this sentence and focus for the moment on what Kent meant, and what his frame of reference must have been, for the final part of the sentence, beginning with the words “revision of a decision” and ending with the phrase “extent of property to be affected by a change of it.”

As with the other sections of this Article, a good starting point might be the English decisions of the late eighteenth and early nineteenth centuries. One might begin by considering closely the language used by the English courts when they chose to uphold precedents despite misgivings. A major consideration for the English judges and lawyers was the desire to retain a stable law of property. Decisions that had the effect of destabilizing established property relations by reversing the precedents upon which those relations depended thus met with extreme disfavor. To appreciate the extent to which the English legal profession sought to conserve established property rights, it is well worth it to consider some of these cases.

A question of ecclesiastical presentment existed in the case of *Sparrow v. Hardcastle*.<sup>193</sup> Lord Hardwicke acknowledged that the precedent upon which he was expected to rely was a “harsh case, and that the favour which the law shews to heirs has been carried too far.”<sup>194</sup> Lord Hardwicke, however, found it necessary to dismiss this concern—there had simply been too much reliance, for too long a period of time, on the older case, to justify reversing it now:

Lord *Trevor* gives an answer to this objection. He says, that a law being made long ago, and having received many uniform determinations, after long debate, and acquiescence under them, and when accepted and received as a general rule of property; though

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193. Amb. 224, 27 Eng. Rep. 148 (Ch. 1754). The case involved competing claims to the right of advowson—the transferable and assignable right to present clergymen to benefices. This was a right dating to the Middle Ages but retained in English practice until as late as the end of the nineteenth century. See D. Herlihy, *Church Property*, in 3 NEW CATHOLIC ENCYCLOPEDIA 849, 852 (1967) (for an early history of advowson).

194. *Sparrow*, Amb. at 227, 27 Eng. Rep. at 149.

some should not be satisfied in their private judgments, yet it is reasonable to determine the same way to prevent the mischiefs that might arise from the uncertainty of the law.<sup>195</sup>

Other cases expressed similar sentiments. For instance, Lord Camden wrote: "It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyances have proceeded upon the ground of that determination."<sup>196</sup> Similarly, Lord Tenterden wrote about that cornerstone of commerce, negotiable instruments:

I should certainly have entertained some doubt whether this case fell within the statute . . . had it not been for the authority cited on behalf of plaintiff. . . . It is of great importance that there should be an uniformity of decision in the different Courts of Westminster Hall upon all questions, but particularly upon questions affecting negotiable instruments of this description. Upon the authority of that case, therefore, we are of opinion that the rule for entering a verdict for the plaintiff should be made absolute.<sup>197</sup>

These cases indicate that English courts sometimes felt themselves required to consider factors other than the abstract rightness or wrongness of a prior line of cases. Large interests were at stake. Property owners, testators, borrowers, and lenders were entitled to rely to the extent possible on the continued stability of English law. Interpretations of old legal doctrines and constructions of statutory language—maintaining the stability of these foundational concerns was a high priority to the English bench and bar. The judicial enforcement of *stare decisis* was aimed at these concerns.

Where, however, English judges had real doubts about prior decisions, they often expressed those doubts by drawing lines—a particular case, they would say, has gone thus far, but will not be allowed to advance its principle so much as another inch. Again, one might consider some cases that use this device. One case provides this example: "At all events, that doctrine is not to be further enlarged. . . . The cases on this subject have gone too far already; and I would be understood as saying that I will not add to their

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195. *Id.* at 227–28, 27 Eng. Rep. at 149.

196. *Morecock v. Dickens*, Amb. 678, 680–81, 27 Eng. Rep. 440, 441 (1768).

197. *Fayle v. Bird*, 6 B. & C. 531, 533, 108 Eng. Rep. 547, 548 (K.B. 1827).

authority . . . .”<sup>198</sup> Similarly, we see: “As to the demand of Mr. *Whitbread* . . . I do not see, how I can refuse it; though I do not hesitate to say, that I should not have made those decisions.”<sup>199</sup> And again:

Though *Gerrard* and *Gerrard*, and *Greaves* and *Maddison* were strong cases, yet this case seems to go yet farther . . . I for my part declare, I'll not go a jot farther; but where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all people know how to act.<sup>200</sup>

At times, we see judges declaring that even while case authorities are at variance with principles of English law, they have become so much a part of the legal landscape that it is now impossible to overturn them: “This Court should determine upon broad principles which will meet the common sense of mankind. I therefore yield to the authority of those cases, not to the reason of them, and I confess I should have hesitated a long time, before I had determined them in the same manner.”<sup>201</sup> Similarly, Lord Thurlow questioned the outcome of some previous cases but wrote: “[Y]et the rule was such, and so many estates stand upon it that it cannot be shaken.”<sup>202</sup> Even Lord Kenyon, who in other contexts stood ready to defend principle against improperly decided cases,<sup>203</sup> was moved to write:

The maxim *misera est servitus ubi jus est vagum aut incertum* [the servitude is pitiable where the law is vague or uncertain], applies with peculiar force to questions respecting real property. In family settlements provision is made for unborn generations; and if by the means of new lights occurring to new Judges, all that which was supposed to be law by the wisdom of our ancestors, is to be swept

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198. *Ex parte Hooper*, 1 Mer. 7, 9–10, 35 Eng. Rep. 580, 581 (Ch. 1815). Lord Eldon, the author of this opinion, closed by noting the important role that distinctions play in his judicial reasoning: “I will not add to their authority, *wherever the circumstances are such as to warrant me in making a distinction.*” *Id.* at 10, 35 Eng. Rep. at 581 (emphasis added).

199. *Ex parte Whitbread*, 19 Ves. Jun. 209, 211, 34 Eng. Rep. 496, 496–97 (Ch. 1812).

200. *Butler v. Duncomb*, 1 P. Wms. 448, 452, 24 Eng. Rep. 466, 467 (Ch. 1718).

201. *Stebbing v. Walkey*, 1 Cox 250, 252, 29 Eng. Rep. 1152, 1153 (1786).

202. *Evelyn v. Templar*, 2 Bro. C. C. 148, 149, 29 Eng. Rep. 85, 86 (Ch. 1786).

