

PARALLEL LINES ON THE ROAD TO STARE DECISIS: A RESPONSE TO PROFESSOR ALBERTO GARAY

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Professor Alberto Garay's article, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*¹ is an illuminating and panoramic exploration of the tension in Argentine law between its civil law tradition and, at least in matters of constitutional law, the influence of American legal reasoning. The latter resulted from the efforts of Argentine legal reformers of the nineteenth and twentieth centuries to use American doctrines to create a liberal constitutional order through the judiciary as had been done in the United States. Alas, Professor Garay ruefully charges, this effort has fallen short, in significant part because Argentine lawyers and judges have proved less-than-capable at replicating the American style of judicial decision-making and decision-establishing. This, in turn, he attributes to the Argentine civil law tradition and its continuing baleful influence on his country's legal education. The result is that Argentine lawyers and judges are unable to grasp intellectually, much less to practice, the common-law-bred, case-based method of American adjudication.

Among the related problems that Professor Garay identifies are the historical and continuing disrespect for judicial decisions in contrast to statutes as sources of law, and the uncertain nature of such decisions as binding law that controls subsequent litigation horizontally (cases in the same-level court) or vertically (cases in inferior courts). He traces these difficulties to long-standing legal philosophy and practice derived from Roman law as far back as at least the Emperor Justinian. That Roman law tradition permeated the European legal culture, including that of Spain, Argentina's mother country, whose legal epistemology Argentina has yet to jettison. Professor Garay contrasts that tradition unfavorably with what he

1. Alberto Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 358 (2019).

perceives as the both more practical and normatively preferable common law epistemology that evolved in England and was transplanted to the United States.

After reading Professor Garay's article, I was struck less by the stark differences he has sought to portray, than by the similarities of the two approaches, especially in the domain of constitutional adjudication. Moreover, his account of the development of this facet of Argentine jurisprudence over the past two centuries reveals a distinct parallel in some particulars to several centuries of evolution of English counterparts. That said, his critique shows the difficulty of creating an instant legal tradition, a process that, more realistically, requires incremental adjustments which may depend more on fortuitous cultural and political developments than on top-down imperatives. But, in the end, it appears that the differences between the civil law and common law traditions are of degree, not of kind. Both systems must address certain common and, at times, vexing issues that arise out of the nature of law, courts, and dispute resolution and that exist apart from particular traditions.

I shall address, by necessity briefly, Professor Garay's criticism that judicial decisions are not treated as law under the civil law tradition, in contrast to the common law; the uncertain position of precedent in Argentina to bind other courts, in contrast to the United States; and the habit of Argentinian lawyers and judges to look for broad generalizations when evaluating or deciding cases, in contrast to the narrower and more fact-specific legal principles employed in common law jurisdictions. These comments will focus, when feasible, on constitutional adjudication, while recognizing that such cases may not cleanly reflect jurisprudence in the traditional domain of common law, such as the law of contracts, property, or crimes.

One other significant and unavoidable area of inquiry is how the desire of judges, as of all political actors, to establish and protect their courts' institutional legitimacy affects these questions. This is particularly true in the context of constitutional judicial review, an area that produces more direct confrontations between the judges and other politicians. As necessary, I will enter that area, but it deserves much more in-depth attention than I can give here.

ARE JUDICIAL DECISIONS LAW?

This topic has been debated as long as advanced societies have had courts and judges to resolve conflicts through a process based on reason. When addressed directly, the inquiry may lead to grand statements that rest

on “self-evident truths” (i.e. unproven postulates) and reveal political preferences as much as they enlighten about the nature of law.²

Much depends in this investigation on definitions, especially of the central term, “law.” Thomas Aquinas’s classification of human law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated” is a workable starting point.³ Ordinances and statutes are positive acts that are legally binding and reflect the voluntary action (“will”) of either the “whole people” or a duly constituted political authority (“someone who is the viceregent of the whole people”).⁴ In their “judicial” role, judges (and their decisions) lack that characteristic. By common understanding, judges are not in office to “have care of the

2. For example, Thomas Aquinas declared:

As the Philosopher [Aristotle] says, *it is better that all things be regulated by law, than left to be decided by judges*: and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case.--Secondly, because those who make laws consider long and beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact.--Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.

Thomas Aquinas, *Summa Theologica*, “Of Human Law,” in *THE GREAT LEGAL PHILOSOPHERS* 70, 71 (Clarence Morris ed., Univ. Penn. Press 1971) (1959). Thomas’s first point is simply personal opinion, with which jurists on the bench, academics in the law schools, or other assorted opponents of codes and decrees might vehemently disagree. See, e.g., Friedrich Carl von Savigny:

A free communication between the Law-Faculties and the Courts . . . would be an excellent mode of bringing about this approximation of Theory and Practice Let jurisprudence be once generally diffused among the jurists in the manner above-mentioned, and we again possess, in the legal profession, a subject for living customary law.--consequently, for real improvement.

Friedrich Carl Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, “What Are We to do Where There Are no Codes” Chapter VIII, in *THE GREAT LEGAL PHILOSOPHERS*, *supra*, at 297, 299-300. The second is highly dubious as an empirical proposition, at least as to the first clause. The third part may be a more fundamentally sound critique of judges. It certainly has been made by more recent skeptics of judicial impartiality and modesty:

Although a speech-restricting injunction may not attack content as *content* . . . it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: They are the product of individual judges, rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders.

Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 793 (1994) (Scalia, J., dissenting).

3. Thomas Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 4, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 57, 60.

4. Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 3, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 59; see *Ordinance*, *BLACK’S LAW DICTIONARY* (6th ed. 1990); *Statute*, *BLACK’S LAW DICTIONARY*, *supra* (“A formal written enactment of a legislative body . . . declaring, commanding, or prohibiting something[:] the written will of the legislature[.]”).

community,” but to resolve specific disputes and achieve “justice” between the parties, a justice that is often defined – and limited – by the command of a lawgiver. For that reason, among others, it has been a frequent trope of common law judges and commentators that the judges do not “make” law, but merely “find” it.

Law also requires ability to coerce conformance, which, again, exists only in the people collectively or “some public personage, to whom it belongs to inflict penalties.”⁵ Judges can impose penalties, but depend on legislation (or customs of the people) to create, and executive power ultimately to inflict, those penalties.⁶ Further, “law” ideally has certain operative characteristics, among them constancy, predictability and knowability, along with broad conformity to some principle, idea or form of “the good.”⁷ This is the “reason” of the law directed towards its end—to promote the flourishing of the community and the individuals in it. Aristotle teaches, “The law is reason unaffected by desire.”⁸ In further explaining the distinct and superior nature of law over judicial decisions, Thomas asserts that statutes are the work of wise individuals deliberating about an issue carefully and dispassionately, whereas a judge must give judgment speedily and is more likely to be affected by bias for or against a party.⁹ In line with classic Greek reasoning, legislators make laws in consideration of the general good, because they consider many instances, rather than one.¹⁰ In a phrase, they see the forest,

5. Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 3, *supra* note 4.

6. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Id.

7. See Garay, *supra* note 1, at 315. Such characteristics are associated with the use of the term in other contexts, for example, in the natural world, such as the “law” of gravity, or in other realms of human inquiry, such as the universal moral “law” of classical writers.

8. ARISTOTLE, *POLITICS*, Book III, at 77 (Benjamin Jowett trans., Kitchener, Batoche Books 1999) (1885). This phrase has been interpreted variously, using different words for the Greek concepts, e.g., “Hence, law is intelligence without appetition.” “In law you have the intellect without the passions.” These formulations all convey the basic message of law as a consummate product of the human mind at work, undistracted by human emotions. That is classic Greek metaphysics inherited from Socrates/Plato.

9. See Aquinas, *supra* note 2.

10. See PLATO, *REPUBLIC* (Benjamin Jowett trans., New York, Anchor Books 1973) (1871). Socrates speaking to Adeimantus said:

And is not a State larger than an individual? --It is. --Then in the larger the quantity of justice is likely to be larger and more easily discernible. I propose therefore that we enquire into the

not just individual trees. In similar vein, because they are more numerous, assemblies and councils are more likely to make decisions that advance the public good than individuals will.¹¹ Having appellate courts composed of multiple judges encourages collegial decision-making, and, thereby, advances collective wisdom in theory.

Finally, law must be promulgated, so that it is known, and people can adjust their actions accordingly. This is particularly important for the criminal law. Judges' decisions, however, are not known until after the disputed action has occurred. Moreover, as discussed below, and as described by Professor Garay, judicial decisions – or, more significant, the facts and legal principles on which they are based – often have not been published.¹²

Of course, the very fact that law, in this postulation, is a positive command that addresses future occurrences of yet-unknown specific factual contexts makes judges necessary. Aristotle and Thomas both acknowledge the unavoidability of judicial decisions, with the former providing a more analytic explanation of why judicial decisions are not law. Law speaks in general terms as it “takes into consideration the majority of cases.” But if a case arises that does not specifically fit the circumstances that the lawmaker envisioned under the law and thereby creates an exception to that law, a judge solves this problem “by deciding as the lawgiver would himself decide if he were present on the occasion.” The judge may do equity, a type of justice, but his work is not law. Rather, it is a “rectification of the law where law is defective because of its generality.” Nor may he decide as a free actor; that would make him a lawgiver. Rather, he must merely be the voice of the lawgiver and find that which the latter would have said.¹³

nature of justice and injustice, first as they appear in the State, and secondly in the individual, proceeding from the greater to the lesser and comparing them.

Id. bk. II, at 59-60.

11. See ARISTOTLE, *POLITICS*, *supra* note 8, bk. III, pt. 11, at 65-68, and his rather circumspect discussion about the “wisdom of the multitude.” The thesis is that, while one must be cautious about this idea and while it is not without intrinsic weaknesses, when it comes to governing, the many might be preferable in some instances to the few. *Id.* at 67 (“[I]f the people are not utterly degraded, although individually they may be worse judges than those who have special knowledge—as a body they are as good or better.”). This is Aristotle’s response to Plato’s challenge in *Republic* that government by an expert elite is best suited to produce a just *polis*. Aristotle is defending the democratic element of the Athenian constitution.

