

# Impeaching Precedent

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*This Article is about the nature and scope of legal argument. It considers the question of whether a court, when determining the precedential weight of one of its prior decisions, should consider historical evidence indicating that the decision was decided on the basis of improper motivations or as the result of political pressure. In a common law system in which courts pervasively rely on precedents as a source of law, that question is of obvious practical and theoretical importance. Yet courts and scholars have hardly even raised the question, let alone provided a satisfactory answer to it. Instead, they have assumed that such explanations are historical, not legal arguments—the kind of thing appropriate for law reviews, but not for courts of law.*

*This Article directly challenges that assumption. Drawing on a few rare examples when justices of the Supreme Court, or lawyers arguing before them, have sought to undermine court precedents by showing them to have been based on “extra-legal” considerations, I argue that such efforts to historicize or—to use the term I prefer—impeach past decisions are a legitimate and potentially useful means of evaluating a decision’s precedential weight. Although various policy justifications may support excluding such arguments from judicial debate, I consider several such objections and explain why none is particularly persuasive. If the argument presented is sound, then not only should courts be more receptive to impeaching arguments, but—at least in the realm of constitutional law—both courts and scholars should perhaps broaden their understanding of how constitutional history bears on constitutional theory.*

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## INTRODUCTION

When deciding whether to follow one of its precedents, should a court consider historical evidence indicating that the precedent was decided on the basis of improper motivations or as the result of political pressure? The question seems so obvious that one would think that there must be an equally obvious answer to it. But not only is there no consensus answer to it, the question has hardly been asked. This is astonishing. Despite the fact that judicial decisions remain a pervasive source of law in the American legal system, and despite the fact that efforts to historicize court precedents fill volumes of law reviews, neither courts nor legal scholars have devoted any serious attention to asking whether, and if so when, a past court's actual motivations might properly bear on the precedential status of its decision. The purpose of this Article is to raise that question and offer an answer to it.

Before laying out my own analysis, however, a few examples may help to clarify the issue. Consider first the news reports following the Supreme Court's recent decision in *National Federation of Independent Business v Sebelius*<sup>1</sup> that Chief Justice John Roberts may have switched his vote to uphold the Patient

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<sup>1</sup> 132 S Ct 2566 (2012).

Protection and Affordable Care Act<sup>2</sup> largely for political or institutional reasons.<sup>3</sup> Professor Randy Barnett, who worked on the case on behalf of those challenging the law, commented to the press that such a fact, if true, “reduces [the decision’s] value as a precedent.”<sup>4</sup> Of course, that comment was likely made in Professor Barnett’s capacity as a lawyer representing the losing party, but that is precisely the point. For it prompts the following questions: Would Professor Barnett make that argument in a brief to the Court in a future case in which the scope of Congress’s power under the Taxing and Spending Clause was at issue? *Should* he make the argument?

In one sense, the answer to both questions is likely no, and the reason is obvious: lawyers typically make arguments they think courts will find persuasive, and accusing the Court (or one of its members) of ignoring the law for the sake of political expedience is a risky strategy indeed. More importantly, though, such an argument hardly seems to be a *legal* argument at all. Sure, constitutional-law professors may tell their students about Chief Justice Roberts’s reported shift as part of the *explanation* of the decision, but when they do they will likely not claim that those facts, if true, bear on the decision’s legal *justification*. As one recent commentator put it in a related context, such a professor “would not [ ] be indoctrinating her students in the norms of professional legal practice; she would not be ‘doing’ constitutional law.”<sup>5</sup> Lawyers, after all, advance arguments about the legal grounds (or lack thereof) of past decisions, not about their historical causes.

Recently, however, a group of lawyers and historians made an argument to the Supreme Court of exactly that sort. In *Hamdan v Rumsfeld*,<sup>6</sup> an amicus brief submitted by a group of legal scholars and historians sought to persuade the Court that its 1942 decision in *Ex parte Quirin*,<sup>7</sup> in which the Court had upheld the President’s use of a military commission to try and

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<sup>2</sup> Pub L No 111-148, 124 Stat 119 (2010).

<sup>3</sup> See, for example, Jennifer Haberkorn and Darren Samuelsohn, *Roberts’ Health Care Switch: Gasoline on the Fire*, Politico (July 2, 2012), online at <http://www.politico.com/news/stories/0712/78075.html#ixzz1zW0vWkp5> (visited Nov 19, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> Jamal Greene, *The Anticanon*, 125 Harv L Rev 379, 381 (2011). Professor Greene is here referring more specifically to cases in the so-called anticanon, but his point applies more broadly to the use of non-doctrinal history to explain past decisions.

<sup>6</sup> 548 US 557 (2006).

<sup>7</sup> 317 US 1 (1942).

sentence to death seven German saboteurs,<sup>8</sup> was a “poisoned” precedent because it was infected by judicial bias, conflict of interest, and inordinate pressure from President Franklin Roosevelt.<sup>9</sup> In so arguing, the amici cited various historical materials, including the Justices’ private papers, to show such bias, conflicts, and pressure.<sup>10</sup>

Still, when it came to justifying the legal relevance of their historical evidence to the Court’s stare decisis inquiry, the amici had little to work with. Although the Court has said that its policy of stare decisis can be overcome for various reasons, none of those reasons quite fit the amici’s argument about *Quirin*.<sup>11</sup> After all, the thrust of their argument was not that the *Quirin* Court’s constitutional analysis was poor (though they argued that, too), nor was it that circumstances since *Quirin* had changed. Instead, their claim was that the historical evidence revealed the case to have been “poisoned” or “discredit[ed]” or, to use the term I will invoke, *impeached*.<sup>12</sup> With no doctrinal footing to support their argument, amici failed to persuade even those Justices who were critical of *Quirin* to repudiate that decision entirely.<sup>13</sup>

Again, it may seem unsurprising that the Justices declined the invitation to attack the good faith of their past brethren on

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<sup>8</sup> Id at 20–24, 48.

<sup>9</sup> Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner [Effect of *Quirin*], *Hamdan v Rumsfeld*, No 05-184, \*6–18 (filed Jan 6, 2006) (available on Westlaw at 2006 WL 53973) (“Legal Scholars Brief”). The brief lists its authors as Professor Michal R. Belknap, Professor David J. Danelski, Professor Peter Irons, and Pierce O’Donnell.

<sup>10</sup> See id at \*11 (observing that “several private communications from the Roosevelt Administration to the Justices reveal that the President expected—indeed, demanded—unanimous approval of the exercise of his war powers”).

<sup>11</sup> The cases amici cited in their brief held that the following circumstances would justify the Court in treating one of its own past decisions as nonbinding: where the decision was wrongly decided; where it has caused harm to the legal system; where it is deemed to be “inconsistent with the sense of justice”; where the “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” See id at \*7, citing *Payne v Tennessee*, 501 US 808, 834 (1991) (Scalia concurring), *Patterson v McLean Credit Union*, 491 US 164, 174 (1989), *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 855 (1992).

<sup>12</sup> Legal Scholars Brief at \*15, 18.

<sup>13</sup> For instance, in his dissent in *Hamdi v Rumsfeld*, 542 US 507 (2004), Justice Antonin Scalia had observed that *Quirin* was “not this Court’s finest hour,” id at 569 (Scalia dissenting), but in *Hamdan* Scalia did not deny *Quirin*’s authority completely, as amici had encouraged the Court to do. Instead, he distinguished it on the ground that it predated the Detainee Treatment Act of 2005, Pub L No 109-148, 119 Stat 2739, which offered the petitioner “an avenue for the consideration of petitioner’s claims that did not exist at the time of *Quirin*.” *Hamdan*, 548 US at 677.

the Court. But in fact, occasionally they have done just that. Consider two more examples. First, in *Mitchell v Helms*,<sup>14</sup> Justice Clarence Thomas, writing for the Court, made use of historical evidence to suggest that the Court's Establishment Clause jurisprudence had been infected by anti-Catholic bigotry.<sup>15</sup> Specifically, the Court held that whether a school is deemed to be "pervasively sectarian" was not properly a factor in determining whether the Constitution barred the government from offering aid to the school in part because the "pervasively sectarian" language, first used in the 1973 decision *Hunt v McNair*,<sup>16</sup> had a "shameful pedigree" and was originally associated with "hostility to the Catholic Church and to Catholics in general."<sup>17</sup> As a pair of commentators observed soon after the decision, Justice Thomas's analysis may well have been accurate as a historical matter, but it is "not the usual stuff of Supreme Court debate."<sup>18</sup>

Indeed it is not.<sup>19</sup> But nor was Justice Thomas's style of argument unprecedented. Four years prior to *Mitchell*, Justice David Souter, writing in dissent, employed a similar strategy to undermine another of the Court's precedents. In *Seminole Tribe of Florida v Florida*,<sup>20</sup> the Court held that the Eleventh Amendment barred Congress from authorizing federal courts to take jurisdiction over cases in which a state was sued by one of its own citizens.<sup>21</sup> In so holding, Chief Justice William Rehnquist's opinion relied heavily on the 1890 case of *Hans v Louisiana*,<sup>22</sup> which had first interpreted the Eleventh Amendment to apply to suits brought by a state's own citizens.<sup>23</sup> In his dissent, Justice Souter, joined by Justices Ruth Bader Ginsburg and Stephen

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<sup>14</sup> 530 US 793 (2000).

<sup>15</sup> See *id.* at 828–29.

<sup>16</sup> 413 US 734 (1973).

<sup>17</sup> *Mitchell*, 530 US at 828–29, citing *Hunt*, 413 US at 743.

<sup>18</sup> John C. Jeffries Jr and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich L Rev 279, 280 (2001) (observing that "[t]he constitutional disfavor of 'pervasively sectarian' institutions is indeed a doctrine born, if not of bigotry, at least of a highly partisan understanding of laws 'respecting an establishment of religion'").

<sup>19</sup> Rather, at first blush, such an argument seems to be what Professor Jack Balkin calls "off-the-wall." See generally Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner and Constitutional Historicism*, 85 BU L Rev 677 (2005) (distinguishing between "off-the-wall" and "on-the-wall" arguments). That is, it stands outside the existing conventions that determine what are and what are not reasonable and appropriate forms of constitutional interpretation.

<sup>20</sup> 517 US 44 (1996).

<sup>21</sup> See *id.* at 76.

<sup>22</sup> 134 US 1 (1890).

<sup>23</sup> See *Seminole Tribe of Florida*, 517 US at 54–55, 64–65, 68–69.

Breyer, took dead aim on *Hans*, arguing that the decision lacked authority as precedent because it had been decided largely for political and institutional reasons. Citing law review articles, he argued that the *Hans* Court knew that it could not enforce its judgments after federal troops had withdrawn from the South as part of the Compromise of 1877.<sup>24</sup> By refusing jurisdiction over the suit, the *Hans* Court was thus able to pay lip service to the plaintiff bondholder's right to be reimbursed by the state of Louisiana without the Court having to suffer the embarrassment that would arise if it could not enforce its remedy.<sup>25</sup> "So it is," Justice Souter concluded, "that history explains, but does not honor, *Hans*."<sup>26</sup>

Justice Souter's *Seminole Tribe* dissent nicely illustrates the precarious status of such historicizing arguments in contemporary legal culture, both because he developed it in such a detailed way and because it provoked such a fierce response from the majority. Chief Justice Rehnquist decried the dissent's effort to undermine *Hans* as an "undocumented and highly speculative extralegal explanation of the decision in *Hans*," which did a "dis-service to the Court's traditional method of adjudication."<sup>27</sup> In other words, even if such "extralegal explanations" are commonplace in law reviews, they are out of bounds in judicial argument.<sup>28</sup>

Yet the question remains: Is the exclusion of such arguments from judicial debate *justified*? If so, why? If not, why not? Answering such questions is not only necessary in order to evaluate properly arguments like those made by the *Hamdan* amici; it is also vital to understanding the nature and scope of legal argument itself. Yet despite the vast literature on the role of history

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<sup>24</sup> See id at 120–21 & n 16 (Souter dissenting). The commentators the dissent relied on most were John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum L Rev 1889, 1974, 1978–82, 2000, 2002 (1983); John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 53–57 (Oxford 1987); and Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877* 575–87 (Harper 1988).

<sup>25</sup> See *Seminole Tribe of Florida*, 517 US at 121 (Souter dissenting); *Hans*, 134 US at 20.

<sup>26</sup> *Seminole Tribe of Florida*, 517 US at 122 (Souter dissenting).

<sup>27</sup> Id at 68–69.