203. *See supra* text accompanying notes 63–65.

away at a time when the limitations are to take effect, mischievous indeed will be the consequence to the public.<sup>204</sup>

It is possible to read these cases in at least two ways. One can read them as attesting to a strong notion of precedent, a commitment by English judges to a powerful understanding of *stare decisis* even in the face of contrary legal principle. It seems better, however, in light of all of the evidence adduced in this Article, to read these statements as efforts by English judges to cast doubt on the continued viability of cases of which they really disapproved. In a sense, one might see judges putting the legal community on notice: these cases have been deemed suspect in their reasoning and fidelity to first principles, and while they might endure a little while longer, one does well not to place too much faith in their continued survival.

One discerns the same patterns repeating in American judicial opinions. There were times when *stare decisis* would trump all other considerations. Thus, one finds in an 1823 New York decision: "*Stare decisis* is a maxim essential to the security of property; the decisions of courts of law become a rule for the regulation of the alienation and descent of real estate, and where that rule has been sanctioned and adopted in our courts, it ought to be adhered to . . ." <sup>205</sup> A Connecticut case of the same year declared: "*Stare decisis*, is a sound judicial maxim, especially in settlement cases, where the stability of a rule is of more importance than its technical correctness." <sup>206</sup> A second Connecticut case of 1823 similarly declared: "It is unnecessary to consider at greater length the merits of a question, which, in this state, is clearly settled, by determinations of court, if the maxim *stare decisis* is anything more than a name." <sup>207</sup>

In a case involving the attachment of property of out-of-state debtors, one member of the 1833 Alabama Supreme Court declared himself indifferent to legal principle so long as a particular line of cases remained undisturbed: "I consider it much more important, that the decisions should be uniform and the law settled, than how it is

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204. Doe v. Allen, 8 T. R. 497, 504, 101 Eng. Rep. 1510, 1514 (K.B. 1800) (brackets indicating author's translation of Kenyon's Latin).

205. Lion v. Burtiss, 20 Johns. 483, 487 (N.Y. Sup. Ct. 1823). The *Lion* court went on to add as a disclaimer that precedent might be overturned where "it be manifestly wrong and unjust." *Id.* The court stressed, however, that in the case at bar a long history of legislative and judicial action cohered in the proper direction. *Id.* at 488 ("The law is settled, and I think well and justly.").

206. Inhabitants of Middleton v. Inhabitants of Lyme, 5 Conn. 95, 98 (1823).

207. White v. Trinity Church, 5 Conn. 187, 188-89 (1823).

settled . . . *stare decisis*, I therefore, consider as determining the question, as to me."<sup>208</sup> The Supreme Court of Pennsylvania wrote in 1808: "Unless the rule of *stare decisis* is adhered to in the administration of justice under a government of laws, all property must be rendered insecure."<sup>209</sup> And, a New York case of 1834 added, with respect to judicial interpretation of clauses in insurance policies:

We are bound to presume that since that decision, parties have acted with a full knowledge of the construction then given to this clause in policies, and we should regret exceedingly, if we were obliged, after the lapse of thirty years, to draw in question its soundness. If there ever was a case in which the court should feel bound by the maxim *stare decisis*, this is that case. A different construction now would shake and alarm the confidence of the commercial community.<sup>210</sup>

As in the English cases, however, so also in the American, one finds judges who wished to draw lines against extending precedents beyond narrow confines. Thus, one sees the following in a Connecticut case of 1837 concerning the enforceability of a freight shipping contract:

I cannot persuade myself, that the principle has any warrantable foundation, or that the rule of damages is just, or relative to the case. A conformity, however, to the necessary rule of *stare decisis*, constrains me to sacrifice my own judgment, and to follow the precedents, so far as they lead. But I shall anxiously resist their extension a single hair's breadth.<sup>211</sup>

All of these cases involved, in some form or another, the protection of property or commercial rights under the law of the relevant jurisdiction. Cases, after all, were an important source of legal knowledge for practitioners—guiding them in how to construe such basic documents as a wills act or the version of the statute of frauds in a particular jurisdiction. Where such terms were once construed, an expectation of stability arose—practitioners, after all, might make use of particular words and phrases in the drafting of

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208. *Middlebrook v. Ames*, 5 Stew. & P. 158, 169 (Ala. 1833) (Taylor, J.).

209. *Jones's Lessee v. Anderson*, 4 Yeates 569, 575 (Pa. 1808).

210. *Am. Ins. Co. v. Dunham & Wadsworth*, 12 Wend. 463, 466–67 (N.Y. Sup. Ct. 1834).

211. *Escopiniche v. Stewart*, 2 Conn. 262, 267 (1817) (Hosmer, J., concurring).

legal documents, wills, and trusts, say, that might not be construed themselves until decades later. Stability in judicial outcomes was an essential ingredient in such circumstances in preserving the intent of the drafters. This, then, is what Kent meant by “expediency.” He did not use the term in its modern sense—by which “expedience” is often contrasted with steadfastness and is often used as a way of signaling a willingness to abandon principle. Kent’s use was different. His usage was closer to the original Latin sense of the word—to be of service, or value, or profit.

At this point, we should take up the first clause of Kent’s sentence: “Even a series of decisions are not always conclusive evidence of what is law.” We might begin by observing that *stare decisis* was considered by lawyers and judges of the eighteenth and early nineteenth centuries to be a maxim of law. We should focus, therefore, on what it meant to refer to a particular phrase as a maxim.

Maxims of law are a peculiarly medieval way of reasoning about the law. The term “maxim” in fact is derived from the expression “maximum proposition,” a term of art employed in medieval scholastic reasoning.<sup>212</sup> Maxims were understood to be conclusions that follow from a pattern of syllogistic reasoning.<sup>213</sup> Maxims, however, did not serve to close the door on further reasoning, especially where the law was concerned. Because medieval lawyers recognized that the law contained “gaps, ambiguities, and contradictions,” maxims were intended to assist in the search for the just result in particular cases.<sup>214</sup>

From the Middle Ages onward, maxims had an important role to play in the development of English and, much later, American law. Roscoe Pound noted that “[s]cholastic adoption of Aristotelianism and the consequent emphasis upon formal logic made itself felt in English law in the fifteenth century.”<sup>215</sup> Maxims, at this early stage in English legal history, were often equated to narrow statements of rules.<sup>216</sup> The term was also frequently used synonymously with the term “principle.”<sup>217</sup>

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212. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 139 (1983).