12. See, e.g., Garay, *supra* note 1, at 272-73, 274-75.

13. ARISTOTLE, *NICOMACHEAN ETHICS*, Book V, at 141-42 (Martin Ostwald trans., New York, Bobbs-Merrill 1962) (c. 384 B.C.E.). In this part of the book, Aristotle is expounding one of his favorite ethical topics, “justice.” Aristotle’s full discussion elegantly ties together law, equity, the distinct roles of the lawmaker and the judge, and at least two of his diverse conceptions of justice:

The jurisprudential musings of Aristotle and his Christian interpreter, Thomas Aquinas, are important mirrors of medieval perceptions of law and the role of judges. That period, of the eleventh through fourteenth centuries, is significant because it is often identified as the time when the foundations for the modern continental civil law system and the English common law system were laid and when those systems gradually began to diverge. Thomas was perhaps the most influential of the Medieval Scholastics. His wide-ranging and systematic inquiry into philosophy and religion gave his interpretations great authority with church and lay authorities. Of course, he was hardly the only scholar engaged in the development of medieval understanding of law for civil or ecclesiastical courts. Nor was he among the earliest. The development of a new Roman law on the continent had been proceeding for well over a century before him, beginning with renewed interest in the early twelfth century in Justinian's *Corpus Iuris Civilis* at the Law School of Bologna, Italy, and proceeding through the works of Irnerius and the other Glossators and Commentators over the following two centuries. What is clear is that, to these continental scholars, legislation was law, but judicial decisions were not. Their position is consistent with the Justinian directive that "Decisions [of a judge] should be based on laws, not on precedents. This rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind."¹⁴ At the very least, this declares positive enactments to be superior to judicial decisions. More likely, it denies to judicial decisions the status and legitimacy of law altogether.

The "rediscovered" Roman law of Justinian, over time, became systematized and "scientific" through the efforts of the scholars. It became potentially suitable as a universal law to be applied across the increasingly prosperous and commercially connected European realms of the High

What causes the problem is that the equitable is not just in the legal sense of "just" but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law is nonetheless correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case. For such is the material of which actions are made. So in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have said if he were present, and what he would have enacted if he had known (of this particular case) And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality Such a characteristic is equity; it is a kind of justice and not a characteristic different from justice.

Id. In similar, but briefer, manner, Thomas Aquinas observes that "[c]ertain individual facts which cannot be covered by the law *have necessarily to be committed to judges[.]*" Thomas Aquinas, *Summa Theologica*, "Of Human Law," *supra* note 2, art 1, at 71.

14. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 203 (Liberty Fund 1986) (1966).

Middle Ages. However, its initial success was limited, as it had to compete with the “customary Roman law” derived from the code of the Roman Emperor Theodosius II and often modified by local custom. This customary Roman law arose out of the need to deal practically with the changing conditions in diverse communities over the course of generations. It was the province of merchants, lay rulers, property owners, and their advisors on concrete legal matters, rather than of the law professors.

In England, as well, the Roman law was influential in ecclesiastical courts and, to a lesser extent, in some civil courts. The writings of Ranulf de Glanvill in the late twelfth century and Henry de Bracton several decades later show strong Roman law influence. For Bracton, described as “the flower and crown of English jurisprudence,”¹⁵ judicial decisions were not themselves law. He wrote an influential treatise, his “Note Book” on *The Laws and Customs of England*, which sought to provide a systematic body of (what he deemed) good law. While Bracton used cases gleaned from the Plea Rolls or drawn from his memory, he ignored contrary cases that were more recent in time. His abundant case citations were examples, merely illustrative, not authoritative. Thus, contrary to the classic common law rule-making, where the cases are analyzed and the operative legal principle is induced from them, “his” law produced the case citations; the cases did not produce the law.¹⁶

While this mode of thinking about the essence of judicial decisions has an ancient pedigree,¹⁷ it is not limited to the civil law tradition or to medieval English treatise writers. In the 1842 U.S. Supreme Court case *Swift v. Tyson*,¹⁸ Justice Joseph Story distinguished state statutes from state court decisions and declared that the federal courts in diversity cases of national effect (such as commercial matters) were not bound by state court decisions. He reasoned that court decisions were merely evidence of law, but not

15. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 258 (Little, Brown & Co., 5th ed. 1956) (1929).

16. *See id.* at 344; The argument that cases were examples of an *a priori* legal principle, but not law themselves, was maintained even a century later, when C.J. Bereford in 1315 quoted Bracton that “one must judge not by examples, but by reasons.” *Id.* at 345; *see also* Garay, *supra* note 1, at 279-80.

17. Some scholars claim that the Code of Hammurabi was not a decreed systematic body of law, as the Code of Napoleon was. Rather, it was a collection of non-binding precedents, or simply summaries of cases, to help judges decide justly: “May any king who will appear in the land in the future, at any time, observe the pronouncements of justice that I inscribed on my stela.” “May that stela reveal . . . the traditions, the proper conduct, [and] the judgments of the land that I rendered[.]” Other scholars assert that the Code is a statement of ideal law. RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 4-6 (2002).

18. 41 U.S. 1 (1842).

themselves law that would impose the rule of decision in the case. It is also instructive that the word commonly used, even in the formal record of a case, to describe a court's justification for its action is "opinion." An opinion is a belief about something else that exists independently of that opinion, here the judge's belief about the facts, the applicable law, and their relation to each other.

Two other, partly overlapping rationales have been advanced frequently by judges and commentators in common-law jurisdictions to support the proposition that judicial cases are not law. They are that the common law applied by the courts is merely custom or customary law, and that judges do not "make" law, but merely "find" it. What connects these rationales is the need to determine what their exponents mean by the "common law." What separates them is their different answers to that question.

The term "common law" has been defined multifariously, depending on the need of the occasion. First, the term may refer to a system of law developed in England and adopted in other countries with a legal heritage connected to England, in contrast with civil law countries whose law is derived more directly from some codification traceable to Roman law.¹⁹ Second, within the English tradition, common law has been contrasted with equity, with different sources of claims, procedures, remedies, and courts. Third, common law also is often defined broadly as legal principles and rules derived from judicial cases, in distinction to legislation. Fourth, it is the law applied by the English royal courts, in contrast to the manorial courts and the ecclesiastical courts. Fifth, more generally, it may be a body of principles regarding personal relations and the government of society, which derive their authority from usage and custom of immemorial antiquity. The focus here will be on the last two, as they relate to the question of whether judicial decisions are law.

If the common law is a body of principles of "immemorial antiquity," it pre-exists any instantiation of it in a particular judge's opinion in a specific case. A case, indeed, is nothing but an example of that principle in action and, thus, not itself law. In that sense, judges do not make that law, but merely find it and apply it. In Platonic language, the form of action (the common law pleading) by which the case is brought through the proper writ is merely the material perception of the eternal Form of that action which the judicial craftsman (the judge) adapts to the problem in front of him. This view of the common law edges close to classical "natural" or "higher" law thinking and leads yet again to the perennial connection in ethical

19. *People v. Rehman*, 61 Cal. Rptr. 65, 85 (1967) ("The common law is all the statutory and case law background of England and the American colonies before the American Revolution.").

jurisprudence between law and reason. Drawing on Stoic metaphysics, Cicero had written, “True law is right reason, consonant with nature, diffused among all men, constant, eternal It needs no interpreter or expounder but itself, nor will there be one law in Rome and another in Athens, one in the present and another in the time to come[.]”²⁰

The royal judges, engaged in the practical application of law to resolve disputes with an eye to effective governance of the realm, likely did not speculate about the universalism and idealism of Cicero’s conception of Law. Still, their more parochial view of the peculiarly English source of the common law, showed the same affinity for grounding “rights” (and justice) in a received body of ancient unwritten law based on reason and reflected in usage.²¹ Thus, Bracton could say that,

[W]hile they use *leges* and a written law in almost all lands, in England alone there has been used within its boundaries an unwritten law and

20. HOGUE, *supra* note 14, at 9 (quoting C. H. McIlwain *The Growth of Political Thought in the West*, and Cicero *De Republica*); see also Marcus Tullius Cicero, *De Legibus [On the Laws]* Book I, in THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 40, 44 (“Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite [T]he origin of Justice is to be found in the Law But in determining what Justice is, let us begin with that supreme Law which had its origin ages before any written law existed or any State had been established.”); Cicero, *supra*, Book II:

Even if there was no written law against rape at Rome in the reign of Lucius Tarquinius, we cannot say on that account that Sextus Tarquinius did not break that eternal Law by violating Lucretia, the daughter of Tricipitinus! For reason did exist...and this reason did not first become law when it was written down, but when it first came into existence[.]

Id. at 50-51.

21. Equating the common law, and custom, with a set of superior norms binding on ordinary positive law was an intermittent, but ultimately unsuccessful, judicial project in England. The strongest affirmation was by Edward Coke, as Chief Justice of Common Pleas, in *Dr. Bonham’s Case*:

And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason . . . the common law will controul it and adjudge such act to be void.