<sup>28</sup> Each of the historical arguments surveyed above has been made by legal scholars about the cases in question. See, for example, Jeffries and Ryan, 100 Mich L Rev at 279–80 (cited in note 18); Michal R. Belknap, *Alarm Bells from the Past: The Troubling History of American Military Commissions*, 28 J S Ct Hist 300, 307 (2003); Edward A. Purcell Jr, *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts"*, 81 NC L Rev 1927, 2057 (2003).

in shaping constitutional adjudication, neither historians nor constitutional theorists seem to have carefully considered the question of whether such historical explanations could play a legitimate role in doctrinal analysis, constitutional or otherwise.<sup>29</sup> One reason for this may be that investigating the question is as much a jurisprudential inquiry as it is a traditionally legal or historical one. Pursuing it thus requires breaking down the boundaries that sometimes divide various subdisciplines of law, including historical, doctrinal, and philosophical scholarship.

Whatever the reason for such neglect, the goal of this Article is to put an end to it. It does so by challenging directly the deeply felt intuition—expressed well by Chief Justice Rehnquist in *Seminole Tribe*—that arguments which offer “extralegal” explanations of previous court decisions have no proper role to play in judicial argument. My claim, in short, is that the effort to historicize or impeach a past decision is a legitimate and potentially useful means of evaluating a decision’s authority as a matter of precedent. True, various practical and policy concerns might be offered to justify excluding such arguments from courtroom

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<sup>29</sup> On the historical side, see William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 Mich St L Rev 623, 624–25. Novak provides a helpful collection of sources examining the role of history in constitutional jurisprudence, including, among others, Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991); Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2005); and Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004). For other historical explanations of Court precedent, see generally Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford 2004); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 Cornell L Rev 203 (2008). For good examples of historical debates about the role political pressure has played in the Court’s constitutional decisions, see generally Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford 1998); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford 1995); G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 Am Hist Rev 1094 (2005); Laura Kalman, *Law, Politics and the New Deal(s)*, 108 Yale L J 2165 (1999). As for constitutional theorists, see, for example, Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9 (Oxford 1982) (comparing various types of constitutional argument including, among others, “textual argument,” “doctrinal argument,” “prudential argument,” and “historical argument,” but defining the last category as that kind of argument concerned with determining “the original understanding of the constitutional provision to be construed”); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189, 1194–1209 (1987) (discussing various forms of constitutional argument, including those based on the plain meaning of the constitutional text, those based on the framers’ intent, and those based on judicial precedent, but not including any mention of the kind of historicizing or impeaching argument discussed here).

debate, but I consider several such objections and show why none is particularly persuasive.

My argument proceeds in four parts. Part I distinguishes arguments that attempt to historicize court precedents in the way described above from other, less controversial uses of history to interpret previous decisions, which differ in subtle but important ways. Since I refer to the arguments with which I am concerned as “impeaching” arguments due to their structural similarity to the arguments lawyers make at trial when seeking to impeach witnesses, I defend and explain the analogy to witness impeachment in this Part. Still, for reasons explained below, my core argument in no way depends on the impeaching analogy.

Part II then lays the jurisprudential groundwork for the rest of the Article. Doing so requires engaging in some fairly technical philosophical analysis of the nature of, and justification for, precedent. Specifically, I show that the relevance of impeaching arguments to a court’s analysis of precedent depends on (1) which rationales underlie the precedential practice in question and on (2) whether that practice authorizes courts to make their own judgments as to the authoritative weight past decisions deserve.

Part III then makes the core claim of the paper. It applies the jurisprudential analysis of Part II to various contexts in which courts treat past decisions as authoritative: the practice of lower courts obeying the decisions of superior courts (so-called “vertical precedent”), the common law practice of treating a court’s own past decisions as binding (*stare decisis* or “horizontal precedent”), and finally, the role of *stare decisis* in the context of constitutional adjudication. I argue that under the most plausible rationales for, and models of, precedent considered in Part II, impeaching arguments are indeed relevant to a court’s precedential analysis at common law and in the constitutional context as well.

Part IV then responds to various practical and policy objections to using impeaching arguments in doctrinal analysis. I argue that such objections, though powerful, are not as persuasive as they first appear. Finally, in a short conclusion, I suggest some broader implications my argument may have for the relationship between constitutional history and theory more generally.



## I. HISTORY, PRECEDENT, AND IMPEACHING EVIDENCE

Before considering the role that impeaching arguments might play in a court's analysis of precedent, it will be helpful to clarify the structure of such arguments and to illustrate why they entail a distinctive type of reasoning. This Part does just that, first by distinguishing impeaching arguments from three other, less controversial uses of history and then by analogizing them to the kinds of arguments lawyers make when cross-examining witnesses at trial. Most of the examples below are drawn from the Supreme Court's constitutional jurisprudence, but the points made are generalizable to other courts and other doctrinal areas.

## A. Using History to Interpret the Meaning of a Past Decision

One relatively uncontroversial use of historical evidence involves using it to interpret the meaning of a past decision regarded as good law. When the historical evidence relied on is a traditional legal source, such as a previous court's written opinion, this use is paradigmatic of conventional legal analysis. But it is not unheard of for a court to look to other historical sources to help discern a decision's meaning.

Consider, for instance, the Supreme Court's recent decision in *Parents Involved in Community Schools v Seattle School District No. 1*.<sup>30</sup> There, the Court considered the constitutionality of two school districts' plans to maintain racial diversity in public schools by assigning students to schools based partly on their race. In concluding that the Equal Protection Clause barred the plans under review, Chief Justice Roberts, writing for the Court, quoted transcripts of the oral argument in *Brown v Board of Education of Topeka*<sup>31</sup> to show that the plaintiffs' counsel in that landmark decision had insisted that the Equal Protection Clause prohibited the government from using race as a factor in providing educational benefits.<sup>32</sup> "[H]istory will be heard," the Court proclaimed, and what history said, according to the Court, was that *Brown* stood for a colorblind principle that barred public school districts from using race when assigning students to schools, even for the purpose of maintaining racial diversity.<sup>33</sup>

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<sup>30</sup> 551 US 701 (2007).

<sup>31</sup> 347 US 483 (1954).

<sup>32</sup> *Parents Involved in Community Schools*, 551 US at 747.

<sup>33</sup> *Id.* at 746–48.

Using history to interpret the meaning of a precedent may be controversial in certain instances and for particular reasons. For instance, the transcripts from oral argument that the *Parents Involved* Court relied on may not be a very reliable indicator of what the *Brown* Justices thought about colorblindness.<sup>34</sup> One might even object to using a more reliable source, such as a judge or justice's internal memos and notes, either on the ground that what a court is properly interested in is the public meaning of past decisions, not the subjective intent of the person who decided it,<sup>35</sup> or because doing so might create perverse incentives for future judges and justices.<sup>36</sup> At least in part for these reasons, the widespread practice of courts is to exclude such evidence when interpreting precedents.<sup>37</sup>

But these objections, which mirror those made against the use of legislative history for the purpose of statutory interpretation,<sup>38</sup> only bear on a particular type of historical evidence used, rather than the use of history as such. So, for instance, if one were concerned with understanding the public meaning of the *Brown* holding, then presumably newspaper articles showing how it was understood at the time would also be relevant and not subject to the same concerns.

In any case, this use of history is clearly distinguishable from the impeaching arguments considered above. In his *Seminole Tribe* dissent, for instance, Justice Souter was not suggesting that the *Hans* Court *really* meant to authorize federal court jurisdiction over suits brought against states by their own citizens even though the language of the opinion suggests the opposite conclusion. Rather, he was using the historical evidence as part of an argument for not treating *Hans* as precedent at all.

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<sup>34</sup> See Schmidt, 94 Cornell L Rev at 215–16 (cited in note 29) (criticizing the Court for relying seemingly exclusively on these historical materials in interpreting the *Brown* decision).

<sup>35</sup> See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144 (Free Press 1990) (emphasizing the importance of a comparable distinction in the context of determining the original understanding of constitutional provisions).

<sup>36</sup> See Adrian Vermeule, *Judicial History*, 108 Yale L J 1311, 1339 (1999).

<sup>37</sup> See *id.* at 1313 (“Federal courts do not consider the judiciary’s internal records as interpretive sources bearing on the meaning of published opinions or judicially-promulgated rules.”) (citation omitted).

<sup>38</sup> Indeed, Professor Adrian Vermeule has drawn the analogy between such “judicial history” and legislative history in order to show that many of the arguments that support excluding the former seem to apply with equal force to the latter. See *id.* at 1315 (“[T]he judicial history puzzle may tell us something, perhaps a good deal, about the more familiar debates over legislative history and similar materials.”).

Similarly, Justice Thomas was not offering a particular gloss on the “pervasively sectarian”<sup>39</sup> language of *Hunt* on the ground that doing so better captures that Court’s meaning; instead, he was giving grounds for discarding the doctrine entirely because it had been based in religious animus.

## B. Using History to Show Changed Circumstances

It is also relatively uncontroversial for courts to use history to show that factual circumstances—whether social, legal, economic, or political—have sufficiently changed to justify abandoning a past decision’s doctrinal approach. In the 1997 antitrust case *State Oil Co v Khan*,<sup>40</sup> for instance, the Supreme Court recognized the importance of stare decisis, but observed that when interpreting the Sherman Act, where the Court acts much like a common law court, “there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience.”<sup>41</sup> The Court thus overruled its previous decision in *Albrecht v Herald Co*,<sup>42</sup> which had held that vertical maximum price fixing was per se unlawful, instead holding that such price fixing should be evaluated under the rule of reason.<sup>43</sup> Since *Albrecht*, the Court explained, it had yet to confront “an unadulterated vertical, maximum-price-fixing arrangement.”<sup>44</sup>

In the constitutional context, the Supreme Court has engaged in similar reasoning, though sometimes the relevance of changed circumstances is explicitly incorporated into substantive constitutional doctrine rather than functioning as an implicit exception to the doctrine of stare decisis. In *Roper v Simmons*,<sup>45</sup> for example, the Court overruled its previous decision in *Stanford v Kentucky*,<sup>46</sup> which had held that the Eighth Amendment did not bar states from executing defendants who had been sixteen years old at the time they committed murder.<sup>47</sup> It did so on the ground that interpreting the Eighth Amendment required

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<sup>39</sup> *Hunt*, 413 US at 743.

<sup>40</sup> 522 US 3 (1997).

<sup>41</sup> *Id.* at 20.

<sup>42</sup> 390 US 145 (1968).

<sup>43</sup> See *State Oil*, 522 US at 22.

<sup>44</sup> *Id.*, quoting *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 336 n 6 (1990) (quotation marks omitted).

<sup>45</sup> 543 US 551 (2005).

<sup>46</sup> 492 US 361 (1989).

<sup>47</sup> *Simmons*, 543 US at 555–56, 574.

looking to “the evolving standards of decency that mark the progress of a maturing society,” and concluding that those standards had evolved substantially in the nearly sixteen years since *Stanford* had been decided.<sup>48</sup>

The changed-circumstances justification for overruling a past decision is relatively uncontroversial, but it is quite different from the kind of arguments considered in the Introduction. Justice Souter was not arguing that *Hans* was at one point justifiable but that events had proven its interpretation of the Eleventh Amendment to be unworkable. Justice Thomas was not reasoning that considering whether a school was “pervasively sectarian”<sup>49</sup> was at one point properly relevant to determining Establishment Clause violations but that such a consideration had outgrown its utility.<sup>50</sup> Nor were the *Hamdan* amici suggesting that circumstances had changed since *Quirin*, thereby rendering it an anachronism. Instead, each of these arguments suggested that the decision under analysis was defective the moment it was decided.

### C. Using History to Contradict an Assumption of a Past Decision

Closely related to, but conceptually distinct from, the application of history just discussed is one that uses it to contradict a proposition on which a past court’s holding rests.<sup>51</sup> An example of this use of history is the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*.<sup>52</sup> There the Court considered whether the Due Process Clause rendered unconstitutional various provisions of a Pennsylvania statute regulating abortions.<sup>53</sup> In upholding the constitutional right to an abortion that the Court had announced in *Roe v Wade*,<sup>54</sup> the Court’s joint opinion distinguished *Roe* from other cases of a

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<sup>48</sup> *Id.* at 560–61, quoting *Trop v Dulles*, 356 US 86, 100–01 (1958) (quotation marks omitted). See also *Simmons*, 543 US at 564–68.

<sup>49</sup> *Hunt*, 413 US at 743.

<sup>50</sup> *Mitchell*, 530 US at 828–29.

<sup>51</sup> So closely related, in fact, that the Supreme Court lumps them together into one factor in its stare decisis analysis. See *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 855 (1992) (listing as one of the factors that could outweigh the policy of stare decisis “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

<sup>52</sup> 505 US 833 (1992).

<sup>53</sup> *Id.* at 846–53.

<sup>54</sup> 410 US 113 (1973).