213. *Id.* at 139–40.

214. *Id.* at 141.

215. Roscoe Pound, *The Maxims of Equity—I*, 34 HARV. L. REV. 809, 829 (1921).

216. *Id.* at 830.

217. *Id.* at 829–30.

In an important book, *The Common Law Mind*, J.W. Tubbs explored in detail the development of legal maxims in early modern England.<sup>218</sup> Tubbs showed that Sir Edward Coke (1552–1634), who may be safely considered one of the two or three most important founders of the modern English common law, continued to use the term “maxime” to signify “a proposition, to be of all men confessed and granted without prooffe, argument, or discourse. *Contra negantem principia non est disputandum* [One ought not to argue with someone who denies principles].”<sup>219</sup> We might equate Coke’s use of maxims to the role that axioms play in mathematics—first principles that are necessary for further investigation but which are themselves not subject to further questioning or analysis. Coke still moved in the world described by Pound: a world in which maxims were not subject to further dispute or investigation.

In point of fact, however, the maxims of the law, taken on their own terms, did not form a single and consistent whole. Representing competing values, some maxims occasionally came into conflict with other maxims. Disputes therefore arose, of necessity, over how or whether a particular maxim should apply to a particular circumstance.<sup>220</sup> These disputes led some to question the view that maxims represented axiomatic truth. Tubbs singled out John Dodderidge (1555–1628) (also spelled Doddridge), a contemporary of Coke, as the lawyer most responsible for challenging the traditional understanding as articulated by Coke.<sup>221</sup>

Dodderidge distinguished between two types of principles. “First” principles (*de primis principiis*), Dodderidge declared, cannot be subjected to further dispute.<sup>222</sup> Dodderidge compared this type of principle to the axioms we use in mathematical reasoning. We make use of first principles, which are not subjected to further disputation, as the necessary starting points for further reasoning.<sup>223</sup> They are “universal” (*universalia*), and so firmly impressed and fixed naturally

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218. J.W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS* 173–78 (2000).

219. *Id.* at 174 (quoting 1 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 67a (Philadelphia, Small 1853)) (brackets indicating author’s translation of Coke’s Latin). The point made with the Latin phrase was that maxims must remain the unquestioned starting point of further legal reasoning.

220. *Id.* at 175.

221. *Id.*

222. JOHN DODDRIDGE, *THE ENGLISH LAWYER* 192–93 (Da Capo Press Inc. 1973) (1631).

223. *Id.*

in all persons that they cannot be doubted, need no further proof, and are “undoubtedly and most widely” known.<sup>224</sup>

Legal maxims, however, are not first principles on Dodderidge’s account. They fall into the category of “Secondary Principles . . . which are not so well knowne by the light of Nature, as by other meanes . . . .”<sup>225</sup> They are not necessarily true, although they “compreh[end] great probabilit[y]” of truth.<sup>226</sup> The maxims of law, Dodderidge concluded, belong to this latter category.<sup>227</sup> As a matter of logical and legal correctness, Tubbs sided with Dodderidge over Coke:

Dodderidge’s sophisticated understanding of the philosophical tradition that underlies his treatment of maxims allows him to give a more realistic and theoretically coherent account of the reason of the common law than that offered by many of his contemporaries. He can admit that parts of the law are uncertain, inequitable, wrongheaded, or in conflict with other parts and yet claim that the law as a whole is reasonable because of the reason worked out artificially through the debate and discourse of lawyers.<sup>228</sup>

What must be addressed next is the question: how did early American lawyers understand maxims, in particular the maxim *stare decisis et non quieta movere*?<sup>229</sup> Did they understand by this term the rigid inelasticity of Sir Edward Coke, or the more supple and sophisticated understanding of John Dodderidge?

A review of early cases makes it clear that the term “maxim” was used with some frequency with respect to *stare decisis* and that it was often used coterminously with words like “principle” or “rule.” We can, furthermore, certainly identify cases in which *stare decisis* was used to signify a kind of rigid woodenness in the application of past

224. *Id.* at 193 (author’s paraphrasing of Dodderidge’s Latin, which reads: “*Primaria principia dicuntur universalialia quaedam Iuris pronuntiata, quae omnibus hominibus ita sunt impressa naturaliter et infixa, ut, velut, indubitata et notissima, non alia egeant Demonstratione, aut certe levi aliqua probatione Confirmentur.*”).

225. *Id.* at 194 (in this passage Dodderidge shifted from Latin to English).

226. *Id.* Regarding their truth content, Dodderidge added: “Probable, they are said to be, because, although the manifest truth of them be unknown, yet nevertheless they appear to many, and especially to wise men, to be true.” *Id.*

227. *Id.*

228. TUBBS, *supra* note 218, at 178.

229. See BLACK’S LAW DICTIONARY, *supra* note 10, at 1443 (“To stand by things decided, and not to disturb settled points.”).

decisions to present concerns. Some of these cases are cited and discussed above,<sup>230</sup> and others might also be adduced. Thus the Pennsylvania Supreme Court wrote in 1827: "If the rule, *stare decisis*, has any application, it is here."<sup>231</sup> In 1834, the Supreme Judicial Court of Massachusetts traced a particular rule of law back in time through a case of 1813 and a statute of 1791; the court concluded: "Under these circumstances we feel bound to abide by the rule of *stare decisis*."<sup>232</sup> In 1826, a concurrence in the Connecticut Supreme Court of Errors declared rhetorically, with respect to a question of mortgage law: "*Is the mortgagee seised of the premises mortgaged?* Certainly not, if the rule *stare decisis* or a decent respect to the determinations of the most respectable courts, is permitted to influence."<sup>233</sup>

In each of these cases the word "rule" was used to describe the application of *stare decisis* and in each of these cases the court upheld its application to the case at bar. In each instance the court issued what amounted to a rhetorical demand: *stare decisis* compelled a particular outcome that the court considered itself bound to follow.