8 Co. 107a, 118a (1610), quoted in EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 44 (Cornell Univ. Press, 9th Printing 1974) (1928). Lawyers, commentators, and, apparently, a few jurists subsequently endorsed this constitutional theory, traceable to Magna Carta. The exact boundaries of Coke’s assertion are unclear, since there was not at the time a clear separation of functions for Parliament, then still called the “High Court of Parliament.” Ultimately, it failed to control Parliament’s *legislative* supremacy. Control over the king’s prerogative, and the claim that the king was subject to this higher law, led to a different result, as Charles I found out much to his chagrin and bodily integrity in 1649. Moreover, living far from Parliament and in a comparative state of nature, the North American colonists of the seventeenth and eighteenth centuries were more receptive to Coke’s idea. Various nineteenth century jurists developed it further into a full philosophy of law, and American courts have used it to flesh out their construction of unenumerated constitutional rights under substantive due process. For a thorough analysis of this issue, see CORWIN, *supra*.

custom. In England legal right is based on an unwritten law which usage has approved For the English hold many things by customary law which they do not hold by *lex*.²²

This is the common law as the “brooding omnipresence in the sky” that Justice Oliver Wendell Holmes, Jr., rejected as an accurate reflection of how the common law actually is generated and applied.²³ More in accord with Holmes’s view would be the approach of legal positivists in England and the United States. One of the foremost articulators of English legal positivism was John Austin, who championed a “scientific” approach to the analysis of law. For Austin, “law” is a command of a political sovereign to a political subordinate, which command is enforced by the state.²⁴ Austin did not consider custom or customary law, as such, to be law. He criticized the nineteenth century German school of historical jurisprudence for claiming that customary law is true law because it is enforced by the courts and is adopted spontaneously by the governed through long adherence.²⁵ Austin agreed that judges can “transmute a custom into a legal rule.” However, this is not due to an inherent nature of judicial decision-making as legislating. The judge is acting by permission of the sovereign. The principle he uses from the pre-existing customary law is not actual law because he makes it, but because he is permitted to do so to the extent the sovereign law-maker chooses. After all, that customary law can be limited or eliminated by the law-maker, and it must be enforced by the state.²⁶ Under either of these

22. HOGUE, *supra* note 14, at 10, n.5.

23. *S. Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or semi-sovereign that can be identified.”) (superseded by statute as stated in *Hetzl v. Bethlehem Steel Corp.*, 50 F.3d 360 (1995)).

24. “LAWS PROPER, or properly so-called, are commands[.]” John Austin, *Lectures on Jurisprudence; The Province of Jurisprudence Determined*, in THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 336. “The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors[.]” *Id.* at 337 (Lecture 1); “A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain [‘sanction’] in case the desire be disregarded.” *Id.* at 338. Since law is set by “political” superiors, sanction for violation of law must also be by the state; *see also* Thomas Hobbes, *Leviathan*, “Of Other Lawes of Nature,” in THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 113, 119 (“Whereas Law, properly is the word of him, that by right hath command over others.”).

25. For a prime example of the German historical jurisprudence, see Von Savigny:

The sum, therefore, of this theory is that all law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence--everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.

Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, “Origin of Positive Law,” Chapter II, in THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 290, 291.

26. “A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force

approaches, Bracton's unwritten customary law approved by long usage or Austin's positive command of the sovereign (which reflect contrasting views of the legal essence of the customary common law), judicial decisions themselves are not inherently law. At most, judicial decisions are manifestations of law which is created by the actions of others, that is, the state in its corporate form or the people organically.

Customary law is continued adherence to a particular rule in response to similar events. This rule becomes established by diffuse and informal adherence by members of the community generally or by some directly affected and influential subgroup thereof. The reasons for adherence to that rule may be shaped by social mores, religious doctrine, metaphysical assumptions, economic relations, legal traditions, and sundry nebulous historical influences that reflect the collective experience of that community.²⁷ If a legal conflict arises, the judge will discern the appropriate legal rule based on that experience in relation to the relevant facts. The legal tradition from which the judge draws likely will include known cases with similar facts. If the facts reveal a novel problem, the judge will look to that collective experience to induce from it a new rule or reshape an existing one.

In medieval England, the customary law of the broad community was derived from Anglo-Saxon practice and experience, and generally administered in manorial courts. That was the "common law of the country."²⁸ The royal courts, such as Common Pleas and King's Bench,

from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." Austin, *Lectures*, *supra* note 24, at 342.

27. Determining what constitutes custom and how it resembles, differs from, and relates to, law is complex and often imprecise. Philosophers of law routinely strive for clear answers as they construct—or at least describe—a jurisprudential system. These philosophers have been products of complex civilizations with well-developed law and formal legal bureaucracies. For an interesting anthropological overview of how custom and law interact, if at all, in less complex societies, see generally, E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (2006).

28. On the continent, as well, there developed and long existed, a "common law of the country." As Savigny wrote about the German areas,

Up to a very recent period a uniform system of law was in practical operation throughout the whole of Germany under the name of the common law, more or less modified by the provincial laws, but nowhere altogether without force. The principal sources of this common law were the law books of Justinian.

Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, "Civil Law in Germany," Chapter V, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 295. Savigny was discussing the synthesis in Germany of Roman law principles and local practices to shape a uniform common law in many areas of law, while local conditions produced a multitude of diverse rules in others, a synthesis that began during feudal times. This is remarkably like the situation in England

developed a different variant of “common law,” one that was rooted in the necessity of the king and the Norman aristocracy to maintain control over the English masses. At the same time, and continuing even after the clear status lines between Norman rulers and English subjects had been obliterated, the courts were instrumental in establishing a uniform “national” law in areas of particular concern to the Crown in a feudal system evolving gradually into a precursor to the modern state: criminal law, land law, and revenue. This latter version, the “common law of the royal courts,” has been the real origin of what became the body of English common law. It would be a gross oversimplification, however, to limit the content of that common law to judicial decisions. The various statutes adopted by other organs of the English “nation,” that is, the Great Council and, later, the bicameral Parliament, are part of the totality of the English common law. So are the vestiges of Roman law principles, the “customary rules” of merchants, and eventually, various maxims and remedies developed by the body of English law referred to as equity.

If, by common law is meant only that more restricted sense, that it is the body of law created by the royal judges as the functionaries of the king in matters of particular consequence for the monarch, rather than being the old customary law of the people, the notion that the judges are merely finding pre-existing law becomes difficult to maintain. The judges sat in the King’s Council and helped make the law that emerged from that administrative process. They also participated in legislating statutes if the Great Council was assembled. This arrangement is not surprising. The judges were drawn initially from the loyal Norman nobility, and there was not the same conception of a functional separation of powers during the birth of the common law as in the modern age. Indeed, even after the process of separating king and Parliament and, eventually, Lords and Commons, was completed in late-medieval England, the English conception of separation of powers, with its feudal origins, was quite distinct from the later American version that rests on a classless conception of popular consent and operates through formal differences of function that accord the courts a role well beyond that conceded to the English courts.²⁹

in the early decades after the Norman invasion. Only gradually did the influence of the Roman law wane in the royal courts.

29. The English version was based on the separation of interests, in that the House of Commons represented one class or estate, the House of Lords another, and the Crown the realm as a whole politically and symbolically. Montesquieu’s approbation of divided government, so popular among European republicans of his time and of Americans during the framing of the state and national constitutions in the 1780s, looked to the classic model of Polybius that he saw embodied in English institutions. After describing, in fashion reminiscent of Plato and Aristotle, six forms of government (three original, noble forms, and their three inevitable degenerate forms),

As discussed below, over time the mission of the king's courts to secure Norman power waned in favor of their role as arbitrators of legal disputes among competing interest groups in a changing political and economic order. The judges' function in ordinary legal matters changed well before the modern era from creating a "law of the ruler" to protecting a "rule of law." What remained constant in this development of the common law was the sense that the judges in their judicial function were not "making law." They were "legal" actors, not "political" ones, and their work represented a cautious balance of continuity and change within an order rooted in custom, that is, reason reflecting on experience.

One may attribute this cautious and, typically, incremental approach to a healthy respect for the judges' vulnerable position in the constitutional order. Their practical effectiveness depended on the cooperation of others. Their constitutional legitimacy depended on their agency. Whether under the constitutional theory of late feudalism and its stable universal order based on status and immemorial custom, or the early modern constitutional focus on the sovereign's will, or the more recent constitutional order founded on the "voluntary" consent of the governed, the judges have power over individual

Polybius extolled the Roman Republic's constitution as a balanced combination of the three noble forms, monarchy (consuls), aristocracy (Senate), and democracy (assemblies and tribunes), representing different interests. See Polybius, *The Histories*, Book 6, Chapters 3-18, in OXFORD WORLD'S CLASSICS 371, 372-85 (Robin Waterfield trans., Oxford University Press 2010) (1922). Montesquieu borrowed much from Polybius and acknowledged his own philosophical debt to the Greco-Roman historian. Montesquieu's theory of divided government starts with the idea of separating the three different aspects of governmental power, which distinguishes him from Polybius, and much endeared him to American constitutional theorists in the latter eighteenth century. But his fascination with the English constitution as a model for his native France also led him to recognize the class-based nature of the bicameral Parliament. Moreover, while he advocated a separate and independent judiciary, it was not one equal to the task of governing:

Of the three great powers, which we have mentioned above, as necessarily belonging to every civil society, the judicial power is, by the arrangement above-described, removed so far out of sight, and rendered so incapable of inspiring the persons in whom it is vested with ambitious or dangerous designs, that it may almost be said to be annihilated.

Therefore, another institution would be needed to balance the ambitions of king and commons, those political institutions most likely to try to usurp each other's role and, thus, be a threat to the common liberty. Montesquieu looked to the House of Lords for that mediating constitutional role. See Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Book XI, Chapter VI, "Of the Constitution of England." American writers on the Constitution, as well, cited Polybius and, more rapturously, Montesquieu. Hamilton distorted the preceding sentence of the "celebrated Montesquieu" to say, "of the three powers above mentioned, the JUDICIARY is next to nothing." But their version of Montesquieu's "scientific" analysis of government resulted more directly in a "Newtonian" machinery of functionally interlocking parts not at all tied to class identity and interests. The judiciary's role was strengthened, as well. Thus, Hamilton, in defending the nascent practice of judicial constitutional review, assigned to the courts the "mediating" role between the people's liberty and the exercise of power by institutions of the government. See THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 6, at 404.

litigants. However, their power only exists under the terms set by another governing authority.³⁰ In that sense, they do not make law. The positive law of the practical sovereign or the customary law of the people controls. This approach becomes a useful protective cloak for the judges, who have no inherent power to raise revenue or armies and helps insulate them from political repercussions. They can point to others—the legislators, the people – and say, “You made the law; we only find the relevant principle and apply it.”³¹

In constitutional controversies, this becomes a more delicate proposition, due to the inherently “political” nature of such matters in comparison to, say, the doctrine of mutual mistake of fact as a defense to contract formation. If anything, that has only encouraged American courts further to nurture public perception of them as oracles of the Constitution. A truly impressive specimen is found in the opinion of Justice Owen Roberts in *United States v. Butler*:

It is sometimes said that the court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. The

30. For a modern example of this, the jurisdiction of the federal courts is defined by the Constitution and Congress’s judiciary acts.