“comparable dimension,” which had been subsequently overruled.<sup>55</sup> It explained that the Court had been justified in overruling *Plessy v Ferguson*<sup>56</sup> and *Lochner v New York*<sup>57</sup> (in *Brown* and *West Coast Hotel Co v Parrish*,<sup>58</sup> respectively) on the ground that history revealed those decisions to have been premised on “false factual assumptions.”<sup>59</sup> In particular, *Lochner* had been based on a false assumption “about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare,”<sup>60</sup> whereas the *Plessy* Court had wrongly assumed that legally enforced racial segregation did not inherently stigmatize African Americans with a “badge of inferiority.”<sup>61</sup> The Court thus distinguished *Roe* on the ground that history had *not* revealed it to have been based on analogously false premises.<sup>62</sup>

Another example of this use of history is the recent Fourth Amendment case, *Arizona v Gant*.<sup>63</sup> There the Court held that the Fourth Amendment bars police officers from searching the inside of a recent arrestee’s car unless the officer has a reasonable belief either that the arrestee can regain access to the car or that inside it there is evidence justifying the arrest.<sup>64</sup> In so holding, the Court disclaimed adherence to what it characterized as a “broad reading” of *New York v Belton*,<sup>65</sup> according to which police officers were permitted to search the inside of an arrestee’s vehicle irrespective of whether the arrestee could possibly reenter the vehicle and destroy any possible evidence.<sup>66</sup> The Court justified its treatment of *Belton* by reasoning that “[t]he experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely ‘within the area into which an arrestee might reach.’”<sup>67</sup>

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<sup>55</sup> *Casey*, 505 US at 861–64.

<sup>56</sup> 163 US 537 (1896).

<sup>57</sup> 198 US 45 (1905).

<sup>58</sup> 300 US 379 (1937).

<sup>59</sup> *Casey*, 505 US at 861–63.

<sup>60</sup> *Id* at 862.

<sup>61</sup> *Id* at 863, citing *Brown*, 347 US at 494–95 (quotation marks omitted).

<sup>62</sup> *Casey*, 505 US at 864.

<sup>63</sup> 129 S Ct 1710 (2009).

<sup>64</sup> *Id* at 1714.

<sup>65</sup> 453 US 454 (1981).

<sup>66</sup> *Gant*, 129 S Ct at 1719.

<sup>67</sup> *Id* at 1723 (quotation marks omitted), quoting *Belton*, 453 US at 460.

It is possible to interpret one of the arguments I've cited as an example of an impeaching argument as really an argument about false factual assumptions. Specifically, Justice Souter's argument about *Hans* could be construed in this way. The interpretation would go like this: The *Hans* Court considered the capacity of federal courts to enforce their judgments to be a valid and relevant factor in interpreting the scope of the Eleventh Amendment. It also assumed, as a factual matter, that federal courts did not possess the power to enforce judgments brought against a state by one of its own citizens and so held that the Eleventh Amendment barred federal court jurisdiction over such suits. But that factual assumption was subsequently proven to be false, which undermines the *Hans* decision's authority as precedent. Indeed, there is some textual support for this interpretation.<sup>68</sup>

Nevertheless, this is not a plausible interpretation of what Justice Souter was trying to do. Nowhere did he argue that the *Hans* Court was *mistaken* in thinking that it would not have been able to enforce a judgment against the state of Louisiana. Rather, Justice Souter suggested that the history he discussed "explains, but does not honor" the *Hans* decision.<sup>69</sup> Lest there be any doubt as to why the explanation he offered does not "honor" *Hans*, the article from which Justice Souter drew most heavily in making his historical argument makes it clear: "By couching its opinion in the abstractions of high jurisprudence and legal

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<sup>68</sup> Supporting this interpretation are two salient facts. First, the *Hans* Court did itself mention in its opinion the difficulty of enforcing the judgment against the state. See *Hans*, 134 US at 13. Second, Justice Souter arguably tried to characterize his own argument this way, insisting that his historical explanation of *Hans* was analogous to the Court's recent treatment of *Kentucky v Dennison*, 65 US (24 How) 66 (1860), in *Puerto Rico v Branstad*, 483 US 219 (1987). See *Seminole Tribe of Florida*, 517 US at 122 n 17. In *Dennison*, decided in 1860, the Court had held that federal courts had no power to compel a state officer to fulfill his duty under the Extradition Clause to deliver a fugitive back to a state from which he had fled. See *Dennison*, 65 US (24 How) at 109–10. In overruling *Dennison*, the *Branstad* Court suggested that the *Dennison* Court's perception of the power of the federal government was skewed because of the particular historical circumstances in which the case arose. The Court observed that although "it seemed clear to the Court in 1861 [sic], facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,'" within fifteen years, that assumption seemed unwarranted. *Branstad*, 483 US at 227, quoting *Dennison*, 65 US (24 How) at 107.

<sup>69</sup> *Seminole Tribe of Florida*, 517 US at 122.

history the [Hans] Court could avoid discussing *the unrelenting popular pressure that actually dictated its ultimate decision.*"<sup>70</sup>

Nor are the other examples we've considered plausibly interpreted as efforts to question the factual premises of the decisions at issue.<sup>71</sup> Justice Thomas was hardly claiming that the *Hunt* Court was under a false factual assumption about the contributions of American Catholics to public life. Nor were the *Hamdan* amici arguing that *Quirin* was bad law because the factual premises of the Court's reasoning were somehow faulty or inaccurate.

#### D. Using History to Impeach the Authority of a Past Decision

No, their arguments were about something else entirely. Each of them sought to deny the precedential authority of one of the Court's past decisions by challenging the sincerity or the impartiality of the past Court in offering reasons in support of it. I refer to them as "impeaching" arguments because they are structurally similar to the arguments lawyers often use to impeach witnesses at trial. Technically, impeaching arguments refer to any that have the effect of weakening the credibility of a witness, which includes arguments that show defects in a witness's perception, memory, or narrative capacity.<sup>72</sup> In this sense, a court that contradicts the assumption on which a past court's conclusion rests may also be said to "impeach" that court's decision. But here I use the concept of impeachment in the more specific sense to refer to those arguments that undermine a witness's credibility by raising doubts about her impartiality or sincerity—that is, by attempting to show that she is either consciously lying or unconsciously biased in some way.<sup>73</sup>

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<sup>70</sup> Gibbons, 83 Colum L Rev at 2001 (cited in note 24) (emphasis added). See *Seminole Tribe of Florida*, 517 US at 103–22 (Souter dissenting).

<sup>71</sup> See notes 6–18 and accompanying text.

<sup>72</sup> Richard O. Lempert, et al, *A Modern Approach to Evidence: Texts, Problems, Transcripts and Cases* 394–95 (West 4th ed 2011) (explaining that impeachment sometimes involves "revealing the limits of [a witness's] perception or memory of an event").

<sup>73</sup> Impeaching a witness through bias is considered such a significant form of evidence that the Supreme Court has determined that the Sixth Amendment's Confrontation Clause protects the right of criminal defendants to cross-examine witnesses about sources of bias. See *Davis v Alaska*, 415 US 308, 316–17 (1974) ("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). See also Lempert, et al, *Evidence* at 426 (cited in note 72) (observing that bias "is 'favored' as a mode of impeachment").

My suggestion is that arguments like those discussed in the Introduction, which seek to explain a past decision based on a court's institutional interests or its bigoted attitudes, are analogous to a cross-examining lawyer's effort to discredit the testimony of a witness by suggesting that her testimony is biased or that she has an interest in the case. Just as impeaching evidence in the trial context does not necessarily imply that the witness is wrong about a given matter—just that he or she cannot be trusted on the issue one way or the other—the inference supported by impeaching evidence in the precedential context is *not* that the precedent was necessarily wrongly decided and therefore must be overruled. Rather, it simply suggests that the decision should no longer be treated as having settled the matter or foreclosed further inquiry on the merits.<sup>74</sup>

Although both lay and expert witnesses can be impeached, the analogy to an *expert* witness is particularly apt because both judicial precedents and expert witnesses serve as forms of *authority* in their respective domains. Treating something as an authority means taking the mere fact that the authority said or did X as a reason to believe or do X.<sup>75</sup> Thus, in both cases, impeaching evidence makes it less likely that the statements made (or actions taken) by the authority in question are proper because it increases the likelihood that something other than the authority's belief in the truth of the statement (or the propriety of the action) explains why it said (or did) what it did.<sup>76</sup>

The essential similarity between the two kinds of argument can be most vividly seen if one considers the more extreme case

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<sup>74</sup> Thus, the *Hamdan* amici close their brief with a request to the Court that it repudiate the *Quirin* decision, so that “without the heavy hand of *Quirin* on the scales of justice, the Court can address the merits of the weighty constitutional issues presented in this case.” Legal Scholars Brief at \*19 (cited in note 9). The distinction drawn in the text is similar to that drawn by English courts between “overruling” and “undermining” a precedent. See Rupert Cross and J.W. Harris, *Precedent in English Law* 127–33 (Oxford 4th ed 1991) (explaining that according to English *stare decisis* doctrine, a past decision is “undermined” when it is revealed to have been based on a false assumption about the law).

<sup>75</sup> For this reason, philosophers often say that authorities provide their subjects with content-independent reasons for action or belief. See Scott J. Shapiro, *Authority*, in Jules Coleman and Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence & Philosophy of Law* 382, 400 (Oxford 2002) (observing, in the context of epistemic or “theoretical” authority, that such authorities are legitimate when “their directives are *also* conclusive reasons to believe that their content is justified”).

<sup>76</sup> See *United States v Abel*, 469 US 45, 51 (1984) (“A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.”).



where a judge is accused of having a personal financial interest in the outcome of a case but has refused to recuse herself. Such cases are typically litigated as alleged violations of judicial codes of conduct, though in particularly extreme instances they may rise to the level of a constitutional violation of due process of law.<sup>77</sup> In either case, the claim is that the judge violated her professional duty by failing to recuse herself in a situation where one might reasonably suspect that her impartiality and judgment would be (or would have been) compromised.<sup>78</sup> The reasonable suspicion triggered by such circumstances depends on precisely the same background psychological assumptions as those that underlie a cross-examining lawyer's effort to impeach an expert by showing that she has a personal stake in the outcome of the case or a financial reason to testify in one way rather than another. In both cases, the assumption is that the prospect of earning personal rewards is likely to influence a person's professional judgment, whether consciously or unconsciously.

Historicizing or impeaching arguments made in the context of interpreting case law aim to expose a comparable defect, but typically in a weaker sense. Consider again Justice Souter's argument. His claim was not that the Justices of the Court had a *personal* financial interest in the outcome, but rather that the Court's *institutional* interests might have been sufficiently powerful to influence its decision in an improper way.<sup>79</sup> And the

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<sup>77</sup> See, for example, *Tumey v Ohio*, 273 US 510, 516, 520, 535 (1927) (concluding that a defendant's due process rights were violated when he was convicted under the state's Prohibition Act by a mayor who presided over the case and who only received payment for his services if the defendant was convicted). See also *Caperton v A.T. Massey Coal Co.*, 129 S Ct 2252, 2264–65 (2009) (holding that a judge's refusal to recuse himself from a case in which one of the parties had spent over \$1 million more than either of the campaign committees on behalf of the judge's electoral campaign and thus had "a significant and disproportionate influence on the electoral outcome" constituted a violation of due process of law).

<sup>78</sup> See, for example, 28 USC § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); *Caperton*, 129 S Ct at 2264, quoting *Withrow v Larkin*, 421 US 35, 47 (1975) ("[T]he Court has asked whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.") (quotation marks omitted).

<sup>79</sup> Such institutional incentives can also trigger a due process violation. See *Ward v Village of Monroeville*, 409 US 57, 60 (1972) (holding that due process was violated when a mayor presided over cases in which the fines and fees he was authorized to levy against parties funded a large portion of the town's income on the ground that the "mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court").

point is not that any particular justice should have recused himself, but rather that, insofar as the decision seems to have been influenced by such improper considerations, its status as precedent should thereby be cast into doubt. The same is true of Justice Thomas's suggestion in *Mitchell* that the *Hunt* Court's focus on "pervasively sectarian" schools was motivated in part by anti-Catholicism or the *Hamdan* amici's allegation of bias and interest in *Quirin*.<sup>80</sup> The suggestion in each case is that the decision in question was improperly motivated and so undeserving of continuing deference.