The words "maxim" and "principle" were sometimes used in a similar fashion to signal the same strong adherence to past decisions. Thus, Joseph Story, writing in his capacity as a circuit judge in the admiralty case known as *The Avery*, decided in 1815, took note of the presence of "an ancient and indisputable rule of the law of nations," and signaled that it belonged to the legislature to modify the rule.<sup>234</sup> The reason for this, he added, was that: "*Stare decisis* is a great maxim in the administration of the law of nations."<sup>235</sup> Justice Story's practical equation of rules and maxims here clearly signaled the

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230. See *supra* notes 201–17 and accompanying text.

231. *Kearney v. Tanner*, 17 Serg. & Rawle 94, 98 (Pa. 1827).

232. *Clap v. Smith*, 33 Mass. (16 Pick.) 247, 250 (1834).

233. *Clark v. Beach*, 6 Conn. 142, 162 (1826) (Hosmer, C.J.). Chief Justice Hosmer declared, prior to putting the question, that he had conducted "a review of the numerous and uniform determinations of this Court, spreading over a period of nearly twenty years" and that he had also consulted "all the decisions of the judiciaries on both sides of the *Atlantic*." *Id.*

234. *The Avery*, 2 F. Cas. 242, 242–43 (C.C.D. Mass. 1815). Justice Story stressed:

At all events, [the disputed rule] is a part of the admiralty law, which this court is bound to respect; and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule.

*Id.* at 243.

235. *Id.*

outcome. Similarly, at the state court level, the Supreme Judicial Court of Maine wrote, regarding an older line of cases and the judges who authored those opinions: “If the principle, *stare decisis*, properly actuated them, we certainly have additional motives, arising from their decision, for yielding to its authority.”<sup>236</sup>

*Stare decisis*, termed variously as a maxim of the law, or a first principle, or a rule of law, was asserted as a means of bringing a disputed question to resolution in all of these cases. Should these outcomes, however, be taken as evidence that Coke’s understanding of what a legal maxim should be—a kind of non-negotiable axiomatic claim about the law—governed as a matter of course in the late eighteenth and early nineteenth centuries? A thorough answer to this question requires us to consider a different range of cases. Far from deciding the matter at hand, in the cases about to be considered, *stare decisis* was merely one among several competing goods that courts considered in order to render a decision.

That courts were willing to give *stare decisis* weight, as opposed to decisive significance, can be seen in a case in which the court ultimately decided to judge in favor of settled principle. In 1831, the Virginia Supreme Court wrote:

It must be admitted on all hands, that the principle *stare decisis*, is of peculiar importance in whatever relates to the title to property, and to real property in particular. Among other things, a continual fluctuation in the decisions of the courts on the construction of wills, is calculated to produce the most serious evils.<sup>237</sup>

It is important for our purposes to advert to the structure of the court’s argument: the court was not giving blind deference to *stare decisis*; rather, it admits that this “principle” has peculiar weight in a particular type of case and should be applied in order to ward off a particular type of evil. What we see here, in short, is a process of weighing and balancing between competing values.<sup>238</sup>

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236. *Elwell v. Shaw*, 1 Me. 339, 342 (1821). Consider, also, language from *Ruth v. Owens*, 23 Va. (2 Rand.) 507, 512 (1824): “*Stare decisis* is a safe and sound maxim, and I should be among the last to counsel a departure from it.”

237. *Callava v. Pope*, 30 Va. (3 Leigh) 103, 106–07 (1831) (Tucker, P.).

238. Another case exemplifying the same structure of reasoning is *Smith v. Triplett*, 31 Va. (4 Leigh) 590 (1833). In a case involving the enforcement of a debtor’s bond, the court wrote: “Hence the principle *stare decisis*, is peculiarly applicable to cases of this description.” *Id.* at 600 (Tucker, P.). Under a strict doctrine of precedent, one would not find this sort of weighing employed, even where

One can discern the same process in cases from other states as well. Writing in dissent in a Kentucky case, Chief Justice George Robertson (1790–1874), one of the leading lights of early Kentucky jurisprudence,<sup>239</sup> declared that “‘*stare decisis*,’ though a wise judicial maxim, when fitly applied, and always entitled to much influence, does not *conclude* the question now involved.”<sup>240</sup> In an 1824 North Carolina Supreme Court case, we find the statement: “[W]hile I readily admit the propriety of the rule *stare decisis*, I would yet respectfully examine and weigh the reasoning advanced in support of the different opinions.”<sup>241</sup> Likewise, in 1827, the Pennsylvania Supreme Court stated that “in cases of this sort where the recurrence of the mischief may be prevented without disturbing what has already been done, the rule of *stare decisis* must yield to the justice and policy of a new practice.”<sup>242</sup> A North Carolina dissent, finally, advised the reader how the weighing process might take place: “[P]recedents only shew the opinions of the writers, yet all precedents which are brought into argument are of the same authority. Their weight depends much upon the age in which they were written, and the character of the writers.”<sup>243</sup>

The same state supreme court, in fact, might take differing positions on the significance of *stare decisis* based, it seems, on the issue presented and the outcome that was sought. Thus the Supreme Court of Errors for the State of Connecticut wrote in 1810 that “few maxims of our law are more important than that of *stare decisis*” as it prepared to jettison an English rule of property favored by *stare*

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the court determined to apply precedent. The court, under the strict doctrine, would consider itself constrained to do so. See, e.g., *Bridge v. Johnson*, 5 Wend. 342, 366 (N.Y. 1830) (Tallmadge, Sen.) (“The maxim *stare decisis*, is one to which we shall all be disposed to adhere; it is a salutary one. . . . [W]e are required to maintain the decision . . .”).

239. Robertson served two terms on the Kentucky Court of Appeals and was the chief justice from 1829 to 1834. He also served three terms in the United States House of Representatives and was a professor of law at Transylvania University in Lexington. UNITED STATES CONGRESS, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–1989, at 1727 (1989), available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000322>.

240. *Palmer v. Merriwether*, 30 Ky. (7 J.J. Marsh.) 506, 512 (1832) (Robertson, C.J., dissenting) (emphasis added).

241. *Wood v. Bullock*, 10 N.C. (3 Hawks) 298, 299 (1824) (Hall, J.).