31. The claim that a judge is not a law-maker, but merely a law-finder, has come under considerable academic attack for more than a century. Among the most biting critics were the “Legal Realists” of the mid-twentieth century, who rejected the “formalism” of the older position. Judge Jerome Frank in Chapter XIX, “Precedents and Stability,” of his important contribution, *Courts on Trial*, string-quoted critics of the older view. JEROME FRANK, *COURTS ON TRIAL* 237 (Atheneum, college ed. 1970) (1949). He called it a myth and protested the harm it did to society by obscuring the role of the judge. He re-defined “law,” and then concluded that judges make law, which is, he asserted, “legislating.” However, it is “judicial legislating,” not “legislative legislating.” I suppose that if courts can split due process (“procedure”) into substantive due procedure and procedural due procedure, Frank can be pardoned for his word-craft. I do not here challenge Frank’s critique, which, like the Realist critique generally, raises many cogent points. But it, too, rests on assumptions and definitions subject to dispute. More troubling, as is the case with most “skeptical” approaches, washing a constructive theory with “cynical acid” (to borrow a term from Oliver Wendell Holmes), merely dissolves that structure. It does not thereby provide an alternative coherent and systematic construction, here, a jurisprudence of the nature of law and of judging within a socio-political system.

At the risk of overstatement, a purported analytical approach that attributes apparently conflicting decisions by a judge in somehow similar cases to what the judge had for breakfast or some conscious or unconscious bias (including ideological bias in favor of a particular policy) is dangerously simplistic and itself can cause harm to the legitimacy of a legal order. As any lawyer knows, sometimes legal fictions serve a purpose of dealing with difficult issues with the least amount of difficulty. I have not included further discussion of the arguments of legal skeptics because the “older” attempts to define law and resolve how judges’ decisions fit (or not) within that definition has been around in some form for millennia and advocated by men of great intelligence. Of course, the classic formalist views have also been important in the development of the common law and how the judges viewed their role. If this be a fiction, a “noble lie,” it may be a confession of institutional weakness by the judges and a simple attempt to preserve their political legitimacy and promote the effective administration of justice. That, alone, gives it value.

Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.³²

English courts are spared this difficulty. Regarding constitutional issues that go to fundamental matters of government, the English judges long have hewed to the admonition in Sir Francis Bacon's aphorism from 1625 that the "Judges must be lions, but lions under the throne." With the Glorious Revolution in 1688 and the triumph of Parliamentary supremacy, the judicial lions may have moved figuratively from the king's palace to another enclosure, but their subordinate role in constitutional matters has not changed appreciably.³³

THE LONG, DIFFICULT ROAD TO *STARE DECISIS*

In one sense, however, a decision of a court might be deemed law. Even if a decision lacks the essence of law relative to other institutions of government or to the population generally, it could have the effect of law as to other courts in their judicial capacity. This would depend on the extent, if any, such a decision would bind the future judge and compel him to apply the law "found" by his predecessor. The historical pattern of uncertainty about this matter in the Argentine courts that Professor Garay describes, is also apparent in the similarly halting and erratic Anglo-American experience.

The role of the judges in developing the common law as the custom of the king's courts accompanied and assisted the formation of the modern nation-state in England a few generations before similar developments on the continent. With the passage of time, the number of judicial decisions increased, and the scope of the common law broadened into areas previously left to the domain of the nobility in the manorial courts. As the number and importance of the judges grew, there arose, predictably, the need for constancy and uniformity in the application of legal rules to solve similar disputes, at least within the respective courts of Common Pleas, King's

32. 297 U.S. 1, 62-63 (1936); *see also* Garay, *supra* note 1, at 269 (speaking about the historical acceptance in Argentina of Montesquieu's assessment that judges are only "the mouth of the law").

33. English judges today can declare an act of Parliament to be incompatible with the European Convention on Human Rights, but that does not void the act. *See infra* note 66.

Bench, and Exchequer. Initially, the use of previously-decided cases served the same function as tradition in other areas of human action, that is, to provide stability and predictability to human interactions. As well, such use of precedent by a judge gave legitimacy to his decision, based on the practical success of prior decisions in resolving similar disputes. Precedent also promoted social harmony by fostering the psychologically calming and, thereby, politically important, perception of equality before the law.³⁴

As the earlier reference to Bracton shows, the initial use of precedent was to serve as examples and illustrations. There was no clear sense that those prior cases were “binding” on the judges.³⁵ The evolution of *stare decisis*, of precedent in one case “binding” subsequent courts, was gradual and not fully realized until the nineteenth century.³⁶

However, a different consideration arose if there was a *series* of cases that was decided similarly. That line of cases represented more than just the

34. See Garay, *supra* note 1, at 319-20. “Equality before the law,” or “equal protection of the law” has been a cherished declaration in Western ethical theory of the state and the law at least since the emergence of Stoic philosophy in the 3rd century B.C. To what extent this reflects reality as experienced by people in the class-based orders of the past or the administrative state of today with its myriad of legislation and regulations enforced by numerous agencies through prosecutorial and administrative discretion is open to considerable debate. Perhaps it is more an aspirational concept or a politico-legal fiction, another “noble lie” that we tell ourselves to provide an ethical basis for government.

35. Professor Arthur Hogue in his *Origins of the Common Law* pointed out that Bracton and others often referred to prior cases not by name but by general statements such as “It has been decided before this.” HOGUE, *supra* note 14, at 201. Moreover, the desire for consistency in mundane cases and incrementalism in novel cases drove the use of cited precedents: “[I]f any new and unwonted circumstances . . . shall arise, then if anything analogous has happened before, let the case be adjudged in like manner, since it is a good opportunity for proceeding from like to like.” (Latin phrases omitted.) *Id.* at 200. While Bracton used many hundreds of cases, subsequent English writers into the early modern period used few, if any, in their treatises.

36. Professor Plucknett noted merely a “faint beginning of a more modern spirit” as recently as 1454 in the comments on a case by Chief Justice Prisot:

If we have to pay attention to the opinions of one or two judges [in recent cases] which are contradictory to many other judgments by many honourable judges in the opposite sense, it would be a strange situation, considering that those judges who adjudged the matter in ancient times were nearer to the making of the statute than we are, and had more knowledge of it.

PLUCKNETT, *supra* note 15, at 346. The reason this is “faint” is that, while the chief justice appears to believe that he is obligated to follow the older cases, he is still just balancing and weighing competing legal authorities, something that was done in the civil law countries, as well. Plucknett also pointed out the droll fact that the chief justice was disturbed by the idea that using the more recent cases cited by counsel would, as the court declared, “assuredly be a bad example to the young apprentices who study the Year Books [irregularly compiled records of cases], for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the books.” *Id.* Plucknett described other cases found in the *Year Books* in which the judges expressly voice concern that their decisions be clear and comprehensible to the law students present in court. This is one demonstration of the close connection between the work of the courts reflected in the concrete cases they decided and legal education, which Professor Garay admires about the common law system.

opinion of one judge. Instead, the application of that principle over time and by different judges was evidence that it had become part of custom, its legitimacy rooted in experience, and its existence verified by the judges' memory of what they themselves had decided or had learned in their legal training, and by what could be found, albeit in an annotated manner, in the Year Books. As time went on, and a unified modern nation state increasingly replaced the feudal order, any distinction between the common law as the "custom of the king's courts" and the "custom of the country" was meaningless. Common law and custom had become fully synonymous. From a sociological perspective, custom was how the people generally, or some important interest group (such as the merchants or other elite), responded repeatedly to actions by individuals that was an affront to some broadly accepted norm of behavior. From a jurisprudential perspective, custom had the essence of law in that it had been repeatedly applied in predictable fashion to similar facts and was a coherent form of social control. Even if not technically deemed binding on a court, this custom became difficult to ignore in the absence of compelling reasons of societal necessity. This was analogous to the "jurisprudence" of civil law countries that was developed by the continental scholars and judges expounding on Roman law molded to fit local conditions. It is similarly analogous to the tradition of *jurisprudencia* that shapes adjudication in the Argentine courts which Professor Garay describes.³⁷

The relatively centralized system of legal training at continental European law schools allowed for development of codes and treatises that provided a structure for the systematizing of legal principles to guide future decision-making. The comparatively haphazard English system of studying the law by observing the actions of the royal courts and "reading the law" in the Year Books was the result of the bench being put in charge of the training of lawyers in 1292. Those apprentices eventually became lawyers, from whom the professional judiciary was drawn.³⁸ To understand the practical

37. Garay, *supra* note 1, at 269-71. This mode of thinking, too, is rooted in classical Greek epistemology. See *supra* note 10 and Socrates's colloquy with Adeimantus about it being easier to discern larger forces at work in the city than in the individual man. A legal principle derived from an individual case decided by one judge is more likely to be influenced by the particular facts of that case, whereas in a series of cases the peculiarities of any one of them are more likely to be muted when determining the principle that decides all. Put another way, one can induce a legal principle more soundly from multiple experiences than one. Or, yet another analogy: One point does not a line make; with three points, one has more assurance of the line's slope.

38. See PLUCKNETT, *supra* note 15, at 217-20, 224-26:

In 1292 a royal writ was sent to Meetingham, C.J., and his fellows of the Common Bench, in these terms: 'Concerning attorneys and learners ("apprentices") the lord King enjoined Meetingham and his fellows to provide and ordain at their discretion a certain number, from

application of the common law to particular controversies required the student, the practitioner, and the judge to know cases. However, knowledge of cases was not and cannot be enough. There are too many “examples” with too many factual variables, and an atomized learning of cases lacks the structure that the human mind needs to impose order on an apparently chaotic system. That calls for the use of more general operative rules to govern similar cases. Even if a legal system relies on judges and individual cases to discern those rules, stability and predictability require those rules to be known and generally fixed.