Notably, in both contexts—assessing witness credibility and evaluating the authority of past decisions—the consequence of drawing the inference intended is often described metaphorically in terms of "weight." The *weight* of the expert's testimony is weakened by impeaching evidence, just as the logic of impeaching arguments like Justice Souter's or Justice Thomas's is that the explanation offered for a past decision—institutional interest in the one case, religious bigotry in the other—undermines the precedential *weight* of that decision.<sup>81</sup> In the same way, the *Hamdan* amici's insistence that the historical evidence they adduced leaves *Quirin* "discredit[ed]" reveals the way in which *stare decisis* implicates a notion of *credibility*, a concept more traditionally associated with testimony.<sup>82</sup>

Analogizing such arguments to those made in the course of evaluating witness testimony strikes me as useful and illuminating for primarily two reasons. First, it demonstrates the way in which the legal system already not only tolerates but authorizes and privileges the kind of reasoning that such arguments implicitly depend on—albeit in the quite different context of

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<sup>80</sup> *Hunt*, 413 US at 743.

<sup>81</sup> Interestingly, Justice Souter sought to distance himself from the logic of his own argument. He denied that he was arguing that "historical circumstance may undermine an otherwise defensible decision." *Seminole Tribe of Florida*, 517 US at 122 n 17 (Souter dissenting). Instead, he insisted that it was only because the legal analysis in *Hans* was so poor that one was "forced to look elsewhere" for an explanation of the poor decision. *Id.* (Souter dissenting). But surely this is pure rhetoric. For while it is true that the quality of the *Hans* Court's reasoning counts as its own sort of evidence as to the correctness of its interpretation of the Constitution, either the evidence Justice Souter discussed about the historical circumstances surrounding *Hans* is relevant to how the Court should treat that case as a matter of precedent, or it is *not* relevant to that question. Whether it is relevant depends on one's theory of precedent, as will be discussed in Part II below. But if Justice Souter himself did not consider that evidence relevant, he presumably would not have discussed it. No one, after all, was literally forcing him to look anywhere for an explanation.

<sup>82</sup> Legal Scholars Brief at \*18 (cited in note 9).

trial fact-finding.<sup>83</sup> Second, it focuses attention on the way in which such arguments aim to *discredit* a precedent, rather than to engage directly with the underlying legal issues with which it deals. It thereby underscores how precedential analysis involves reasoning from *authority*.<sup>84</sup>

#### E. A Preliminary Objection

An important objection to my characterization of impeaching or historicizing arguments remains. One might assert that, as I have described them, such arguments depend on drawing a naïve distinction between law and politics that cannot survive the lingering challenge of critical legal studies and, before that, legal realism.<sup>85</sup> In suggesting that Justice Souter's political explanation of *Hans*, for instance, might undermine that decision's authority as precedent, I have assumed that one can distinguish meaningfully between a decision determined by the law and one determined by politics. In fact, though, the two are indistinguishable. The law—especially constitutional law—is so indeterminate that a court's decisions are effectively driven by the judges' values. Whether one takes a romantic view of this process, seeing it as a legitimate part of a court's "best interpretation" of the relevant legal materials, or a more sinister view of it, seeing it as the exertion of power masked as ideology,<sup>86</sup> the

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<sup>83</sup> See FRE 607 ("Any party, including the party that called the witness, may attack the witness's credibility.").

<sup>84</sup> Nevertheless, I have found that some people either do not see the essential structural similarity between the two forms of argument or do not find the analogy useful, perhaps because some of the more concrete differences between finding facts at trial and interpreting texts on appeal cloud the underlying similarity. I must therefore emphasize that *no part of my core argument turns on the analogy to witness impeachment*. (I qualify this statement with the modifier "core," because I extend my argument in the Conclusion in a way that, at least to my mind, derives further support from the use of impeaching arguments in the trial context.) Those who remain unmoved by it may simply substitute the term "historicizing" whenever I use the term "impeaching" below.

<sup>85</sup> See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L J 1515, 1516 n 6 (1991) (listing the claim "law is politics" as an example of a "general proposition[] on which most people committed to the [critical legal studies] project agree"). In linking legal realism with critical legal studies I do not mean to suggest that the realists made the same "law is politics" claim as the later critical legal theorists. They did not. But both groups share in common a rejection of the view that application of traditional legal materials is insufficient to decide cases. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex L Rev 267, 299–300 (1997).

<sup>86</sup> Compare Ronald Dworkin, *Law's Empire* 87 (Belknap 1986) ("Judges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice."), with J.M. Balkin,

distinction between legal and political decisions falls apart and so with it the coherence of the idea that one can undermine a past decision by pointing out that it was based on “extralegal” considerations.

Responding to this objection requires first distinguishing between a claim about the nature of law and a claim about how judges should decide cases. The use of impeaching arguments does not depend on any claim at all about what law is and whether it differs from something called “politics.” It only requires that some distinction be drawn between considerations judges *properly* rely on when deciding cases and those they rely on *improperly*. And even that is a very weak assumption. For neither the realists nor the critical theorists denied that *any* distinction could be drawn between good and bad legal decision making. Rather, they thought judges often did, and should, look to other considerations, beyond the black-letter law, that they deemed relevant to a fair or just resolution of the dispute.<sup>87</sup>

The use of impeaching arguments is perfectly consistent with such an approach to deciding cases. Indeed, their use does not depend on any *particular* theory of what sources and considerations courts should rely on when adjudicating cases.<sup>88</sup> Thus,

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*Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L Rev 392, 426 (1987) (observing that “[t]he whole point of the [critical legal studies] critique of American law has been that judges do suffer from false consciousness, and the law does reflect the ideological biases of judges,” but emphasizing that the critical legal studies view is “perfectly consistent with Dworkin’s explanation of how judges decide cases”).

<sup>87</sup> See, for example, Leiter, 76 Tex L Rev at 275 (cited in note 85) (describing as the “Core Claim” of legal realism the view that “judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law”). Professor Leiter argues that Judge Jerome Frank had a particularly “extreme” interpretation of this claim. *Id.* at 269. But even Judge Frank endorsed a normative theory of adjudication, albeit a rather idiosyncratic one. See Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 Buff L Rev 1127, 1129 (2010) (arguing that, contrary to conventional wisdom, Judge Frank did develop a theory of adjudication). On the critical legal theorist side, see, for example, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685, 1777 (1976) (advocating that an “altruist judge” should “view himself as a resource whose effectiveness in the cause of substantive justice is to be maximized,” which requires in part relying on standards, rather than rules, when deciding cases).

<sup>88</sup> In technical terms, we might say that the coherence of such arguments is “robust” with respect to different normative theories of adjudication. See Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* 5–6 (Oxford 1996) (explicating the concept of robustness, which describes the dependence of one theory’s justification on another theory’s justification). See Micah Schwartzman, *Judicial Sincerity*, 94 Va L Rev 987, 1001 (2008):

The principle of legal justification is robust in relation to all but the most radical theories of adjudication. Because it leaves open what counts as a reason in

for instance, under some theories of constitutional adjudication, it may be perfectly appropriate for the *Hans* Court to have based its interpretation of the Eleventh Amendment on institutional considerations, perhaps on the ground that maintaining its reputation as a strong institution is necessary for it to enforce its judgments in a legitimate manner.<sup>89</sup> For such a theory, the evidence adduced by Justice Souter would *not* impeach the decision. Instead, it would help vindicate it. But as long as one's theory of adjudication entails that there are *any* considerations that are out of bounds for a court to contemplate, then that theory leaves room for an impeaching argument. And a theory of adjudication that denies that there are *any* considerations that are improper for a court to consider—even those based on the judge's personal gain or in naked racial animus—would be a radical and implausible one indeed.

## II. IMPEACHING EVIDENCE AND THE PRACTICE OF PRECEDENT

This Part tackles what is potentially a far deeper problem for the use of impeaching arguments. It might be argued that the motivations behind a past court's decision are simply *irrelevant* to a present court's decision of whether to treat that past decision as binding on it. Such historical facts are simply not something with which courts are properly concerned at all.

That objection has some force. In fact, it is sometimes true. But determining whether, and if so when, it is true requires a careful philosophical analysis of the nature of, and justification for, the practice of making decisions according to precedent. Specifically, it depends on two related but distinct issues. First, it depends on what the rationale is for treating past decisions as authoritative sources of law generally. Second, it depends on whether courts are authorized to make their own independent judgments as to whether they are bound by past decisions they recognize to be applicable to the case at hand.

This Part takes up each of these jurisprudential issues and shows how their resolution determines the circumstances in

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the context of judicial decisionmaking, it is compatible with a wide diversity of theories. The principle could be endorsed by formalists, legal realists, textualists, purposivists, process theorists, pragmatists, and so on.

<sup>89</sup> See Deborah Hellman, *The Importance of Appearing Principled*, 37 *Ariz L Rev* 1107, 1139–51 (1995) (arguing that the Supreme Court properly takes into account its own reputation for being principled on the ground that doing so may be necessary to ensure that it can enforce its judgments generally and thus legitimately).

which impeaching evidence of the sort described above would be relevant to a court's inquiry. It then explains how the two issues relate to each other so that the analysis in this Part can be applied more usefully to actual practices of precedent, a task taken up in Part III. To foreshadow slightly, Part III argues that the rationales for, and models of, precedent that recognize the relevance of impeaching evidence provide the most persuasive interpretations of *stare decisis* in the context of common law and constitutional adjudication.

#### A. Why Past Decisions Bind Courts

There is a vast literature on precedent and the rationales that may underlie it.<sup>90</sup> Below I survey some of the most persuasive and commonly offered justifications and show why under some, but not all, of the justifications for treating past decisions as authoritative, impeaching evidence is relevant to a present court's inquiry. For the purposes of this Section, I assume that courts have authority to consider whether to accord a particular past decision authoritative weight. In the following Section I relax this assumption, raising the possibility that they may be denied that authority entirely.

##### 1. Rule-of-law values: certainty and formal equality.

The values of legal certainty and formal equality in some ways reflect quite different concerns, but I consider them here together under the general category of "rule of law" values.<sup>91</sup> Probably the most common justification for precedent lies in its

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<sup>90</sup> See generally Cross and Harris, *Precedent in English Law* (cited in note 74); Gerald J. Postema, *On the Moral Presence of Our Past*, 36 McGill L J 1153 (1991); Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1 (1989); Frederick Schauer, *Precedent*, 39 Stan L Rev 571 (1987); Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 Oxford J Legal Stud 215 (1987); David Lyons, *Formal Justice and Judicial Precedent*, 38 Vand L Rev 495 (1985); Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford 1961); Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 ABA J 334 (1944); Herman Oliphant, *A Return to Stare Decisis*, 14 ABA J 71 (1928). See also Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 262–89 (Princeton 1949).

<sup>91</sup> In doing so, I do not mean to suggest that vindicating such values is sufficient to establish the rule of law, which is a controversial claim. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga L Rev 1, 5 (2008) ("I shall argue that our understanding of the Rule of Law should emphasize not only the value of settled, determinate rules and the predictability that such rules make possible, but also the importance of the procedural and argumentative aspects of legal practice.").

capacity to ensure legal certainty.<sup>92</sup> Following precedent generates a number of benefits in this regard: it enables people to predict how the state's coercive power will be exercised so that they can exercise their autonomy in making plans,<sup>93</sup> as well as to coordinate their behavior with others;<sup>94</sup> it protects the interests of those who have already relied on past decisions;<sup>95</sup> it curbs the discretion of judges, thereby limiting potential abuses of power;<sup>96</sup> and, more generally, it fosters political stability by ensuring a degree of continuity in the structure of rights and duties.<sup>97</sup> In addition to these benefits, treating the holdings of past decisions as binding on present courts serves the goal of equality by "treating like cases alike."<sup>98</sup>

Impeaching evidence would *not* be relevant to a court's decision to follow precedent solely for the purpose of ensuring legal

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<sup>92</sup> See Wasserstrom, *The Judicial Decision* at 60 (cited in note 90) ("The reason that undoubtedly is most often cited as constituting a justification for the doctrine of precedent is that its consistent application assures to the legal system a degree of certainty which would otherwise be impossible to attain.").

<sup>93</sup> See Schauer, 39 *Stan L Rev* at 597 (cited in note 90):

When a decisionmaker must decide [a] case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.

<sup>94</sup> See Scott Hershovitz, *Integrity and Stare Decisis*, in Scott Hershovitz, ed, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* 103, 108 (Oxford 2006) (observing that coordination benefits contribute to the justification of the practice of so-called vertical precedent).

<sup>95</sup> See Alexander, 63 *S Cal L Rev* at 14 (cited in note 90) ("[S]ome people, despite the lack of any formal practice of precedent following, will justifiably rely on the precedent court's opinion and will modify their behavior in response to it. A constrained court, therefore, should take that behavior into account when determining what decision to reach."); Frank, *Courts on Trial* at 286 (cited in note 90) ("Most important are the cases in which there has been actual reliance upon the precedents, so that it would be unjust to change them, retroactively, as to persons who have thus relied.").

<sup>96</sup> See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 *Va L Rev* 1, 4–5 (2001) (observing that in the eighteenth and nineteenth centuries, "Americans viewed *stare decisis* as a way to restrain the 'arbitrary discretion' of courts"). See also Federalist 78 (Hamilton), in *The Federalist* 521, 529 (Wesleyan 1961) (Jacob E. Cooke, ed).