242. *Means v. Trout*, 16 Serg. & Rawle 349, 350 (Pa. 1827). Cf. *Hobbs v. Middleton*, 24 Ky. (1 J.J. Marsh.) 176, 185 (1829) (“[W]e shall not be much embarrassed by the maxim ‘*stare decisis et non quieta movere*.’ For we do not consider it as applicable to such a question, as that now under consideration, and to such decisions as those which have been rendered upon it.”).

243. *State v. Owen*, 5 N.C. (1 Mur.) 452, 463 (1810) (Taylor, J., dissenting).

decisis in favor of a local rule more suited to Connecticut's needs.<sup>244</sup> Eighteen years later, however, the same state court wrote: "There is not in the common law a maxim more eminently just, and promotive of the public convenience, than that of *stare decisis*."<sup>245</sup> The existence of such discordance even within a single jurisdiction points toward the flexibility of *stare decisis*. When a court wished to demonstrate that a particular rule must be held in a firm and unyielding fashion, it might invoke the important role *stare decisis* played in conferring certainty upon the law. But where the court wished to depart from a settled understanding of the law, the same court might engage in a weighing process, balancing the importance of *stare decisis* as opposed to other, competing values.

Arguments of counsel reproduced in state reporters also give evidence that practitioners considered the maxim *stare decisis* not as a fixed and unyielding rule, but as a maxim that had to be weighed with other maxims and principles in order to reach a just outcome in a particular case. Thus, we see that counsel in Connecticut argued: "The precedent, however, will have its due weight, in proportion to the soundness of the reasons, on which it was founded, and the number and respectability of the judges, who acted upon it."<sup>246</sup> Counsel in Virginia in 1807 asserted: "*Stare decisis* is a rule which I hold in as much respect as any man in the Commonwealth; but there are cases in which it may be necessary to depart from it."<sup>247</sup>

These cases demonstrate that *stare decisis*—termed variously a maxim, or a principle, or a rule of law—was not understood as a doctrine that exerted binding authority on the courts. Courts, rather, engaged in a process of weighing and balancing a variety of competing considerations. The vocabulary the courts employed was not one of strict obligation, or absolute adherence; rather, the vocabulary is one of proportionality, due weight, measuring, and balancing. Again, the explanation for this vocabulary is to be sought in the jurisprudential foundations of the time. The early American

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244. *Bush v. Bradley*, 4 Day 298, 305 (Conn. 1810) (Reeve, J.). The court went on to acknowledge that the law of property in Connecticut differed from that found in England and declared that it was therefore free to reach decisions at variance with English precedent. *Id.*

245. *Palmer's Adm'rs v. Mead*, 7 Conn. 149, 158 (1828) (Hosmer, C.J.).

246. *Fitch v. Brainerd*, 2 Day 163, 176 (Conn. 1805) (argument of counsel).

247. *Eldridge v. Fisher*, 11 Va. (1 Hen. & M.) 559, 560 (1807) (argument of counsel). *Cf.* *Oliver v. Newburyport Ins. Co.*, 3 Mass. (2 Tyng) 37, 44–45 (1807) (argument of counsel) ("The maxim *stare decisis* is of peculiar weight in commercial questions, in which, perhaps more than in any others, it is more important that the law be settled, than how it is settled.").

Republic came of age at a time before the ascendancy of the strict positivism, the instrumentalism, and the utilitarian doctrines of a later age. As this Article has made clear, what mattered more at this stage in American history was fidelity to theories of natural justice and natural law.

### CONCLUSION

This Article can now be fitted within the scholarship on the history of *stare decisis* and precedent. The American history of *stare decisis* in the eighteenth and nineteenth centuries has been the subject of historical investigation since at least the 1950s and possibly longer. During the last half century, the assumptions made by legal historians concerning what is important in the historical record have shifted. Thus, the thesis of this Article differs substantially from the work of early historians such as Frederick Kempin. Kempin recognized the importance of not viewing the past through the lens of the present, or at least he voiced his appreciation for this approach in his study of the early history of *stare decisis*.<sup>248</sup> But Kempin's work is nevertheless flawed by his normative assumption that the doctrine of precedent should look much like it does today. Kempin applied this normative assumption to the historical record in an attempt to recover the early history of the strict doctrine of precedent.<sup>249</sup> Using the strict doctrine as his model, Kempin concluded: "One may summarize by saying that . . . American cases, up to the year 1800, had no firm doctrine of *stare decisis*."<sup>250</sup> And, when it finally developed later in the nineteenth century, Kempin confidently asserted that the original American version looked much like the doctrine of *stare decisis* that we know today.<sup>251</sup> Kempin, in short, wished to tell the story of a

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248. Kempin, *supra* note 133, at 28 ("In viewing early American law . . . modern lawyers are quite prone to assume, without conscious thought, that the approach of eighteenth century lawyers and modern lawyers to legal problems is identical.").

249. *Id.* Thus Kempin distinguished between the nineteenth century and the earlier historical record in order to dismiss the early cases as representing a system of thought that was fundamentally different. Kempin takes as a guiding principle Theodore F.T. Plucknett's insight that "it is to the nineteenth century that we must look for the final stages of the present system." *Id.* at 30 (quoting THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 350 (5th ed. 1956)).

250. *Id.* at 50.

251. *Id.* at 52 ("The last question . . . is the extent to which our modern methods . . . differ from their colonial and eighteenth century predecessors. In results, at least, we are not too far from them.").

“process of growth”—the evolution of the modern doctrine of stare decisis from a body of older materials the contents of which interested him only slightly.<sup>252</sup>

As this Article has demonstrated, such an assertion is inconsistent with the historical record. In fact, the vocabulary of stare decisis and precedent was frequently invoked by judges and lawyers in both the late eighteenth and early nineteenth centuries. But these terms meant something different in the period before 1836 than they do today. In assuming that stare decisis had to conform to a set of normative assumptions shaped by present practice, Kempin in fact failed to adhere to the guidelines he set up for his own scholarship. Indeed, one might even criticize his work by using that indelicate term “Whig history.”<sup>253</sup> As this Article makes clear, English and American courts most certainly had a conception of stare decisis; it was not, however, the strict doctrine that would come to prevail at a later time in American history. And, indeed, it is hoped that this Article’s review of the jurisprudential foundations of this older way of viewing stare decisis establishes the extent to which this now vanished thought-world was a rich and coherent one on its own terms.