One way to meet that requirement is to make the rule in a case binding on determinations of future such disputes. Acceptance of the binding nature of previously-decided cases through a strict application of *stare decisis* was a slow process that realistically could not begin before there was a systematic and accessible record of cases and of the reason for the judge’s decision.³⁹ That had to await the appearance of modern mass printing, an organized system of case reports, and a more hierarchical structure of the judiciary.

every county, of the better, worthier, and more promising students . . . , and that those so chosen should follow the court and take part in its business; and no others.’

Id. at 217-18; *see also* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 24, 318-22 (2d ed. 1985); HOGUE, *supra* note 14, at 246.

39. *See* HOGUE, *supra* note 14, at 181 (commenting on the Plea Rolls):

The records were kept solely for use in royal administration, and the king was particularly interested in knowing who owed him money and how much. The king’s officers did not then make records of legal cases for the benefit of the legal profession. Only such facts of a case as were of value to the royal administration were entered in the rolls But the reasoned opinion of the justices employed in the decision was not considered of value in the thirteenth century. The decision alone was recorded. Even after the beginning of reporting and the making of those unusual volumes known as *Year Books*, the modern doctrine of *stare decisis* could not develop because uniform reports of cases could not be widely distributed until the beginning of printing in the fifteenth century. When there were not printed records or reports, who could verify citations to previous decisions without first obtaining permission to consult the royal plea rolls?

Bracton’s herculean effort, described earlier, to research the unannotated Pleas Rolls for his “Note Book” was not replicated.

Versteeg describes judges in the Egyptian New Kingdom period (1552-1069 BC) as relying on authoritative precedent, with judicial case records being kept as early as the Middle Kingdom period (2040-1674 BC). He quotes an instruction to the vizier Rekhmire: “As for the office in which you hold audience, it includes a large room which contains [the records] of [all] the judgements Do not act as you please in cases where the law to be applied is known.” He extracts from this the application of *stare decisis*, and attributes an essential conservatism to Egyptian law marked by judges relying on custom and precedent. VERSTEEG, *supra* note 17, at 129. While this sounds remarkably like modern Anglo-American judicial practice, Versteeg may be optimistic if he believes that these statements are more than aspirational and actually reflect a coherent philosophy of horizontal and vertical *stare decisis*. As he acknowledges, records were typically private documents kept by parties whose rights were affected in a case. Some official archives may, at time, have been kept, however, and one of his cited sources claims that there were examples of judgments based on decisions hundreds of years old.

Mass printing of court records and decisions was possible by the sixteenth century. A system of reporters replaced the *Year Books*, often under the name of a prominent judge or lawyer, even if the report was not made by that person. These reports were not the modern style that describes the factual background (including, in some versions, the lawyers' arguments), followed by the reasoning and the decision. Rather, they often were discussions of the cases, frequently with commentary by the reporter, and, when in less competent hands, cursory and inaccurate.⁴⁰ Plucknett identifies a significant improvement in the reports in the latter half of the eighteenth century, with proper structure and judges reviewing the draft reports of their decisions, which set the pattern for the establishment of the official Law Reports in 1865.⁴¹

A similar development occurred in the United States. Until 1816, the reporter of Supreme Court opinions acted unofficially, and, until 1874, even the official reporter published the reports privately as part of his compensation. The very early reports of Supreme Court opinions were eclectic collections of cases from diverse courts, state and federal, supreme and inferior, as suited the reporter's fancy and his expectation of what would interest the readers and spur sales.⁴² As was the case with the English versions, these reports often were descriptions of the events and of the decision and reasoning, accompanied by commentary, but not verbatim transcripts. One such example is *Hayburn's Case*,⁴³ in which the reporter, Alexander Dallas, referred to "the Court" impersonally, described

40. PLUCKNETT, *supra* note 15, describes Edward Coke's *Reports*, the best of the lot, as follows:

There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question. A case in Coke's *Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history. The whole is dominated by Coke's personality, and derives its authority from him.

Id. at 281.

41. *Id.*

42. What became the first series of United States Reports was assembled by Alexander Dallas, the unofficial reporter from 1790-1800. His first volume, of four in total, focused on Pennsylvania cases decided before and after the Revolutionary War. One of the first cases in the book is a 1760 case, *Stevenson v. Pemberton* from the Pennsylvania (Provincial) Supreme Court. Other cases were from various local courts before and after the war. There were cases from the Federal Court of Appeals under the Articles of Confederation (a special court of limited jurisdiction that heard appeals from state court judgments in admiralty). The first Supreme Court case, *West v. Barnes*, did not appear until the second volume, 2 U.S. (2 Dall.) 401 (1791). Not until Dallas's successor, William Cranch, became reporter, were the United States Reports limited to U.S. Supreme Court cases.

43. 2 Dallas 409 (1792).

subsequent events and extraneous communications, summarized the argument and decision, but provided only cursory reference to the factual background. There was no discussion of the *ratio decidendi* behind the Court's decision.⁴⁴ Still, these reports soon took on a standard form that separated the lawyers' arguments from the Court's pronouncement. Within the latter, the new model distinguished between the facts, the legal reasoning applied to those facts, and the decision. By the nineteenth century, in England and the United States, the material conditions were in place that would allow for the evolution of the theory of the "binding" nature of a single precedent, at least when directed from a superior court to an inferior.⁴⁵

However, there was one more hurdle. Adding to the jurisprudential chaos in England were the often-overlapping jurisdiction and specialized procedures of the common law courts of Common Pleas, King's Bench, and Exchequer. To provide more flexibility in responding to new legal issues, and to cut through arcane procedures in dealing with old ones, various equity courts arose that developed alternative structures and jurisdiction. Unfortunately, as time passed, the equity courts underwent their own process of bureaucratization, and equity as an alternative body of substantive and procedural law became more formalized and calcified. The former innovation then added to the complexity and opacity of the entire legal system. A more rational court system was needed, a process begun in the sixteenth century, but not completed until the Supreme Court of Judicature Acts of the 1870s. Its most recent iteration is the Constitutional Reform Act 2005.

A rudimentary appellate structure existed within the system through various avenues, most significantly the Court of Exchequer Chamber. That court exercised the formal appellate function beginning in 1585 until the late nineteenth century reforms.⁴⁶ Not surprisingly, decisions of that court

44. A particularly curious example is the 1794 case of *United States v. Yale Todd*, in which the Supreme Court for the first time apparently found a law of Congress unconstitutional. That case, for which there was a record in the Supreme Court of the lower court's decision and the motion by the attorneys, and an extract of the minutes of the Supreme Court showing a decision, nevertheless lacked a report of the Court's opinion. The "official" report appears nearly 60 years later, in *United States v. Ferreira*, 13 How. 40 (1851). The "report" is a paraphrase of the record in *Yale Todd*, attached to the later case as a "Note by the Chief Justice [Roger Taney]." It is not clear how much of the report is verbatim from the original case and how much is interpretation and commentary by the Chief Justice, although it is clear that there is much of the latter. See Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958).

45. The reports, being well structured and annotated, also served as an educational tool for judges, lawyers, and law students, even better than the rudimentary versions had done in previous centuries. Professor Garay mentions a similar aim in nineteenth century Argentina. Garay, *supra* note 1, at 274-75 n.37.

46. While appeals were possible from the Court of Exchequer Chamber to the House of Lords, this was unusual before the late nineteenth century. Even more unusual--and controversial--were

received prominence in the decisions of the other courts at a fairly early stage. Professor Plucknett describes one case in 1483 when the chamber reached a decision on a case originating in the court of common pleas by a majority: “When the chief justice of the common pleas gave judgment, he explained that he disagreed with the decision of the chamber, but was bound to adopt the view of the majority.”⁴⁷

By the seventeenth century, Chamber decisions in particular cases, not just lines of cases as custom, increasingly became recognized as binding on (lower) courts.⁴⁸ Some judges began to distinguish the holding of a prior case from mere *dictum*, an unnecessary step if a precedent is not at all “binding.” Chamber decisions, then, seem to be the germ of the modern theory of vertically binding precedent gradually emerging four centuries after Bracton. However, even that hesitant step was unsteady and was not taken uncritically. Moreover, decisions of other courts were not binding. Thus, decisions by the House of Lords, a court higher in theory than the Exchequer Chamber, were not binding on lower courts until the nineteenth century. That might have been due to the fact that the Exchequer Chamber had professional judges, whereas the House of Lords at the time included non-lawyers in its judicial function. Precedent at the same level court clearly was not binding, a practice even more engrained if two different courts, such as King’s Bench and Common Pleas, had concurrent jurisdiction over the same type of dispute.

Judges considered themselves free to ignore individual precedents well into the nineteenth century. Various arguments were used, if following a precedent would lead to an undesirable result. Coke argued that the inconvenient precedents did not represent the true state of the law, a form of “distinguishing” cases that courts still routinely use today in the United States, England, and, apparently, Argentina. Lord Mansfield in the eighteenth century blamed the often unreliable reports for such troublesome precedents and preferred to decide cases on more sympathetic (and controlling) “principles.”⁴⁹ Professor Plucknett also observed that the habit

attempts to bring cases to the House of Lords in original jurisdiction, unless it involved the trial of a peer. All original and appellate jurisdiction of the House of Lords has now been transferred to other courts, except in the (mostly hypothetical) case of a trial of impeachment, none of which have occurred since 1806.

47. PLUCKNETT, *supra* note 15, at 347.

48. “[I]n 1602 a decision of the chamber was referred to as ‘the resolution of all the judges of England’ which was ‘to be a precedent for all subsequent cases,’ [citation in footnote omitted] and in 1686 Herbert, C.J., announced it as ‘a known rule that after any point of law has been solemnly settled in the Exchequer Chamber by all the judges, we never suffer it to be disputed or drawn in question again.’” *Id.* at 348.