<sup>97</sup> See Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 43 (Harvard 2009) ("Stare decisis, in thus valuing settlement for settlement's sake and consistency for consistency's sake, serves a range of values all having something to do with *stability*."); Frank, *Courts on Trial* at 268 (cited in note 90) ("A more powerful argument for *stare decisis* rests on the need for stability. Only if rules are certain and stable, it is said, can men conduct their affairs with safety.").

<sup>98</sup> Ronald Dworkin, *Taking Rights Seriously* 113 (Harvard 1977) ("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.").

certainty or treating like cases alike. The reason lies in the purely formal quality of these justifications; that is, the relevant benefits accrue irrespective of the content of the rule embodied in the past decision and, therefore, irrespective of anything that might bear on the court's reasoning in support of that rule.<sup>99</sup> If the sole and sufficient reason to follow *Hans*, for instance, is that states have relied on the immunity from suits brought by their own citizens that *Hans* ensured, then that remains a reason to follow it regardless of whether the case was rightly decided or how the court reached its decision. Or if the point of treating *Hunt* as binding precedent is to ensure that the parties in *Mitchell* were treated in a relevantly similar way to the parties in *Hunt*, then that goal is achieved irrespective of whether the *Hunt* Court was motivated by some sort of religious animus.<sup>100</sup>

## 2. Epistemic deference.

Under the epistemic-deference rationale, courts follow precedent because they presume the previous case to have been correctly decided.<sup>101</sup> The justification for such an assumption varies depending on the context. In the context of vertical precedent, for instance, superior courts are sometimes said to have greater expertise than lower courts or to have more time and resources to decide difficult legal issues.<sup>102</sup> In the context of common law

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<sup>99</sup> See Schauer, *Thinking Like a Lawyer* at 62 (cited in note 97) ("With respect to both rules and precedents, the key idea is that they are *authoritative*. Their force derives not from their soundness but from their status, and philosophers of law refer to this feature of authority as *content-independence*."). Although Professor Schauer characterizes all decision making according to precedent as content-independent, we will see below that some justifications are, in a sense, *more* independent of content than others.

<sup>100</sup> Of course, if the criterion determining relevance is itself morally objectionable, as Justice Thomas suggested, then it is hard to see why perpetuating the injustice is justified. And that is precisely why some philosophers have questioned how much work the equality value does in justifying a regime of precedent. See, for example, Alexander, 63 S Cal L Rev at 10 (cited in note 90).

<sup>101</sup> See Wasserstrom, *The Judicial Decision* at 43 (cited in note 90) (ascribing to John W. Salmond the view that past cases are presumed to be correct); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L J 503, 512 (2000) ("Precedent means that prior decisions are taken as correct, or correct unless shown otherwise to some requisite degree.").

<sup>102</sup> See Hershovitz, *Exploring Law's Empire* at 108 (cited in note 94) ("To the extent that higher court judges have superior expertise to lower court judges (or even simply more time and resources to bring to bear on a case), lower court deference to the ruling of higher courts will improve lower court decision making."); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan L Rev 817, 838 (1994) ("If we suppose decisionmakers in higher courts are more proficient at legal reasoning, we may conclude they are more likely to arrive at 'better' answers than lower courts.").



stare decisis, the deference to past decisions is grounded on the view, associated particularly with the thought of Edmund Burke, that in the realm of human affairs, it is wiser to defer to the collective judgments of the past than to attempt to use reason to organize society according to abstract principles.<sup>103</sup>

In either case, though, the critical point is that the presumption of correctness is justified on *epistemic* grounds.<sup>104</sup> Although one could coherently assert that courts presume past cases to have been correctly decided in order to protect reliance interests,<sup>105</sup> this rationale asserts something stronger, namely that courts presume past cases to have been correctly decided because that is actually likely to be the case. And this is true whether one defines “correctness” in terms of justice, fidelity to natural law, fidelity to written law, efficiency, or any other criterion.

The epistemic-deference rationale is made more plausible as a general justification for following precedent if one assumes that concerns about institutional efficiency also come into play. It has long been argued that courts defer to precedent in part to avoid having to rethink the underlying considerations relevant to any particular dispute.<sup>106</sup> The epistemic rationale provides a

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<sup>103</sup> See Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1056 (1990) (discussing Edmund Burke in defending the practice of stare decisis partly on the ground that “[t]he usages and institutions of every long-established political regime represent an accumulated fund of wisdom and experience, and any generation would be presumptuous . . . to think it can replace this fund using only its own intellectual resources”); David A. Strauss, *The Living Constitution* 41 (Oxford 2010) (quoting Burke and arguing that the common law practice of stare decisis is premised on the idea that “[i]t is an act of intellectual hubris” to think that one knows better than the “accumulated wisdom” of the past); Thomas W. Merrill, *Bork v. Burke*, 19 Harv J L & Pub Pol 509, 509–11 (1996) (describing and endorsing a theory of constitutional interpretation he dubs “conventionalism,” which accords a strong role to precedent and which draws its inspiration from the thought of Edmund Burke).

<sup>104</sup> In the philosophical literature on authority, this is sometimes called “theoretical authority.” See Shapiro, *Authority* at 399 (cited in note 75) (observing that “the rationality of relying on theoretical authority seems unproblematic” because “[w]hen some person knows more about a subject that [sic] one does, it makes good sense to defer to that person’s judgment”).

<sup>105</sup> Evidentiary presumptions, for instance, are often justified on policy grounds. See Graham C. Lilly, *An Introduction to the Law of Evidence* § 3.2 at 61–62 (West 3d ed 1996) (listing various evidentiary presumptions and explaining that for some of them, “the probative force of the basic facts may not be so convincing, yet some policy rationale or procedural convenience may make the presumed conclusion desirable”).

<sup>106</sup> See Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (Yale 1921) (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”); Schauer,

justification for doing just that: if it is likely that the past court's holding is correct, then the present court can simply assume that the holding is valid and defer to the previous court's judgment.<sup>107</sup>

Unlike the rule-of-law rationale for following precedent, the epistemic-deference rationale does imply the relevance of impeaching evidence to a court's determination of whether to treat a past decision as binding on it. Indeed, under this rationale the analogy to the expert at trial fits perfectly. Although such epistemic deference may generally be justified, if in a given case there is historical evidence presented suggesting that the Court was less concerned with getting the law right than with pursuing some "extralegal" goal (such as preserving the court's institutional authority or appeasing a powerful wartime President), then that will make it more likely that such deference is *not* in fact justified in this case.

*Seminole Tribe* offers a nice illustration of how impeaching evidence bears on the epistemic-deference rationale. There, the Court justified its deference to *Hans's* interpretation of the Eleventh Amendment in part on the ground that the *Hans* Court had a "much closer vantage point" than did the dissent from which to analyze the meaning of the Eleventh Amendment.<sup>108</sup> But if Justice Souter is right that the Court had strong institutional reasons to decline jurisdiction over the plaintiff's case, then that fact would quite reasonably cast doubt on the Court's assumption that the *Hans* Court's decision was due to its closer "vantage point" to the drafting of the Eleventh Amendment. True,

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*Thinking Like a Lawyer* at 43 (cited in note 97) (observing that "stare decisis brings the advantages of cognitive and decisional efficiency").

<sup>107</sup> To the extent that this efficiency rationale does underlie the practice of following precedent, it reveals the mistake in limiting the concept of "following precedent" to include only those situations where a court obeys a past decision even though it believes it to have been wrongly decided. See, for example, Alexander, 63 S Cal L Rev at 4 (cited in note 90) (limiting his discussion of precedent to those situations where a precedent may be said to "constrain a subsequent court of lesser or equal authority to reach a decision different from the one the latter court would have reached in the absence of the precedent case"); Schauer, *Thinking Like a Lawyer* at 88 (cited in note 97) (distinguishing the use of precedent from reasoning by analogy on the ground that "in the latter a previous decision is selected in order to support an argument now, while in the former a previous decision imposes itself to preclude an otherwise preferred outcome"). Doing so is a mistake because under the efficiency-of-decision-making view, if the rule of a previous decision is clearly applicable to the set of facts with which a court is presented, then in theory the court does not ever reach an independent conclusion about what the right outcome would be *but for* the binding precedent.

<sup>108</sup> *Seminole Tribe of Florida*, 517 US at 69.

such evidence may not be sufficient to deprive the decision of its precedential weight, since it is certainly possible that the institutional pressures on the Court aligned with its own independent constitutional analysis. But insofar as the *Seminole Tribe* Court was *deferring* to the judgment of the *Hans* Court, such facts are at least *relevant*, in the technical sense of that word, to whether *Hans* deserves to be accorded precedential weight.<sup>109</sup>

One might object that for a court to consider such evidence defeats the whole purpose of treating a past decision as authoritative. If, as suggested, the premise of the practice is that it is not worthwhile to have later courts reconsider the underlying merits of the earlier decision, then for a court to consider the reasoning of the past decision is to defeat the rationale on which the practice is based.<sup>110</sup>

Below we will consider more generally the question of whether a later court is authorized to make an independent evaluation of whether to treat a past decision as binding on it. But here it is worth pointing out why this objection fails—it misses precisely what is distinctive about impeaching evidence. When considering such evidence, the court is *not* reevaluating the underlying reasons that led the past court to reach its decision. Rather, it is considering evidence bearing on whether the assumption which justifies its treatment of the precedent as an authority actually holds.<sup>111</sup> Again, the comparison to deference to authority in the trial context is revealing: since the purpose of allowing experts to testify is that they are able to opine on matters which the jury is not competent to assess, it may be irrational for the jury to try to evaluate the expert's underlying

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<sup>109</sup> See FRE 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

<sup>110</sup> Put into the terms of Professor Joseph Raz's “service conception” of authority, the claim would be that in considering such evidence, the court is failing to treat the precedent as providing the present court with “pre-emptive” reasons that properly replace the court's “dependent” reasons that already apply to it. Joseph Raz, *The Morality of Freedom* 59–60 (Clarendon 1986). See also Shapiro, *Authority* at 404 (cited in note 75) (explaining that under Professor Raz's view, for parties to consider an arbitrator's ruling as an ordinary reason rather than a preemptive reason would be to “vitiating the purpose of the arbitration” since the arbitrator's decision “is supposed to eliminate the need to deliberate and debate the merits of the case that they have submitted”).

<sup>111</sup> See Raz, *Morality of Freedom* at 42 (cited in note 110) (using an arbitrator as an example of an authority and explaining that if “the arbitrator was bribed, or was drunk while considering the case . . . each party may ignore the decision”).

reasoning.<sup>112</sup> But if the jury learns that the expert has a reason to be biased or interested in some way, then, for the reasons already discussed in Part I, the jury may rationally take that fact into account.<sup>113</sup> In the same way, a court that considers evidence impeaching a particular decision does not defeat the purpose of treating past decisions authoritatively as a general matter.

### 3. Integrity.

More recently, scholars have offered a justification for following precedent that might best be described as a *moral* rationale. Like the equality rationale, this view sees following precedent as valuable because it involves treating people in a consistent way over time and across jurisdictions.<sup>114</sup> But it recognizes that this value cannot be entirely explained by reference to the fairness of “treating like cases alike.”<sup>115</sup> Instead, it insists that there is inherent value in the state treating its citizens in a coherent and *principled* way. This typically involves analogizing a political community to an individual person.<sup>116</sup> Proponents of

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<sup>112</sup> See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 Yale L J 1535, 1552–53 (1998) (asking rhetorically, “if a judge or a jury does not have the requisite scientific training, how can that judge or jury make a warranted choice between competing ‘vigorously cross-examined’ claims by putative experts in, say, medicine, mathematics, chemistry, or biology?”).

<sup>113</sup> See notes 72–76 and accompanying text.

<sup>114</sup> See, for example, Dworkin, *Law’s Empire* at 165–66 (cited in note 86) (describing and endorsing an ideal of “integrity” that “requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some”); Postema, 36 McGill L J at 1177 (cited in note 90) (“Integrity in a community takes the form of an ideal of equality, not the formal or abstract equality of treating like cases alike, but substantive equality, equality among members in recognition of their co-membership.”).

<sup>115</sup> Postema, 36 McGill L J at 1168 (cited in note 90) (“[F]rom the fact that past decisions project as it were a way of treating people the same, it does not follow that that is a way of treating them fairly, or that people are treated unfairly if this projection is not followed.”). See also Dworkin, *Law’s Empire* at 183 (cited in note 86) (“We cannot explain our hostility to internal compromise by appeal to principles of either fairness or justice as we have defined those virtues.”).