In some respects, this Article may serve as a complement to the more recent studies of Gerald J. Postema<sup>254</sup> and Jim Evans.<sup>255</sup> Postema, like Kempin, takes as normative a strict doctrine of precedent and traces its roots back into the philosophical speculations of Thomas Hobbes and Jeremy Bentham.<sup>256</sup> Postema’s account framed the modern doctrine of precedent as essentially an outgrowth of a movement toward legal positivism that was capable of recognizing only the duly enacted law of the sovereign as binding authority to the exclusion of older, naturalistic modes of reasoning. Postema labeled the older school of thought that we have been examining the “traditionary conception of precedent” and associated it with English

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252. *Id.*

253. *See, e.g.,* HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY*, at v–vi (W.W. Norton & Co. 1965) (1831) (describing this type of historical account as one in which historians “emphasise certain principles of progress in the past and . . . produce a story which is the ratification if not the glorification of the present”).

254. Gerald J. Postema, *Some Roots of Our Notion of Precedent*, in *PRECEDENT IN LAW* 9 (Laurence Goldstein ed., 1991).

255. Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in *PRECEDENT IN LAW*, *supra* note 254, at 35.

256. Postema, *supra* note 254, at 11–16 (reviewing Hobbes and Bentham in the context of examining the “positivist conception of precedent”).

common law lawyers like Sir Matthew Hale.<sup>257</sup> It was a doctrine fundamentally dependent upon a naturalistic jurisprudence that looked to generally knowable transcendent norms as the appropriate starting point for all legal analysis. While I have eschewed the label “traditionary doctrine of precedent”—Chancellor Kent and his contemporaries, after all, never knew the doctrine by that term—my investigation complements Postema’s in that it studies the main premises of this older conception of *stare decisis*.

This Article, similarly, has some affinities with Evans’ study of nineteenth-century precedent. Evans uses some of the English cases we examined in this Article as background to his investigation of the emergence of a positivist account of precedent.<sup>258</sup> In my own case, once again, rather than use this material merely as a starting point for the investigation of recent developments, I have chosen to consider the older materials on their own terms.

This Article has also covered some of the same ground as Morton J. Horwitz in his landmark work, *The Transformation of American Law, 1780–1860*,<sup>259</sup> although it parts company from Horwitz’s thesis at a critical juncture. Horwitz correctly asserted that the Founding generation recognized a large role for natural law in the application of precedents.<sup>260</sup> Horwitz, however, went on to assert that this recognition led to “a strict conception of precedent.”<sup>261</sup> As Horwitz explained it, a constellation of related concepts—the idea that cases stood as the best “evidence” of the law, the proposition that judges were obliged to discover the law and not make it, and the widely held belief of judges that they were constrained by the received wisdom of the common law—converged in the 1770s and 1780s to frustrate the possibility of judicial discretion.<sup>262</sup> Matters, however, changed in the generation following the Revolutionary War as writers such as Nathaniel Chipman, Zephaniah Swift, and Hugh Henry Brackenridge adopted a more flexible, “functionalist” approach to the use of previously decided cases.<sup>263</sup>

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257. *Id.* at 15–23.

258. Evans, *supra* note 255, at 35–47 (reviewing the older English materials).

259. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

260. *Id.* at 8.

261. *Id.*

262. *Id.* at 8–9.

263. *Id.* at 24–25.

There is much to commend about Horwitz's thesis. His reading of Chipman, Swift, Brackenridge, and the other jurists of the late eighteenth and early nineteenth centuries takes proper account of the flexibility that they sought to build into common law decision making. But it is a mistake to give the impression that these writers did not share a commitment to natural law or transcendent principles of justice. As this Article amply demonstrates, jurists such as Swift and Brackenridge could simultaneously maintain both fidelity to natural law and a commitment to a more functionalist application of prior decisions. This much, in fact, was built into the system of thought that prevailed between the 1780s and 1830s. In writing as he did, Horwitz seriously understated the significance of natural law to early conceptions of precedent and *stare decisis*.

This Article should also take note of the important work of Caleb Nelson, especially parts of his article, *Stare Decisis and Demonstrably Erroneous Precedents*.<sup>264</sup> Nelson's starting point was self-consciously different from that of Kempin, Postema, Evans, and Horwitz. Each of these scholars was engaged in a self-consciously historical enterprise—the reconstruction of the doctrine of precedent as part of an attempt to describe the historical realities of Anglo-American law in the late eighteenth and early nineteenth centuries. Nelson, on the other hand, wished to use the historical record to resolve some pressing contemporary issues confronting the United States Supreme Court. Nelson explains the dilemma he wished to resolve:

American courts of last resort recognize a rebuttable presumption against overruling their own past decisions. In earlier eras, people often suggested that this presumption did not apply if the past decision, in the view of the court's current members, was demonstrably erroneous. But when the Supreme Court makes similar noises today, it is roundly criticized. At least within the academy, conventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision.<sup>265</sup>

Nelson's overarching purpose in writing was to confront this conventional wisdom. He did so in the first instance by proposing a refinement in our understanding of the way in which contemporary

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264. Nelson, *supra* note 81.

265. *Id.* at 1–2 (footnotes omitted).

courts confront past decisions with which they disagree. As Nelson put it: "When we think about *stare decisis*, we are used to asking whether courts should follow a past decision even though they would have reached a different conclusion as an original matter."<sup>266</sup> But Nelson observed that "this formulation is imprecise."<sup>267</sup> It conceals from view two alternative interpretations of the prior case. It is possible that the judges who decided the earlier case, confronting an open question in the law, chose to follow a certain path that a subsequent court might disagree with (based on policy grounds, say, or on differing conceptions of statutory purpose), but that cannot be described as clearly erroneous.<sup>268</sup> Alternatively, it is possible that the first case represents an obvious error in the law.<sup>269</sup> The latter court's obligations under *stare decisis* would differ, depending upon which of these two alternatives of the first case it adopted. "In the first situation, a presumption against overruling the precedent makes perfect sense . . . ."<sup>270</sup> "In the second situation, however, this fear [that judges would engage in the arbitrary reversal of prior cases] is less acute."<sup>271</sup>

Having laid out his schema, Nelson looked to the past for historical support. His reading of the historical record was a sympathetic and sophisticated one. He asserted that tensions in antebellum American applications of *stare decisis* can be resolved by attention to these two senses in which a later court might disagree with an earlier court's rulings. Jurists and judges of the period between 1780 and 1830 were accustomed, Nelson asserted, to look to "external sources"—by which he meant natural law and reason—for guidance in interpreting prior decisions.<sup>272</sup> In summarizing his reading of Zephaniah Swift, for instance, Nelson wrote: "In Swift's view, judges were free to overrule past decisions precisely because the common law was *not* just what courts said it was; it rested in part on principles that stood independent of past decisions, and judicial decisions could be tested against those principles."<sup>273</sup>

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266. *Id.* at 6.