49. *Id.* at 349.

of the English courts even in the eighteenth century was to “string-cite” cases to cover the same point. He concluded that:

Their very number is significant: under a developed system of precedents one case is as good as a dozen if it clearly covers the point The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice.⁵⁰

Or, to rephrase this idea, in contrast to a precedent in isolation, the “settled practice” was the “custom” represented in the common law, as had been envisioned by the English courts for several centuries. The cited cases were merely examples. It was the “jurisprudence” of the continental scholars, albeit developed by the courts and the practitioners, in a manner analogous to the *jurisprudencia* and its use by Argentine courts.⁵¹

With the reorganization of the English courts into a clearer hierarchy, the emergence of standardized reporting, and public dissemination of the reasoning behind the decisions during the nineteenth century, the stage was finally set to make a precedent binding on subsequent courts. Indeed, the English system relies on a comparatively strict fiction that has had, in the opinion of one skeptic, a debilitating effect on the traditional flexibility of the common law through its connection to living custom. “[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it.”⁵² One may question such pessimism. Judges are political creatures that seek to protect their sinecures, as all bureaucrats do. When the need for flexibility arises and an inconvenient precedent must be ignored, English judges still have sundry rules of construction and creative interpretation, for case precedents as well as for statutes, to lend them a hand.

In the newly-formed United States, an economically and socially simpler society less burdened by the historical encrustations of the English legal structure, the court systems were more rationally organized at an earlier time. Especially at the federal level, the Constitution provided for a Supreme Court with mostly appellate jurisdiction overseeing a system of lower courts. Congress acted quickly to begin its systematic control over judicial organization in the Judiciary Act of 1789. Moreover, the Supreme Court early established its supreme authority over inferior courts to provide uniformity of legal principles.⁵³

50. *Id.*

51. Garay, *supra* note 1, at 269-70.

52. PLUCKNETT, *supra* note 15, at 350.

53. Professor Garay explains that the Argentine constitution expressly authorizes the Congress to enact certain national codes, which, if done, prohibits the provinces from regulating those matters.

As to that last point, the culprits in this saga were the state supreme courts, particularly the Virginia Court of Appeals, which balked at accepting the finality of decisions and legal holdings of the U.S. Supreme Court in matters defined by Article III, Section 2 of the Constitution. In *Martin v. Hunter's Lessee* in 1813,⁵⁴ and *Cohens v. Virginia* in 1821,⁵⁵ the Supreme Court held that it had the constitutional authority to review state court decisions that involved the Constitution, treaties, or statutes of the United States. In *Martin*, Justice Joseph Story laid out several textual and historical reasons for the supremacy of the U.S. Supreme Court. But his clearest argument was practical:

From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere -- wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.⁵⁶

Story then stressed:

[T]he importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be

He describes this as a remarkable difference from the U.S. constitutional system. I am not convinced. If the U.S. Congress enacts a law under one of its delegated constitutional powers, such as the expansive power to regulate interstate commerce, the states (who have concurrent power to regulate under their general "police power") are prohibited from regulating if either their law conflicts with the congressional statute or, in the absence of direct conflict, Congress nevertheless intended to preempt the field of regulation and exclude the states.

Moreover, even if Congress has not legislated in that field, the states are precluded from regulating it, if the state law is inconsistent with the very placement of that power in the hands of the national government. One example would be, if the nature of the power is such that it must be exercised by the nation, not a state. The power to regulate naturalization (and, by extension, immigration) would be an example. What is odd in relation to the American system, is Professor Garay's explanation that such national legislation in Argentina is litigated in provincial courts exclusively, with no review by the Argentine Supreme Court. See Garay, *supra* note 1, at 265-66. In the United States, state courts may hear claims under federal statutes, unless Congress has made jurisdiction exclusive in the federal courts, but, under Article III, Section 2, of the Constitution, the U.S. Supreme Court retains appellate authority over such state court decisions.

54. 14 U.S. (1 Wheat.) 304 (1816).

55. 19 U.S. (6 Wheat.) 264 (1821).

56. *Martin*, 14 U.S. (1 Wheat.) at 345.

different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States.⁵⁷

In sum, finality and uniformity necessarily require that a decision of the U.S. Supreme Court, including its holding, is binding on inferior courts through vertical *stare decisis*.

Just one Supreme Court opinion that is on point is binding in subsequent similar cases heard by lower courts. Yet there, too, “constitutional custom,” established through repeated decisions of the Supreme Court (and possibly influenced by the actions of the other branches of government) lends extra force to the constitutional principle. Justice Story again:

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. *It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion.* This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and *these judicial decisions of the Supreme Court through so long a period do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.*⁵⁸

Horizontal *stare decisis* is a different matter. In balancing stability and flexibility, the theory of precedent in American courts is less strict than in England. A precedent of a court is persuasive, but not binding, on a successor court or on a different court of equal dignity, such as the effect of a decision in one federal circuit court on a similar case in a different federal circuit court.⁵⁹

57. *Id.* at 348.

58. *Id.* at 351 (emphasis added).

59. That comment may not apply if the case is decided by a panel of a particular court, such as a panel of a federal circuit court or a division of a state intermediate appellate court. A decision

This practical consideration is supported conceptually by the idea that a sovereign acting at one point cannot bind the hands of a later sovereign with equal authority who has not consented to that earlier action, and neither can an entity exercising an aspect of that sovereignty bind a successor of equal authority. Thus, a legislature cannot by statute bind its successor,⁶⁰ an executive cannot by decree bind his successor, a court cannot by decision bind its successor, and an “explicit and authentic act of the whole people”⁶¹

by one panel on an issue may bind a subsequent, different panel of that same court until the matter is addressed by that appellate court, *en banc*, or by a higher court. It is also crucial to remember that *stare decisis* in any form applies only within the judicial branch. There is a vast difference between *Marbury v. Madison*, 5 U.S. 137 (1803) and *Martin v. Hunter’s Lessee*. Despite occasional institutional bravado about the “finality,” “infallibility,” and “ultimate” nature of Supreme Court decisions that one may find in the writings of some justices, these expressions of judicial supremacy do not reflect theory or reality. None of those words, or similar characterizations appear in *Marbury* or other cases before the 20th century. There is a practical comity and respect that Congress and the President grant to Supreme Court opinions, to go along with the not-infrequent politically useful blame-shifting with controversial issues. It is also true that, under the theory of separation of powers among the three co-equal branches of the general government, the political branches cannot interfere with the courts’ decisions between particular litigants. However, that same co-equality, in turn, prevents the courts from binding the hands of the other branches in the latter’s political choices. As President Abraham Lincoln declared in his First Inaugural Address on March 4, 1861, about the *Dred Scott Case*:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in S. EXEC. DOC. NO. 1, at 6-7 (1861); *Scott v. Sandford*, 60 U.S. 393 (1857). As a practical matter, as well, the political branches have numerous ways to ignore or avoid the constitutional reasoning of a court. Among the most direct are Congress’s ability to pass a different law, with minor adjustments, to indicate its political will; the President’s power to appoint new justices sympathetic to his view and get the precedent reversed (The Legal Tender Cases: *Hepburn v. Griswold*, 75 U.S. 603 (1870), overruled by *Knox v. Lee*, and *Parker v. Davis*, 79 U.S. 457 (1871)), or the adoption of an amendment to the Constitution, one example being the Eleventh Amendment to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

60. An exception to that rule has been found if the earlier legislative act has resulted in vested rights in property, which cannot then be undone. See, for example, *Fletcher v. Peck*, 10 U.S. 87 (1810), in which the Supreme Court rejected an attempt by the Georgia legislature to repeal an earlier land grant, when the rights of the earlier purchasers and their successors had vested.

61. The expression appears in President George Washington’s Farewell Address and refers to the act of amending the Constitution. See DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 1 (1996).

reflected in the Constitution cannot bind a future generation.⁶² In all cases, such earlier action may be reversed by the successor.

In *Planned Parenthood v. Casey*,⁶³ the joint opinion explained the prudential considerations the Court weighs to determine whether or not to overrule a precedent:

[W]hether the rule has proven to be intolerable simply in defying practical workability[;] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation[;] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine[;] or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]⁶⁴

Most prominent in the Court's calculus, one suspects, is the concern about institutional legitimacy and survival:

There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith There is a limit to the amount of error that can plausibly be imputed to prior Courts The legitimacy of the Court would fade with the frequency of its vacillation.⁶⁵

The Court has also declared at various times that the persuasive nature of one of its precedents is weaker in constitutional law cases.⁶⁶ Yet the Court has also been willing to overturn precedents expressly and in short order on what seems to be merely a political distaste by the later majority for the earlier decision, sometimes only because a single justice has changed his mind.⁶⁷

62. However, Article V of the Constitution purports to make inviolate certain provisions of the Constitution, only one of which is still operative, "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." It is not clear, however, why this exception to the amendment process could not itself be repealed by a properly adopted amendment.

63. 505 U.S. 833 (1992).

64. *Id.* at 854-55.

65. *Id.* at 866.

66. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting):

But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

Id. Historically, this, too, was not an issue for English courts, since they had no power to overturn acts of Parliament. Today, that last point is still generally true, although the highest English court can declare certain acts inconsistent with more authoritative enabling acts. They can also make non-binding declarations of incompatibility of any act of Parliament with the European Convention on Human Rights.

67. See, for example, *National League of Cities v. Usery*, 426 U.S. 833 (1976) and, just nine years later, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and the role of Justice Harry Blackmun in first distinguishing – through intervening cases – and then

Even leaving aside the creativity exhibited by justices to distinguish or re-interpret unfavorable precedents in what appear to be similar cases, it is clear that they do not consider prior precedent as strictly binding in subsequent matters of constitutional law as in other legal disputes.