<sup>116</sup> See Dworkin, *Law’s Empire* at 167 (cited in note 86) (“Political integrity assumes a particularly deep personification of the community or state.”); Postema, 36 McGill L J at 1176 (cited in note 90):

The thesis I shall now defend on the basis of the analogy to the argument in the individual case is that we can trace the importance of the moral presence of our past, and of precedent in particular, to the duty to keep faith with each other, in both dimensions of our communal relations.

Jed Rubinfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 93 (Yale 2001) (“I will be obliged to confront the great difficulties involved in supposing that a

this view then suggest that in both cases we can recognize, and should admire, a certain *integrity* or adherence to principles and commitments across domains and over time.<sup>117</sup> By seeking to ensure that courts apply the same rules and principles as other courts have, the practice of precedent expresses and embodies the moral principle of integrity.<sup>118</sup>

As with the epistemic-deference rationale, impeaching evidence would indeed be relevant under the integrity rationale for following precedent, though here the reason is less straightforward. It lies in the weakened moral force of a decision that did not itself demonstrate a concern with integrity. Consider a person who is faced with a decision and is trying to figure out whether, in making the decision, integrity requires her to remain faithful to an earlier decision or commitment she made. Suppose she reads an old journal she kept at the time of the first decision and learns that she only made that earlier decision for some selfish, short-term reason (such as to turn a quick profit or to gratify a sexual impulse). It seems plausible to think that the earlier decision or commitment ought not any longer constrain her future efforts to act with integrity since, in retrospect, the reason for that earlier decision appears shortsighted or ephemeral.

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*people* might be regarded as a collective agent, persisting over time, able to make and to live under its own commitments.”).

<sup>117</sup> See Dworkin, *Law's Empire* at 172 (cited in note 86) (explaining that his theory of law as integrity “assumes that the community can adopt and express and be faithful or unfaithful to principles of its own, distinct from those of any of its officials or citizens as individuals”); Postema, 36 McGill L J at 1176 (cited in note 90) (“If we, in and through the communities we constitute, are to deliberate and act purposively and responsibly *in* time, we must be able to see our common actions as fitting into meaningful patterns and practices *through* time.”); Rubinfeld, *Freedom and Time* at 43 (cited in note 116) (describing the Constitution as “a democratic effort by a people to write down and live up to its own foundational commitments over time”).

<sup>118</sup> See Postema, 36 McGill L J at 1177–78 (cited in note 90) (“In this notion of communal integrity and its expression in a distinctive notion of equality, we can account for the moral force of precedent.”); Rubinfeld, *Freedom and Time* at 189 (cited in note 116) (“[T]he precedentialist, common law style of adjudication is the means through which a judiciary, holding certain results more or less constant, gives meaning to legal and political commitments over time.”). Professor Dworkin does not explicitly state that integrity justifies the practice of following precedent, but it seems implicit in what he calls “adjudicative integrity.” Dworkin, *Law's Empire* at 167, 217–29, 337 (discussing how the adjudicative principle of integrity “asks those responsible for deciding what the law is to see and enforce it as coherent in that way”). See also Hershovitz, *Exploring Law's Empire* at 115 (cited in note 94) (“A court displays integrity when its decisions reflect a commitment to a coherent and defensible view of the rights and duties people have under the law. Such a commitment can only be displayed by a pattern of decisions across time.”).

And that is true even if the reasons she offered at the time in support of the decision were plausible ones.

The same is true when a court considers whether to defer to one of its past decisions for reasons of integrity. If there are facts that suggest that the Court in a past case decided the way it did for temporary, political reasons or for other reasons that we consider irrelevant to principled adjudication—such as those Justice Souter purports to uncover in his discussion of *Hans* or the anti-Catholic prejudice Justice Thomas found in *Hunt*—then those facts seem relevant to whether the Court has any obligation to remain faithful to it. And this logic applies not only to past decisions of the same court, but also to those of other courts. Having integrity, under this view, means being principled over time and across jurisdictions and subject matters.<sup>119</sup> So if it turns out that a decision of one court is binding on another for reasons of integrity, a discovery that that court was not making a good-faith effort to be principled is a reason to refuse to treat that court's decision as authoritative.<sup>120</sup>

Note, though, that this is true not for epistemic reasons, but rather for moral ones—that is, for reasons of integrity. So it is not that the “extralegal” explanations of *Hans* or *Hunt* count as evidence that the constitutional analyses underlying them were poor; rather, the point is that the obligation that political integrity normally imposes on us to respect past decisions is weakened if those Courts were not themselves respecting the demands of integrity. We might say, then, not that a decision's *credibility* is *impeached* by the historical evidence, but rather that its *character* is *impugned* by it.<sup>121</sup>

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<sup>119</sup> See Dworkin, *Law's Empire* at 243 (cited in note 86) (“Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them.”).

<sup>120</sup> See Jackson, 30 ABA J at 335 (cited in note 90):

The first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle. That means such individual study of its background and antecedents, its draftsmanship and effects that at least when it is announced it represents not a mere acquiescence but a conviction of those who support it.

Postema, 36 McGill L J at 1179 (cited in note 90) (criticizing Professor Dworkin's view on the ground that it assumes “that participants have been behaving in a way that is consistent with its underlying commitments, and that the only question is what these commitments are”).

<sup>121</sup> The survey of rationales in this Section is far from exhaustive. I have focused here only on those that have received the most support from courts and scholars. I have

## B. How Strictly Past Decisions Bind Courts

Even if impeaching evidence is relevant to a court's evaluation of the precedential weight of a past decision, a court may not properly consider such evidence if the practice does not authorize it to make such a determination.<sup>122</sup> It is thus helpful to distinguish among three different ways in which precedential practice might structure how a court treats past decisions. Such decisions may bind courts absolutely, presumptively, or not at all.

### 1. Past decisions as absolutely binding.

A precedential practice may require that, when a past decision is clearly applicable to the legal issue that a present court confronts, the court must in all cases follow the holding of that decision.<sup>123</sup> If a practice is so structured, then regardless of what rationale justifies the practice overall, no individual court would be authorized to consider the persuasiveness of evidence purporting to impeach one of its precedents. A precedential practice might be based on the epistemic-deference rationale, for

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omitted, for instance, the rationale according to which courts should follow precedent because doing so gives courts the appearance of being principled decision-making bodies. See *Casey*, 505 US at 865–66:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

See also Hellman, 37 Ariz L Rev at 1116–19 (cited in note 89) (defending the *Casey* Court's reasoning on the ground that the Court may need to appear principled in order to legitimately enforce its decisions). Moreover, I have considered only normative justifications for following precedent and so have not included those interpretations that might explain, as a causal matter, why Anglo-American law has developed precedential practices. It may be, for instance, that the practice of following precedent is a manifestation of the fact that judges and lawyers pervasively suffer from a "status quo bias," a term psychologists have used to describe people's tendency to overvalue the current state of affairs over alternative ones. See generally Robert L. Scharff and Franceso Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of Legal Rights*, 3 J L Econ & Pol 25 (2006). See also Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Persp 193, 197–99 (Winter 1991).

<sup>122</sup> Of course, such a court will always have to determine if the precedent applies—and, as we'll see, that is often difficult to do—but the issue here is whether, assuming the decision's holding applies to the case, the court must follow it.

<sup>123</sup> Professor Schauer refers to legal sources that bind in this way as "[m]andatory authorities." Frederick Schauer, *Authority and Authorities*, 94 Va L Rev 1931, 1940 (2008) (observing that the decisions of superior courts are called "mandatory authorities" for lower courts because they must be followed).

instance, on the ground that in general the decisions of past courts are more likely to be correct (or no more likely to be wrong) than those of present courts. But because the practice makes that judgment at the categorical level, perhaps because it suspects that a present court is likely to err in determining whether the rationale applies to the case before it (or whether some countervailing reason overrides it), the practice denies courts the power to consider the issue of whether to treat a past decision as authoritative.<sup>124</sup> In such a precedential practice, impeaching evidence does not even get off the ground.

## 2. Past decisions as presumptively binding.

That a court must treat a past decision as binding, however, does not entail that it must treat it as absolutely binding in all cases.<sup>125</sup> A precedential practice could treat past decisions as generally binding on present courts but allow that in certain circumstances a court may determine, if there is good reason to, that the precedent should not bind it.<sup>126</sup> Under this view, then, the fact that a precedent exists on a given issue imposes on present courts a burden of justification they must meet before deciding that they will not follow it.<sup>127</sup>

Even if a practice considers past decisions as only presumptively binding, however, that fact alone is not sufficient to put impeaching evidence on the table as something a court may

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<sup>124</sup> Of course, one could ask all the same questions about what justifies the practice's particular allocation of decision-making authority. But such questions may lead to an infinite regress with no satisfying ultimate answers. See Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S Cal Interdisc L J 97, 117–28 (2006) (arguing that no justification for political authority is ultimately persuasive, even one grounded in natural law or a duty to obey God).

<sup>125</sup> See Schauer, 94 Va L Rev at 1953 (cited in note 123) (“There is no reason [ ] why an authoritative prescription need be understood as absolute or determinative.”).

<sup>126</sup> See, for example, *Casey*, 505 US at 864 (observing that even in constitutional cases, the view “repeated in our cases” is that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided”); Schauer, *Thinking Like a Lawyer* at 76 (cited in note 97) (observing that the Supreme Court requires a “special justification” for overturning a precedent beyond its mere incorrectness); Alexander, 63 S Cal L Rev at 59 (cited in note 90) (arguing that in the context of statutory or constitutional interpretation, “the constrained court must find a precedent under a statute or constitutional provision to be both incorrect and something else”).

<sup>127</sup> See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 109 (Clarendon 1991) (explaining that rules of thumb are “not devoid of normative force” on the ground that they “will ordinarily be taken to increase the burden of justification for acting inconsistently with the rule of thumb” and so “elevat[e] the level of confidence necessary for taking action inconsistent with them”).



permissibly consider when evaluating precedent. Two further conditions must be met. First and most obviously, the rationale for treating decisions as binding (even if only presumptively so) must not be exhausted by the purely formal rule-of-law values discussed above since,<sup>128</sup> if it is, impeaching evidence is not even *relevant* to the question of whether to treat them as authoritative.

Second, the practice must allow that the burden of justification necessary to overrule a past decision may be met at least in part by a showing that the rationale for generally treating past decisions as binding does not apply in the particular case. So, for instance, if a doctrine of precedent were to require courts to always treat past decisions as binding unless a particular decision has resulted in grave injustice or proved impossibly unworkable, then evidence impeaching the reasoning of a past decision would still not be relevant to a court's analysis. And that is true irrespective of which rationale justifies deferring to past decisions more generally.

If, however, all of these conditions are met, so that (1) past decisions are treated as only presumptively binding, (2) the practice is justified substantially on either the epistemic-deference or integrity rationale (or another rationale that allows for the relevance of impeachment evidence), and (3) courts are authorized to assess the applicability of those rationales to particular decisions, then impeaching evidence would be properly considered by a court in deciding whether to treat a past decision as binding.

### 3. Past decisions as not binding at all.

The two forms of precedential practice just described treat past decisions as genuinely *authoritative* sources of law. That is, they require courts to treat the existence of a precedent on a given legal issue as either a dispositive reason or a presumptive reason for the court to exclude other factors it would otherwise consider relevant to the issue it faces.<sup>129</sup> But a precedential practice could exist in which courts discuss and cite past decisions in

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<sup>128</sup> See Part II.A.1.

<sup>129</sup> See Raz, *Morality of Freedom* at 59 (cited in note 110) (describing a conception of authority according to which an authority's directives "replace people's own judgment on the merits of the case").

their opinions but do not in fact treat them as truly binding.<sup>130</sup> Under this view, a court's primary obligation is to decide the case before it in a way that achieves the overall best outcome on the merits even if that means overruling decisions that it considers incorrect.<sup>131</sup>

Such a practice does not require that courts be unconcerned with the values discussed in the previous Section. In deciding what the best overall outcome is, for instance, a court might properly consider the parties' reliance interests based on a prior decision or even the value of maintaining integrity with the rest of the case law.<sup>132</sup> But it does mean that they treat past decisions as first-order considerations that contribute to determining what the right decision is, rather than as genuinely authoritative sources of law that foreclose the court from considering certain deliberative options or that impose a burden of justification on the court that it must overcome before overruling a precedent.<sup>133</sup> For this reason, some deny that such a practice should be called "following precedent" at all.<sup>134</sup>

Regardless of its name, it is not clear that impeaching evidence would have much of a role, if any, to play in such a practice. The reason is not that courts are foreclosed from considering impeaching evidence, but rather that such evidence would

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<sup>130</sup> See Schauer, *Thinking Like a Lawyer* at 118 (cited in note 97) (describing a view of the common law that holds that its rules "are not operating as rules at all and that all of the work is being done by the rule-free determination of the optimal result").