267. *Id.* at 6–7.

268. *Id.* at 7.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 28.

273. *Id.* at 31.

This Article lends substantial support to Nelson's thesis. In the course of explicating Chancellor Kent's pregnant paragraph, it should be clear that the earliest generations of American judges and lawyers held a view of *stare decisis* deeply conditioned by their commitment to theistically grounded natural law. They were emphatically not positivists who viewed as valid law only the rules and decisions internal to the system within which they were operating.

On the other hand, this Article parts company in significant ways with the work of Thomas Healy.<sup>274</sup> Healy's purpose in writing was to answer a contemporary question of constitutional law: whether Article III courts are required by the Constitution to apply the principles of *stare decisis* and precedent when deciding cases, and whether this obligation entails the further requirement that all opinions issued by an Article III court—including unpublished opinions—should be accorded precedential effect.<sup>275</sup> Having raised this question, Healy proposed an answer in the negative: Article III courts are not so obligated because *stare decisis* "was not finally accepted in England until the late eighteenth century and was widely disregarded by judges in this country until the beginning of the nineteenth."<sup>276</sup>

This Article does not pass judgment on the merits of Healy's constitutional claims, but only on his historiographical presuppositions. There are at least two weaknesses visible in Healy's historiography. First, he tends to rely upon secondary sources to set his historiographical horizons. This is especially visible in his reliance on the work of Frederick Kempin as a means of framing his understanding of the shape of the doctrine of *stare decisis* that he wished to find in the historical sources. Thus, he cited Kempin for the proposition that "[a] willingness to consult past decisions for their wisdom or insight . . . is far different from an obligation to follow precedent simply because it exists."<sup>277</sup> The juxtaposition Healy posed in this sentence does an injustice to the historical record. Early Anglo-American common lawyers and judges certainly made use of the

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274. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001).

275. *Id.* at 48–49.

276. *Id.* at 120. Healy continued: "It is therefore doubtful that the founding generation would have viewed *stare decisis* as an inherent limit on judicial power. It is also doubtful that the Framers intended for *stare decisis* to operate as part of the checks and balances implicit in the Constitution's structure." *Id.*

277. *Id.* at 54 (citing Kempin, *supra* note 133, at 30, 41).

language of precedent and stare decisis in deciding whether to follow or reject a line of authorities. To equate stare decisis with the “obligation to follow precedent simply because it exists” is to fall into the same normative trap into which Kempin stumbled. It is to assume, in advance, the shape and substance of a particular legal doctrine and thereby to exclude from historical consideration evidence that that doctrine, while still present, operated along very different lines in the distant past.

Second, Healy paid insufficient attention to the shifting jurisprudential lenses through which courts understood the doctrine of stare decisis. He acknowledged that jurists in the late eighteenth century were shaped by the “declaratory theory” of law<sup>278</sup> and that lawyers and judges in the nineteenth century gradually revealed a deeper commitment to “positivist” theories of law that excluded considerations of natural law or transcendent reason.<sup>279</sup> Healy, however, did not explore the implications of these conflicting theories of jurisprudence for the doctrine of stare decisis.

It should be obvious from this Article, however, that early American jurists did not lack a concept of stare decisis, but that they conditioned their reliance on previously decided cases on these earlier decisions’ fidelity to transcendent principles of justice and right. A more interesting study would connect these differing conceptions of stare decisis with larger movements in jurisprudence. It is hoped that this Article represents a move in that direction.

Finally, it is incumbent upon me to take notice of the important study of Frederick Schauer, entitled simply *Precedent*.<sup>280</sup> Schauer’s work is not historical in nature; he was concerned rather with identifying the ways in which the doctrine of precedent operates in contemporary American law.<sup>281</sup> His article represents a powerful analysis of what it means today to follow prior judicial decisions. But while his work represents an important restatement of contemporary understandings, it could nevertheless benefit from engaging the historical record.

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278. *Id.* at 72. The declaratory theory of law to which Healy refers is really the belief that judges discovered the law through their reliance on transcendent principles—they declared what had always existed in the realm of absolute justice but that now needed clarifying in the light of a particular problem that had come before the bench.

279. *Id.* at 72, 87.

280. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

281. *Id.* at 571–72.

Take, for instance, Schauer's conception of precedent. He purported to describe the "pure argument from precedent" in the following passage:

If precedent is seen as a rule directing a decisionmaker to take prior decisions into account, then it follows that a pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results. That two plus two today equals four is true, but it does not become more true because two plus two equalled four yesterday. When the strength of a current conclusion totally stands or falls on arguments for or against that conclusion, there is no appeal to precedent, even if the same conclusion has been reached in the past. If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior. Only if a rule makes relevant the result of a previous decision regardless of a decisionmaker's current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere.<sup>282</sup>

Thus, adherence to precedent becomes a kind of unvarying and unyielding rule—no matter how wrongly decided we consider a prior decision to be, a strong doctrine of precedent would commit us to adherence. And thus: "A naked argument from precedent thus urges that a decisionmaker give weight to a particular result regardless of whether that decisionmaker believes it to be correct and regardless of whether that decisionmaker believes it valuable in any way to rely on that previous result."<sup>283</sup>

The Anglo-American jurists reviewed in the body of this Article would certainly have rejected any understanding of precedent constructed along these lines. As made clear above, this was because of their continued commitment to a strong version of natural law. Caleb Nelson's important proposal to modify our understanding of what it means to be bound by precedent is more congruent with the actual historical record than Schauer's set of *a priori* assumptions about what a commitment to precedent necessarily entails.