FACT-SPECIFIC INCREMENTALIST RULE-MAKING OR A SEARCH FOR
GENERAL PRINCIPLES AS RULES

One fault of Argentinian judges that Professor Garay finds disturbing, particularly in constitutional law cases, is the tendency to decide cases at a high level of abstraction in the rule applied. He cites to that end the Argentine right of privacy cases, *Bazterrica*, *Montalvo*, and *Arriola*, which dealt with possession of narcotics.⁶⁸ The courts do this, he charges, though it is unnecessary to resolve the particular dispute. For that shortcoming he blames another unfortunate inheritance from the civil law tradition, that of academic jurists looking for general principles rather than employing the narrowly-reasoned, fact-focused, case-by-case incrementalism of the common-law tradition, a habit that is passed along to embryonic lawyers during their gestation in the law schools. Perhaps one should not be too harsh on the judges in those cases, if they were influenced by Article 19 of the Argentine Constitution: “This Article also provides that private actions that neither offend public morality nor harm third persons are exempt from the magistrate’s judgment and reserved only to God.”⁶⁹ The nebulosity and vacuity of this type of posturing as a workable rule of law is what American opponents of a bill of rights decried in the 1780s. Alexander Hamilton described these declarations as “volumes of those aphorisms . . . , which would sound much better in a treatise of ethics, than in a constitution of government.”⁷⁰

Judging by more than a few examples, I suggest that Professor Garay is too laudatory of the U.S. Supreme Court. It is a frequent rhetorical device for a concurring or dissenting opinion to castigate the majority in a constitutional law case of having ventured in its holding well beyond what

overruling the decision he had earlier joined. This was followed just seven years later by a resurrection of the principle of *National League of Cities* and a rejection (though not a formal overruling) of *Garcia* in *New York v. United States*, 505 U.S. 144 (1992) and, once more, in *Printz v. United States*, 521 U.S. 898 (1997). For another example, albeit one less influenced by the vacillations of a single justice, see *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), overruled just fourteen years later in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

68. Garay, *supra* note 1, at 295-97, 310.

69. *Id.* at 267.

70. THE FEDERALIST No. 84 (Alexander Hamilton); Publius, *supra* note 10.

was necessary to decide the case. The inclination to resort to sweeping declarations was criticized by Justice Felix Frankfurter in his concurrence in the important separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*.⁷¹ Frankfurter was critical of Justice Hugo Black's opinion for the Court that sought to define and fix categorically presidential powers relating to his office as chief executive and as commander-in-chief. Frankfurter reminded his brethren of the "humble" role of the Court:

Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle--preferably forever--a specific problem on the basis of the broadest possible constitutional pronouncement may not unfairly be called one of our minor national traits The path of duty for this Court, it bears repetition, lies in the opposite direction The issue before us can be met, and therefore should be without attempting to define the President's powers comprehensively.⁷²

Curiously, in the very area of constitutional law that Professor Garay critiques, the right of privacy, members of the U.S. Supreme Court have relieved themselves of sometimes mind-bogglingly broad holdings. The seminal case, *Griswold v. Connecticut*,⁷³ saw the Court announce a constitutional "right to privacy" beyond the specific aspects protected in various Bill of Rights provisions. As with the Argentine Supreme Court, the members of the majority in that case either did not provide guidance as to what aspects of privacy would be protected or resorted to extra-constitutional considerations of a protean nature. Thus, Justice William Douglas talked about a right of privacy older than the Bill of Rights, even while he purported to base his opinion on "penumbras and emanations" arising out of that very same Bill of Rights. The concurring opinions of Justices Arthur Goldberg

71. 343 U.S. 579 (1952).

72. *Id.* at 594 (Frankfurter, J., concurring). Of course, the exact opposite problem arises when cases are decided without a clear principle of sufficient scope being supplied. This creates inconstancy and a lack of predictability. Indeed, in the very area addressed by Frankfurter, that of the interplay of presidential and congressional powers, the quintessentially political issues of separation of powers has led courts to emphasize fine factual distinctions at the expense of clear legal principles. Writing for three justices in his dissent in *Youngstown*, Chief Justice Fred Vinson listed the problems that arise from ad hoc, principle-free judicial decision-making:

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

Id. at 708 (Vinson, C.J., dissenting). A review of the Court's novel *habeas corpus* jurisprudence involving the detention of enemy combatants in the decade of the 2000s reveals more examples of Vinson's critique.

73. 381 U.S. 479 (1965).

and John Marshall Harlan II tried to limit the right of privacy to the circumstances of that case, a married couple's decision to use contraceptives--a limitation soon forgotten or ignored in subsequent cases that involved much narrower restrictions on access to contraceptives or that regulated abortion.⁷⁴

Since not all private actions are constitutionally immunized from government control, the Court did not really mean what it said--that the case was decided on the basis of the broad right announced. It was not clear from the opinions which actions would receive such favored status. Recreational use of drugs generally? Some drugs? Animal cruelty? Spousal violence? Liberty of contract? If not, why not? Goldberg would look to the collective conscience of the people and to legal customs and traditions; Harlan would look to principles of ordered liberty that inhere in a free society. Whatever those were.

At least Goldberg and Harlan would seek guidance by reviewing American legal history for evidence of concrete laws (or their absence) to help define their "collective conscience" and "ordered liberty."⁷⁵ An even more stunningly broad definition of the operative constitutional principle in a case was announced by Justice Harry Blackmun in dissent in *Bowers v. Hardwick*,⁷⁶ a case that upheld the constitutionality of an anti-sodomy law. The majority had described the principle at issue very narrowly as the "right of homosexuals to engage in sodomy," and considered whether or not that right was recognized under the Constitution. Blackmun countered that the true right at issue was the "right to be left alone," an assertion that would undermine the very function of law as a means of social control that typically

74. Compare the narrow formulation of the operative principle in *Griswold* with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a law that prohibited *distribution* of contraceptives to *unmarried* persons, except when done by a licensed pharmacist, unconstitutional under the *equal protection* clause), *Roe v. Wade*, 410 U.S. 113 (1973) (Supreme Court finding unconstitutional various restrictions on a woman's right to obtain an abortion, based simply on the assertion that this involved a constitutionally protected liberty as part of the right of privacy), and *Carey v. Population Services*, 431 U.S. 678 (1977) (finding unconstitutional a law that--mostly--prohibited distribution of contraceptives to *minors under 16*) (emphasis added).

75. The Connecticut law at issue in *Griswold* appears to have been a rogue law in its sweep. It seems never to have been enforced, according to Justice Felix Frankfurter in the opinion for the Court in the predecessor case to *Griswold*, *Poe v. Ullman*, 367 U.S. 497, 501-02 (1961). The law's intrusion into the marital bedroom by prohibiting "use" of contraceptives by "married couples" may not have had any counterpart in the laws of other states that regulated "sale" of contraceptives. When it came time to apply the right of privacy to abortion, Justice Harry Blackmun's opinion for the Court in *Roe v. Wade* determined that the liberty protected in *Griswold* extended to abortion. However, the fact that abortion prohibitions were of old pedigree and widespread, unlike the Connecticut law, was ignored or distorted.

76. 478 U.S. 186 (1986).

acts *against* the individual's desire to be left alone to do as he sees fit. At the very least, if the Court followed its traditional constitutional jurisprudence regarding fundamental rights (always an uncertain proposition, as current Second Amendment law shows), every criminal law and many civil laws would now be subject to strict judicial scrutiny as a direct and substantial burden on one's right to be left alone.

A similarly unbounded "right" was announced by the joint opinion in the abortion law case *Planned Parenthood v. Casey*.⁷⁷ The issue was whether the act of terminating a pregnancy by abortion was a constitutionally "protected liberty" or one that did not enjoy that status and was, thus, subject to restriction through the usual majoritarian political process. In a phrase attributed to Justice Anthony Kennedy, the opinion stated the operative principle as, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁷⁸ If this was meant to convey more than a right to belief and speech, which would be protected under the First Amendment, and, instead, extended to the right to act on those beliefs, it was, as Justice Antonin Scalia sarcastically charged in *Lawrence v. Texas*, "the passage that ate the rule of law."⁷⁹ Moreover, since the Pennsylvania abortion law was about "action," not just "definition," Kennedy's vacuous "principle" was inapposite. Presumably, Kennedy did not intend his principle to allow me to shoot my obnoxious neighbor because I defined my own concept of existence and the mystery of human life to be incompatible with my neighbor's continued existence.

Such bombastic, New-Age affirmations presumably could be (and, subsequently, were) limited case-by-case in true common-law fashion, often long on assertions and dubious analogies. But that seems to have been the case as well in the Argentine decisions discussed by Professor Garay. Moreover, such *post hoc* trimming does not change the fact that common-law courts are not at all immune to referencing grand principles.

Another way that the U.S. Supreme Court departs from the common-law ideal is through the "facial invalidity" mode of constitutional review. The orthodox manner of deciding about the constitutionality of a law is to determine whether or not the law is unconstitutional as applied to the challenger's actions. That suitably meets the constitutional case-or-controversy requirement and its derivative doctrines, such as the claimant's proper standing to sue. It also avoids unnecessarily chastising the people or their elected representatives for acting unconstitutionally, and thereby limits the affront to the *Grundnorm* of self-government in a republican system that

77. 505 U.S. 833 (1992).

78. *Id.* at 851.

79. 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

occurs when an unelected body overturns the political choices made by the people's elected representatives.⁸⁰ As well, such an approach reflects the cautious incrementalism of case-by-case evolution of the common-law that Professor Garay admires.

Yet, there are numerous cases in which the Court has decided, under various doctrines, that a law under constitutional review must be struck down as written, without regard to the circumstances of its application in that case. Some of these doctrines are readily defensible. For example, if a federal law is simply beyond Congress's power to enact, in that the law regulates purely internal state commerce, the law as written is unconstitutional because it can never be constitutionally applied, in the claimant's case or any other.⁸¹ Also, if the wording in a law is so vague as to be incomprehensible to a typical person after allowing for the unavoidable marginal ambiguity of language and the practical imprecision of statutes, the law as written violates the basic due process protection of notice.⁸² However, the Court's use of the "overbreadth" doctrine is a different juridical proposition altogether. In free speech doctrine, the Court may strike down a law, even if the defendant engaged in speech that the government constitutionally may proscribe, simply because the law is inartfully drafted and reaches substantially more constitutionally protected speech than unprotected speech.⁸³ For pure judicial policy reasons, the Court in an overbreadth case does not wait to bring the statute within its constitutional limits incrementally through a series of properly adjudicated cases in which the state has used the law to punish speakers unconstitutionally.