<sup>131</sup> Of course, the merits may include conformity to other sources of law, such as a written constitution or statute. But the point is that the precedent does not stand in the way of a court's judgment about the outcome the court would reach if the precedent had not been decided. See Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in Laurence Goldstein, ed., *Precedent in Law* 183, 210 (Clarendon 1991) (endorsing what he calls a "natural law theory of precedent" according to which "one sees the common law as being nothing else but what is morally correct, all things considered").

<sup>132</sup> See Alexander, 63 S Cal L Rev at 8 (cited in note 90) (describing Professor Moore's natural law theory and observing that "[w]hat is morally correct, of course, will be a function of facts about the parties and the world" and that "these facts might include the equality and reliance effects of earlier court decisions").

<sup>133</sup> Ultimately, the distinction between authoritative and deliberative forms of decision making may break down, because it is always possible to frame a decision to defer to an authority in terms of first-order rational deliberation. When a patient follows her doctor's orders, for instance, one could interpret her action as an instance of deference to the doctor's judgment, or as an instance of taking the fact of the doctor having uttered the order (along with other facts about the doctor's education and qualifications) as its own kind of evidence of what she should do. But the rough distinction is sufficiently intuitive and entrenched in philosophical thinking about decision making as to justify its continued use. See, for example, Raz, *Morality of Freedom* at 28–31 (cited in note 110).

<sup>134</sup> Alexander, 63 S Cal L Rev at 9 (cited in note 90) (observing that "[i]t is perhaps misleading" to label this theory of precedent "as precedent following at all").

not be relevant to—or would have only minimal probative value for—the court’s essential task, which is to determine what the best overall outcome is given the facts at hand. So although the reliance interests generated by a previous decision might justify a current court in deciding in a way consistent with that decision, how the past court reasoned to its decisions seems irrelevant to what makes the outcome *today* the best one available.<sup>135</sup> Perhaps impeaching evidence would loosen any demands of integrity the court would otherwise attend to, but it would do so only as one of many factors otherwise bearing on the court’s decision.

### C. Summary

The upshot of the foregoing analysis, as represented in Table 1 below, is that impeaching evidence is relevant when either the epistemic-deference or integrity rationales (or both) at least in part explain why courts treat past cases as authoritative and where the model of precedent requires some, but not total, genuine deference to past decisions. Although these conditions represent only two of the nine total boxes in Table 1, it turns out that—as the next Part will show—this combination of rationales

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<sup>135</sup> One might argue that impeaching evidence that reveals a past decision to have been based on improper considerations *is* relevant if we make the reasonable assumption that parties look in part to the reasons courts offer—not just the outcome—for guidance in future cases. The reasoning would go like this: If the parties are aware of circumstances that a later court will likely deem to be impeaching evidence, then parties will predict that future courts will ignore that decision in future cases and will not rely on it as precedent. And since even courts that do not treat past decisions as genuinely authoritative may nevertheless properly consider the reliance interests at stake in a dispute insofar as those interests must be weighed in determining what the best overall outcome in the present case is, such courts will find impeaching evidence relevant to their decision because it will tell them how likely it is that there are considerable reliance interests at stake to be weighed.

This interesting suggestion, which I thank the editors of *The University of Chicago Law Review* for raising, seems plausible to me. And if it is right, then it suggests that impeaching evidence is relevant under even more models of precedent than I claim in the text. But I doubt that such evidence would be very helpful in practice for courts using this model of precedent. The chief virtue of the nonbinding model, after all, is the way in which it frees courts to make the overall morally best outcome in the present case, so it is only in cases where the actual reliance interests are considerable that those reliance interests will likely make a difference—otherwise, courts will be concerned primarily with the substantive underlying merits of the decision. True, such interests may indeed be considerable in some areas of law—such as in criminal law or property law—but even in those contexts there is likely to be better and more direct evidence of reliance, such as the party’s own behavior.

and models best describes the practice of stare decisis in both the common law and constitutional context.

TABLE 1. RELEVANCE OF IMPEACHING EVIDENCE

		<b>Rationales for Precedent</b>		
		<b>Rule of Law</b>	<b>Epistemic Deference</b>	<b>Integrity</b>
<b>Models of Precedent</b>	<b>Absolutely Binding</b>	Not Relevant	Not Relevant	Not Relevant
	<b>Presumptively Binding</b>	Not Relevant	<b>Relevant</b>	<b>Relevant</b>
	<b>Nonbinding</b>	Not Relevant	Not Relevant	Not Relevant (or Minimally Relevant)

### III. APPLICATIONS

The analysis of precedent thus far has been exceedingly abstract. It has investigated the propriety of a court's consideration of impeaching evidence under various rationales for, and models of, following precedent. In doing so, it has assumed that past decisions have a holding or rule that is relatively easy for courts to identify and thus follow. In fact, though, courts and scholars have long debated not only how courts ought to go about the difficult task of identifying the holding of a past decision (and distinguishing it from dicta), but also whether or when present courts are even properly bound by the holdings, rather than just the results, of past decisions.<sup>136</sup>

This Part takes up the task of applying the foregoing analysis to actual court practices in order to determine whether impeaching evidence might properly be considered in each of them. In doing so, the complications just mentioned will be useful because they provide evidence of what kind of model best fits the

<sup>136</sup> Compare Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161, 164, 182 (1930) (arguing that the "ratio decidendi" of a case cannot be discovered by looking to the reasons offered by courts but rather by looking to which facts the court considered material to the outcome), with Schauer, *Thinking Like a Lawyer* at 51–52 (cited in note 97) (criticizing Professor Goodhart's view on the ground that one cannot determine materiality without first having identified what the relevant rule is). See also Schauer, *Thinking Like a Lawyer* at 44–54 (cited in note 97) (discussing various views about how to identify a precedent and its holding).

various practices. The more flexibility a practice affords present courts in determining which *parts* of past decisions (the holding, rationale, or result) bind them, the further away that precedential practice is from the absolutely binding model described in the last Part and the closer it is to a presumptive or even non-binding model.

#### A. Vertical Precedent

Vertical precedent describes the practice whereby lower courts are obligated to obey the holdings of superior courts.<sup>137</sup> Evidence impeaching the holding of a superior court's decision may very well *not* be something that a lower court properly considers. This is true primarily for two reasons.

First, vertical precedent is as close to an absolutely binding model of precedent as there is in Anglo-American law.<sup>138</sup> Thus, even if the lower court has good reason to doubt the correctness of the superior court's decision, it is generally not permitted to ignore the decision on that ground.<sup>139</sup> Of course, where the reach of a superior court's holding is a question of debate, lower courts may conclude that it does not apply to the particular case at hand by distinguishing it on the facts. But at least with respect to the cases where the rule or holding of a precedent is clear, the lower court is compelled to follow it. Thus, in this situation, as we have seen,<sup>140</sup> the lower court is not authorized to determine independently whether evidence bearing on the correctness of the previous decision, including impeaching evidence, undermines that decision. Instead, it must simply comply with its ruling.

But the second, deeper reason is that the absolutely binding quality of superior court decisions on lower courts is itself evidence that the rationale for the practice lies in its vindication of

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<sup>137</sup> See Schauer, *Thinking Like a Lawyer* at 36–37 (cited in note 97) (distinguishing between vertical and horizontal precedent).

<sup>138</sup> See *id.* at 68 (explaining that lower courts are bound or “compelled” to follow superior court decisions).

<sup>139</sup> See *State Oil*, 552 US at 20; *Simmons*, 543 US at 593–94 (O'Connor dissenting) (“[I]t remains *this Court's* prerogative *alone* to overrule one of its precedents. That is so even where subsequent decisions or factual developments may appear to have significantly undermined the rationale for our earlier holding.”) (quotation marks and citations omitted).

<sup>140</sup> Part II.B.1.

rule-of-law values.<sup>141</sup> It is true that vertical precedent is sometimes said to be premised on an epistemic-deference rationale, not because judges on higher courts are necessarily smarter or better lawyers or more just than are those serving on lower courts, but rather because appellate courts typically have more time to consider difficult legal questions and have received better briefing by lawyers than lower courts have.<sup>142</sup> But this suggestion is not particularly persuasive. Imagine, for example, that the epistemic advantages of superior courts were erased entirely, perhaps by increasing the funding of lower courts, so that they had more resources, more time, and better-qualified judges.<sup>143</sup> Would even such a dramatic change prompt a reconsideration of the doctrine that superior court decisions are binding on lower courts? If that consequence seems doubtful, then it suggests that something else may be driving the practice.<sup>144</sup>

That “something else” is unlikely to be the value of political integrity. True, vertical precedent does vindicate a kind of integrity, ensuring that different courts within the same political community speak with a consistent voice. But if that were the dominant concern of courts, then it seems that they would be equally compelled to follow other courts of their same level in other jurisdictions, whereas deference to such courts is typically understood to be optional.<sup>145</sup>

Rather, that “something else” is most likely the rule-of-law and coordination benefits that accrue from having one rule govern a given jurisdiction rather than many.<sup>146</sup> As Professor Evan Caminker has observed, such benefits include the greater predictability that citizens will have to plan their affairs, the protection of reliance interests, and equal application of the

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<sup>141</sup> See Caminker, 46 *Stan L Rev* at 822 (cited in note 102) (“Ultimately, a desire for bright-line rules may largely underpin the particular value tradeoffs [the practice of vertical precedent] entails.”); Hershovitz, *Exploring Law’s Empire* at 108 (cited in note 94) (arguing that vertical precedent is justified primarily by the coordination benefits it generates and the expertise of superior courts).

<sup>142</sup> Caminker, 46 *Stan L Rev* at 848 (cited in note 102) (“[A] district court generally will still face greater time pressures and probably lower quality briefing than would an appellate court.”).

<sup>143</sup> Professor Caminker observes that district courts could do so even without increased funding by simply restructuring their dockets. *Id.*

<sup>144</sup> *Id.* at 849 (observing that “superior court proficiency does not provide a universally applicable nor particularly strong justification for the doctrine of hierarchical precedent”).

<sup>145</sup> See Schauer, 94 *Va L Rev* at 1946–47 (cited in note 123) (characterizing as “optional authorities” for courts of one circuit the decisions of another circuit).

<sup>146</sup> See Caminker, 46 *Stan L Rev* at 822 (cited in note 102).

law.<sup>147</sup> This suggestion is also made more plausible by the fact that political authority in general may be based on the coordination benefits that derive from having uniform rules of application.<sup>148</sup>

Thus, whether evidence impeaching the decision of a superior court is properly considered by a lower court depends on how much work the epistemic or integrity rationales do in justifying the practice of vertical precedent. To the extent that those rationales do not do much work and that, instead, the practice is grounded primarily on rule-of-law values, evidence offered to impeach the decision of a superior court should not be considered by lower courts.

### B. Common Law Stare Decisis

At common law, the doctrine of stare decisis, or horizontal precedent, instructs courts to follow the holdings of past courts of the same level.<sup>149</sup> Impeaching evidence probably *is* appropriate for a court to consider here because all of the conditions mentioned in the last Part hold: (1) past decisions are only presumptively binding at common law, (2) the most plausible rationales for much of the practice include the epistemic-deference and integrity rationales, and (3) courts are not precluded from looking to the rationale for stare decisis in deciding how to treat past decisions.

The first condition is clearly met. It is widely recognized that stare decisis does not impose an absolute obligation on courts to follow past decisions. Rather, it is often said that courts require a “special justification” beyond the mere incorrectness of a precedent, to overrule it.<sup>150</sup> Thus, unlike with verti-

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<sup>147</sup> Id at 850–53. See also Perry, 7 Oxford J Legal Stud at 244 (cited in note 90) (“That lower courts are bound by the decisions of higher courts in a strong exclusionary sense can easily be explained by a general requirement of institutional consistency.”).

<sup>148</sup> See Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 Minn L Rev 1003, 1031 (2006) (“A major, if not the main, factor in establishing the legitimacy of political authorities is their ability to secure coordination.”).

<sup>149</sup> The full Latin phrase from which the term derives is “*stare decisis, et non quieta movere*” or “[a]dhere to the decisions and do not unsettle things which are established.” Frank, *Courts on Trial* at 266 (cited in note 90) (quotation marks omitted).

<sup>150</sup> Schauer, *Thinking Like a Lawyer* at 60 (cited in note 97) (comparing different formulations, including the “special justification” language, of the burden of justification required to overturn precedent and observing that such “modifiers [ ] make clear that the principle of stare decisis becomes meaningless if a court feels free to overrule all of those previous decisions it believes to be wrong”); Perry, 7 Oxford J Legal Stud at 240 (cited in note 90) (explaining that the common law judge is not bound by rules but that her reasons for departing from precedent on a given issue require the judge to be persuaded “above a threshold of strength which is higher than what would be required on the

cal precedent, even when a court is faced with a case on all fours with a previous decision, the practice authorizes it to consider whether the circumstances are such that the prior decision ought not control the present case.