Having a proper appreciation of the history of stare decisis and precedent is not merely an academic concern but in fact matters

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282. *Id.* at 576.

283. *Id.*

greatly to the outcome of cases today. I might thus close by considering the very different treatments of *stare decisis* found in the reasoning of two recent—and highly controversial—cases, *Anastasoff v. United States*<sup>284</sup> and *Hart v. Massanari*.<sup>285</sup> The court in *Anastasoff* concluded that not only published opinions of the court but also every unpublished opinion must, as a matter of originalist constitutional interpretation, be considered as creating binding precedent.<sup>286</sup> This much, the *Anastasoff* court asserted, was the implicit understanding of the conferral of “judicial power” upon Article III judges at the time of the Founding.<sup>287</sup> In support of this contention, the *Anastasoff* court cited some of the authorities discussed in the body of this Article, especially William Blackstone,<sup>288</sup> James Wilson,<sup>289</sup> and even Chancellor Kent.<sup>290</sup>

The *Anastasoff* court can be criticized for reaching the conclusion it did. It fairly can be said that the *Anastasoff* court adopted what might be called a “presentist” reading of precedent and *stare decisis*; in essence, it read back into eighteenth- and nineteenth-century discussions of precedent and *stare decisis* understandings of those terms that would not, in fact, cohere until the middle and later 1800s. Along these lines, perhaps the largest error in *Anastasoff* was the adoption of a positivist reading of precedent and *stare decisis* that precluded the possibility of appreciating the jurisprudential framework of the Founding era.<sup>291</sup> As this Article repeatedly establishes, the historical foundations of *stare decisis* and precedent as understood in early Anglo-American law can only be understood through the prism of theories of natural law and natural justice in the late eighteenth and early nineteenth centuries.

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284. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

285. 266 F.3d 1155 (9th Cir. 2001).

286. *Anastasoff*, 223 F.3d at 899–900 (“Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.” (citation omitted)).

287. *Id.* at 900 (“The Framers of the Constitution considered these principles to derive from the nature of judicial power. . . .”).

288. *Id.* at 900–02.

289. *Id.* at 902 nn.10–11.

290. *Id.* at 902 n.12.

291. The *Anastasoff* court mentioned what it called “the law-declaring nature of the judicial power.” *Id.* at 901. The *Anastasoff* court, however, failed to appreciate the consequences that extend from this limitation on judicial power.

*Hart v. Massanari*,<sup>292</sup> for its part, rejected the conclusion of *Anastasoff* that every judgment rendered by an Article III court carries precedential effect.<sup>293</sup> In the first instance, the *Hart* court proposed to answer *Anastasoff* by engaging in an extended reading of the historical record, particularly that part of the record reviewed in this Article.

For the most part, the *Hart* court read this record insightfully. It noted for example that the early practice—followed by American as well as English judges—of writing opinions *seriatim* was inconsistent with a strict doctrine of precedent.<sup>294</sup> Because those courts spoke with a multiplicity of voices, instead of a single authoritative one, it was impossible to derive a clear and unequivocal rule from their opinions.<sup>295</sup> No clear statement of rule, the *Hart* court seemed to assume, equals no clear precedent for a subsequent court to follow. Thus, the *Hart* court concluded that precedent at the time of the Framing could not have been understood in the “rigid form that we view it today.”<sup>296</sup> Fully appreciative of the historical distance that separates our own time from the eighteenth century, the *Hart* court wrote:

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. . . . It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm.<sup>297</sup>

In this way the *Hart* court confronted the reading of precedent and *stare decisis* in *Anastasoff*. “To accept *Anastasoff*’s argument,” the *Hart* court explained, “we would have to conclude that the generation of the Framers had a much stronger view of precedent

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292. 266 F.3d 1155 (9th Cir. 2001).

293. *Id.* at 1159–60.

294. *Id.* at 1162.

295. *Id.*

296. *Id.* at 1167.

297. *Id.*

than we do. In fact . . . our concept of precedent today is far stricter than that which prevailed at the time of the Framing."<sup>298</sup>

In the course of explaining in a few pages the common law understanding of precedent, *Hart* touched on some of the themes explored in this Article. For instance, we find recited Sir Matthew Hale's assertion that "judicial decisions 'do not make a Law properly so-called,'" but rather constitute evidence of what the law should be.<sup>299</sup> We also encounter Lord Mansfield's declaration that "[t]he reason and spirit of cases make law; not the letter of particular precedents."<sup>300</sup> After reviewing this history, the *Hart* court reiterated the proposition with which it commenced its analysis:

A survey of the legal landscape as it might have been viewed by the generation of the Framers casts serious doubt on the proposition—so readily accepted by *Anastasoff*—that the Framers viewed precedent in the rigid form that we view it today. Indeed, it is unclear that the Framers would have considered our view of precedent desirable.<sup>301</sup>

If there is a blemish in the *Hart* court's reasoning, it is a blemish common to much of the historiography of early Anglo-American theories of precedent and stare decisis (that is, a failure to situate cases and treatises of the late eighteenth and early nineteenth centuries within a naturalist jurisprudential framework). What we perceive as flexibility today would have been perceived by many of the jurists considered in this Article as a willingness to review previous decisions on the basis of prevailing theories of justice.

*Hart* also leaves unasked—and unanswered—an interesting question about the role that these older understandings of precedent and stare decisis should play in our lives today. If we take originalism seriously, ought we to feel any commitment today to follow the theories of stare decisis that the members of the Founding generation would have found so familiar? And as a corollary, to what extent ought we to consider ourselves bound to the older jurisprudential framework in which this doctrine of stare decisis was

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298. *Id.* at 1163.

299. *Id.* at 1164 n.8 (quoting SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 68 (London, Butterworth 1820)).

300. *Id.* (quoting *Fisher v. Prince*, 3 Burr. 1363, 1364, 97 Eng. Rep. 876, 876 (K.B. 1762)).

301. *Id.* at 1167.

situated? The concluding paragraph of an already overly long Article is, of course, no place to answer such questions. It is perhaps best to close with an observation: *stare decisis*, at the time of the Founding era, was a very different concept from what it has become today. How we respond to this background is very much up to us.