The method of legal analysis and judicial decision-making in Argentina that Professor Garay critiques in his article portrays the residual effects of the long tradition of continental civil law, a top-down, code-centered, scholar-driven approach that begins with a universe of prescribed legal principles that are deductively applied by the lawyer or judge to the facts of a particular case. Identifying the principle matters; the facts are secondary. The problem, according to Professor Garay, is the educational system. It is too intellectual,

80. For a brief overview of some other self-imposed limitations in constitutional adjudication in federal courts, see Justice Louis Brandeis's concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 341, 346-49 (1936).

81. *United States v. Salerno*, 481 U.S. 739 (1987).

82. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

83. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *New York v. Ferber*, 458 U.S. 747 (1982) (clearly applying the *Broadrick* test even to pure speech cases).

with too much rote learning of general principles, and not enough emphasis on fact analysis. The first thing we do, let's kill all the law professors.⁸⁴

My response here does not necessarily disagree with this critique. Professor Garay is the expert on Argentina. I would maintain, however, that more is in play than changing legal education to focus more on Socratic discussion of cases to emphasize the importance of factual nuances among them. The same criticisms that Professor Garay makes have often been aimed at American legal education.⁸⁵ Perhaps the difference in education in the countries' respective law schools, or at least in the resulting product, is one of degree, not of kind.⁸⁶

84. Borrowed from Dick the Butcher in WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* pt. 2, act 4, sc. 2. While there is some controversy about Shakespeare's purpose for this line, I have a selfish bias against the suggestion made by Dick, and even more so against this modification. I assure my colleagues that I am using it ironically here.

85. Professor Garay derides the Argentine legal education "centered in scholarly works found in articles, manuals (hornbooks) and treatises annotating codes or statutes, general works that – apart from their intrinsic value as theoretical works – are written with abstraction to the case-law. If cases are occasionally used, it is just to exemplify a specific situation." Garay, *supra* note 1, at 289. For a contrary view about the virtues of case study in law school, see for example, the work of Judge Jerome Frank, one of the leading lights among the skeptics who became known as the "Legal Realists," the more down-to-earth predecessors of the Critical Legal Studies adherents. In Chapter XVI, "Legal Education," of *Courts on Trial*, Frank appears as a "reactionary reformer." FRANK, *supra* note 31. He dismisses case study as "myopic" and far too lengthy. Too much time in law school is spent "analyzing upper court opinions, 'distinguishing cases,' constructing, modifying or criticizing legal doctrines," in other words, what law professors like to dangle in front of law students as the magical "learning to think like a lawyer." Students are unprepared for legal practice, as a result. He would return to the reading of textbooks for basic substantive knowledge and writes favorably of the history of law office training. *Id.* at 237.

86. For an interesting perspective that accords with some of my earlier discussion about the similarities between the jurisprudence of the early English common law and its continental Roman law contemporary, Judge Jerome Frank quotes Professor Max Rheinstein of the University of Chicago about the case study method of American legal education:

In Rome, 'legal' activities were divided up among three groups of men; the jurisconsults, the orators, and practical politicians The jurisconsults busied themselves exclusively with the rules of law; the practical administration of justice remained outside of their field. Yet, their work has become the foundation of all legal science ever since, not only in the countries of the so-called Civil but also in the Common Law orbit. The style of Common Law legal science was determined when Bracton started out to collect, arrange, and expound the rules of the Common Law of his time in the very style of the Roman classics and the *corpus juris*. All the law books since his time...have adhered to the pattern thus determined. Legal education built upon these books has been equally limited; from Pavia and Bologna to Harvard, law schools have regarded it as their task to impart to their students a knowledge of the rules of law and hardly anything else. Of course, for practical work in the administration of justice such a training is far from being complete.

FRANK, *supra* note 31, at 244-45. This critique may be a bit of an overstatement and not do justice to the training traditionally done in England at the Inns of Court or in the early American law office training. But it does describe the essence of modern American legal education, even when a case study approach is used. Not that there is anything wrong with that current method as a first step to understanding how to "discover" the operative legal principles in a common law jurisdiction and to lay a foundation in the substance of those principles.

In the early United States, as for centuries in England, control over legal training was in the hands of the legal guild, and the lawyers and judges selected therefrom, not in the hands of the legal profession, and the law professors and jurists selected therefrom. Abandoning “reading the law” in a law office in favor of lectures in proprietary law schools and, later, university-affiliated law schools, and, later still, in favor of the “textbook method,” gradually removed law study from law practice. Legal training at Harvard at that time resembled more what Professor Garay describes: “[T]he students are assigned a specified portion of a regulation text-book to study, and for the most part to memorize; this is then explained by the teacher and recited on at the next period.”⁸⁷

The introduction of the case method of study by Dean Christopher Columbus Langdell at the Harvard Law School was a reaction against textbook memorization. The fly in the ointment here was that Langdell, like many of his German-influenced contemporaries, believed in a rigorous “science” of the law, whereas the old law-office approach had always seemed to be more art or craft than science. The case method focused on the internal logic of the common law, and how the—relatively few—fundamental legal doctrines developed, all of which would be revealed through a Socratic journey through carefully selected cases. The journey would be guided by professional academics, not practitioners or judges. To demonstrate symbolically the essence of this curriculum to outsiders and to follow the model of the German universities, Harvard changed the law degree from Bachelor of Laws (LL.B.) to Juris Doctor (J.D.). Critics complained that this education bred professors, not practitioners, and that graduating students “would enter a law office feeling ‘helpless,’ at least ‘on the practical side.’”⁸⁸

Langdell’s methodology is still with us, with some modification to account for the slow process of Socratic dialogue that is the ideal in the case study method. While many law schools try to round off the “university-style” education with clinical courses, courses in “practical” skills, and intern- or externships in law offices, there are limits to what this can achieve. Professors in classroom settings do a good job in efficiently getting across to

87. For a good overview of the evolution of American legal education in the 19th century, see “The Rise of the Law School,” FRIEDMAN, *supra* note 38, in Chapter XI, *The Legal Profession: The Training and Literature of Law*, at 610.

88. *Id.* at 616 (quoting Harvard College Dean of Faculty Ephraim Gurney). As a humorous side note, at least for me, Langdell did not consider constitutional law to be suited to his approach because it was too connected to enacted rules through the Constitution’s text, akin to what happens in a code-type system. As a consequence, constitutional law was banned from the Harvard Law School curriculum for a brief time. Fortunately, unlike the rest of Langdell’s reforms, this step did not catch on with the other law schools.

their students the foundations of legal doctrines. Practical skills are most effectively learnt outside the school. The current American system awkwardly tries to do too much and spends too much time doing it. But introducing some of the methods of American law studies to Argentina might nudge that educational model in a direction more to Professor Garay's liking.

The bigger problem that I see from his article is that it takes time to change a judicial culture. It took the English system centuries to evolve fully from the continental, Roman-law approach to the modern system in regard to clear judicial hierarchy and the use and effect of precedent. That was true, even though that evolution received an early boost from the practical necessity of the Norman invaders to solidify their hold over the English masses, and their use of the judges and the "common law of the courts" to help in that endeavor. It appears that the American system entered the modern phase sooner than the English, once again due to a boost from the practical necessity to solidify a central administration's hold over a fractious people. This time the tool was to use the federal courts to begin spreading the "national common law" represented in the Constitution.⁸⁹

Argentina has tried to emulate the form of the American system for more than a century, with at best limited success, in the judgment of Professor Garay. His narrative reminds one of the remark made by Alexis de Tocqueville about the Mexican Constitution of 1824:

The Mexicans were desirous of establishing a federal system, and they took the Federal Constitution of their neighbors, the Anglo-Americans, as their model and copied it almost entirely[.] But although they had borrowed the letter of the law, they could not carry over the spirit that gives it life [A]nd to the present day Mexico is alternately the victim of anarchy and the slave of military despotism.⁹⁰

The ingrained effects of custom are difficult to overcome.

89. I use "common law" in a very colloquial meaning here, in the sense that the Constitution represented a unifying force for what, as a political reality, was little more than a confederation of states for several decades. There was no federal common law of crimes, because that was seen as giving the general government too much power to legislate, just as Parliament could legislate regarding the content of the English common law. See *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812). There remained the possibility of at least a federal commercial common law through *Swift v. Tyson*, 41 U.S. 1 (1842). That, too, was negated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), although Congress and the federal courts have achieved the same result through broad federal securities and commercial statutes that allow the courts much room for interstitial discretion and interpretive creativity. The history of the federal judges in educating the people about the Constitution and helping to bind the union is well-recognized. This process was facilitated by the requirement of circuit-riding and by the practice of often long lectures as part of charges to juries, typically in criminal trials. There is also a common law of the Constitution, a manifold topic that deserves major investigation, but one that is well beyond the scope of this article.

90. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, I, 101 (2009).

At the same time, as I have argued, there are many similarities in the practical operation of the two systems, some of which, such as the need to identify stable legal principles at work in similar situations, are inherent in adjudicating cases. Others, such as the tendency to generalize at too high a level of abstraction, certainly infects not only Argentine judges. The conflicts among courts over the nature of precedent (vertical *stare decisis*) and the degree of discretion a court has to ignore its own precedent horizontal *stare decisis*), especially in constitutional matters, seem to be endemic, due in part at least to the inherently political nature of judges and their desire to maintain or increase personal and institutional influence. Argentina already has in place much of the material that shaped the modern common law approach to precedent and judicial decision-making: Regular publication of reports, a structured judiciary, and a familiarity, however passing and unsettled, with common law adjudication through its attempts over a century and a half to imitate the American tradition. Continued interaction between the different systems, and the efforts of reformers familiar with both, such as Professor Garay, over time likely will yield fruit in bringing the necessary improvements he seeks.