The second condition requires more explanation. Undoubtedly, the ability of stare decisis to foster rule-of-law values plays a role in explaining the virtue of stare decisis.<sup>151</sup> But it is far less clear than in the case of vertical precedent that those values are alone sufficient to justify the practice. This is so partly because the presumptive quality of the precedential obligation that stare decisis imposes vindicates rule-of-law values so much less effectively.<sup>152</sup> Not only are common law courts able to overrule their own past decisions in exceptional circumstances, but they are also understood to have considerable flexibility in expanding rules, reinterpreting past holdings by making reference to their underlying rationales, and sometimes offering entirely new rationales for previous decisions.<sup>153</sup> Such practices mean that courts will often reach decisions that the parties likely could not have predicted beforehand and thus undermine, rather than foster, legal predictability.<sup>154</sup>

Moreover, when common law courts reinterpret past decisions, and sometimes a whole series of them, they do so in order

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ordinary balance of reasons"). An older tradition of precedent in the United States had an even weaker notion of precedential authority. If a past case was clearly in error, this view held that "the decision should be overruled unless there was some special reason to adhere to it." Nelson, 87 Va L Rev at 4–5 (cited in note 96).

<sup>151</sup> See Schauer, *Thinking Like a Lawyer* at 43 (cited in note 97) (explaining that the practice of stare decisis "serves a range of values all having something to do with *stability*"); Frank, *Courts on Trial* at 268–71 (cited in note 90) (observing that arguments related to the rule of law and stability are commonly offered to justify stare decisis).

<sup>152</sup> See Alexander, 63 S Cal L Rev at 40–42 (cited in note 90) (observing that interpretations of precedent that require courts only to follow the results of past decisions do not serve rule-of-law values particularly well).

<sup>153</sup> See Moore, *Precedent, Induction, and Ethical Generalization* at 185 (cited in note 131) (criticizing a strictly rule-based interpretation of common law practice on the ground that it does not square with "the freedom exercised by subsequent courts to reformulate the holding of a case, making it broader or narrower than that stated by the deciding court"); Perry, 7 Oxford J Legal Stud at 239 (cited in note 90) (observing that at common law "the process of reassessing the reasoning in previous cases sometimes takes a more radical form than mere restriction or extension, amounting to what is, in effect, the articulation of a new justificatory basis for a whole line of prior decisions"); Dworkin, *Rights* at 119 (cited in note 98) ("It may be, however, that the new principle strikes out on a different line, so that it justifies a precedent or a series of precedents on grounds very different from what their opinions propose.").

<sup>154</sup> See Schauer, *Thinking Like a Lawyer* at 114 (cited in note 97) (discussing the "problem of retroactivity" as one of the "curious implications" of the way common law rules change).



to *develop* the law or change it incrementally. So the question is, on what ground could common law courts use previous decisions as a source from which to develop new rules of decision? Statutes that change the law presumably derive their legitimacy from the fact that their members have been democratically elected, but past courts have no more democratic legitimacy than present courts. Nor do past courts possess a particular expertise that current courts do not possess in a way that an administrative agency might. What is required, then, is some explanation for why it is rational to develop the law using a method so wedded to the past.<sup>155</sup>

Of those we have considered, only the epistemic and integrity rationales are likely to fit the bill. Consider first the epistemic rationale. Here, as already noted, the argument is based on a general deference to the wisdom of the past.<sup>156</sup> But one problem with this view is that it is hardly obvious that past courts are any wiser than present-day courts. Indeed, if anything, one might think that present courts have an epistemic advantage over previous courts because they have seen more cases and thus have more experience.<sup>157</sup>

For this reason, the epistemic rationale for following precedent may depend on the further assumption that past courts stand in an epistemically privileged position with respect to moral features relevant to the dispute with which they were confronted.<sup>158</sup> It assumes, in other words, that Oliver Wendell Holmes was right when he said that it is a “merit of the common law that it decides the case first and determines the principle

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<sup>155</sup> See Lyons, 38 Vand L Rev at 508 (cited in note 90) (arguing that in order to justify the practice of precedent, one needs to explain the “conservative bias” inherent in it, and further arguing that this cannot be done). Of course, it is possible that this method of developing the law is *not* rational. See Alexander, 63 S Cal L Rev at 40–42 (cited in note 90) (arguing that such a process offers neither the rule-of-law benefits that stricter interpretations of precedent offer nor the moral benefits of a practice in which past decisions do not bind at all); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 Colum L Rev 199, 201 (1933) (“To say that a court reaches a conclusion partly because it is following a precedent and partly because the conclusion is just, is really impossible.”). However, my analysis proceeds on the assumption that it is rational and seeks to explain why.

<sup>156</sup> See notes 101–03 and accompanying text.

<sup>157</sup> See Nelson, 87 Va L Rev at 57–58 (cited in note 96) (offering several reasons why later courts might be more likely to make correct legal judgments than previous courts).

<sup>158</sup> See Oliphant, 14 ABA J at 159 (cited in note 90) (suggesting that the results of past cases are justifiably treated as authoritative on the ground that judges have an “intuition of fitness of solution to problem”).

afterwards.”<sup>159</sup> The rules and principles that courts generate when deciding cases are understood to be courts’ best efforts at explaining by means of a generalization the result that they reach mostly by relying on background legal principles and their own moral intuition based on particular, morally salient facts.<sup>160</sup>

The integrity rationale, meanwhile, provides a slightly different answer. Here the claim is (again analogizing a political community to an individual person) that the virtue of integrity entails a duty to take seriously one’s own past commitments, ideals, or projects. Thus, insofar as the past decisions of a court represent the judgments of a community’s past self, they deserve a certain degree of respect and carry normative force simply by virtue of having been decided and irrespective of the content of the rules and principles they generate.<sup>161</sup>

For reasons already discussed, impeaching evidence is relevant to a court’s decision of whether to follow precedent under

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<sup>159</sup> Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 Am L Rev 1, 1 (1870). But see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi L Rev 883, 890–901 (2006) (arguing that judges may be prone to cognitive errors when making policy decisions based on a set of concrete facts before them).

<sup>160</sup> This rationale also explains the doctrine according to which only a court’s holding (rather than its dicta) binds future courts. For the doctrine presumes that the prior court devoted more substantial attention to its holding than to its speculative ideas about how other cases should be treated. See *Cohens v Virginia*, 19 US 264, 399–400 (1821) (explaining why holdings bind courts more strongly than dicta on the ground that “[t]he question actually before the Court is investigated with care, and considered in its full extent” and that although “[o]ther principles which may serve to illustrate it, are considered in their relation to the case decided, [ ] their possible bearing on all other cases is seldom completely investigated”).

<sup>161</sup> See Postema, 36 McGill L Rev at 1177–78 (cited in note 90) (arguing that the “moral force of precedent” lies in the “duty of loyalty” communities have to their past commitments); Rubinfeld, *Freedom and Time* at 189 (cited in note 116) (arguing that the common law style of adjudication is the means by which the judiciary, by “holding certain results more or less constant, gives meaning to legal and political commitments over time”); Hershovitz, *Exploring Law’s Empire* at 114 (cited in note 94) (“Integrity requires a commitment to a moral view, and one can only display a commitment to a moral view by a pattern of behavior across time. Constantly shifting moral views are a sign of caprice, not integrity.”). Interestingly, it is not clear whether Professor Dworkin, with whom the value of integrity in law is most closely associated, understands the concept as entailing a requirement to maintain consistency with past cases. On the one hand, his analogy to personal integrity suggests such a commitment since the concept in that area typically includes a temporal dimension. It also finds some textual support in his suggestion that Germans today rightly feel a sense of obligation to Jews as a result of the crimes the Nazi regime inflicted against them. See Dworkin, *Law’s Empire* at 172 (cited in note 86). On the other hand, Dworkin insists that integrity “commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces” and does not “require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation.” *Id.* at 227.

both the epistemic and integrity rationales. Therefore, as long as the third condition is met, so that courts are authorized to make reference to those rationales in their decision of whether to accord precedential weight to a past decision, then impeaching evidence will be relevant to a common law court's stare decisis analysis. That condition seems easily met since the common law does not narrowly cabin the grounds on which a court may base its evaluation of precedent, and consideration of such issues is a natural and plausible basis for deciding how much weight to accord a past decision.<sup>162</sup>

### C. Constitutional Stare Decisis

The proper role of stare decisis in constitutional adjudication is deeply controversial and the subject of intense scholarly debate.<sup>163</sup> The controversy stems in part from the fact that stare decisis seems to authorize the Supreme Court to uphold past decisions, such as *Miranda v Arizona*<sup>164</sup> and *Roe*, which remain substantively controversial and which the Court has acknowledged

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<sup>162</sup> It may be worth saying a word about the role of stare decisis in the context of statutory interpretation. It is often said that a court's interpretation of a statute ought to bind future courts more strongly than do common law or constitutional decisions. See William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 Georgetown L J 1361, 1364–65 (1988). However, the justification for doing so is not obvious; nor is it clear how faithfully the Supreme Court actually applies such a “super-strong presumption” against overruling statutory precedents. *Id.* at 1364 (criticizing the rule and noting its “shaky” precedential support and “uneven development and application”). A common justification is that the legislature can overrule the court's decisions, *id.* at 1366–67, but of course that is true of common law decisions as well. Thus, the analysis of impeaching evidence in this Section would seem to apply equally well to precedents interpreting statutes.

<sup>163</sup> For a useful summary and taxonomy of the debate about constitutional precedent, see David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 Tex L Rev 929, 930–40 (2008). See generally John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw U L Rev 803 (2009); Richard H. Fallon Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 NC L Rev 1107 (2008); Nelson, 87 Va L Rev 1 (cited in note 96); Harrison, 50 Duke L J 503 (cited in note 101); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L J 1535 (2000); Hellman, 37 Ariz L Rev 1107 (cited in note 89); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723 (1988). Despite this scholarship, there is still a sense among some that the proper role of stare decisis in constitutional interpretation has not yet been persuasively established. See, for example, James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 Va L Rev 1523, 1570 (2011) (observing that for the purposes of advancing constitutional theory, “[w]ork that establishes the proper scope of stare decisis would be invaluable”).

<sup>164</sup> 384 US 436 (1966).

may be erroneous.<sup>165</sup> Thus, whether following precedent in certain cases is even constitutional is a live issue among constitutional theorists in a way that it is not in the other contexts considered.

Nevertheless, the same considerations already discussed recur at the level of constitutional adjudication. Whether evidence impeaching a past decision is properly relevant to the Court's analysis depends on both the proper rationale for, and model of, precedent. In the constitutional context, the debate tends to be limited to whether past decisions ought to bind the present Court presumptively or not at all.

Under some theories of constitutional interpretation, the Court's precedent should play little if any role in determining the outcome of cases that the present Court must decide. Some originalists, for instance, argue that insofar as a precedent is inconsistent with the original meaning of the Constitution it is improper—perhaps even unconstitutional—to accord it any precedential weight at all.<sup>166</sup> At the same time, the “moral reading” of the Constitution endorsed by Professor Ronald Dworkin, though in some ways diametrically opposed to originalism, treats precedent in a similar way. This view understands the Constitution as embodying important principles of political morality, such as the Fourteenth Amendment's guarantee of equal protection under the laws or the First Amendment's right of free speech.<sup>167</sup> The justice's task is thus “to find the best conception of constitutional moral principles—the best understanding of what

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<sup>165</sup> See Richard H. Fallon Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 NYU L Rev 570, 571 (2001) (“[T]he Supreme Court has suggested that its reaffirmations of such landmark decisions as *Roe v. Wade* and *Miranda v. Arizona* rested on stare decisis, not an endorsement of the original holdings' correctness.”). See also *Dickerson v United States*, 530 US 428, 443 (2000) (“Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”); *Casey*, 505 US at 854–69 (engaging in an extensive stare decisis analysis in order to justify affirming *Roe*).

<sup>166</sup> See, for example, Gary Lawson, *The Constitutional Case against Precedent*, 17 Harv J L & Pub Pol 23, 27–28 (1994) (arguing that treating an erroneous past constitutional decision as binding is unconstitutional); Paulsen, 109 Yale L J at 1596 (cited in note 163) (arguing that stare decisis is only a judicial “policy” that is not constitutionally authorized and that can be overruled by congressional statute).

<sup>167</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 7 (Harvard 1996) (“According to the moral reading, . . . [broadly worded constitutional provisions] must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power.”).

equal moral status for men and women really requires, for example—that fits the broad story of America’s historical record.”<sup>168</sup> In other words, it seems that under Professor Dworkin’s theory of constitutional adjudication, the Court ought to reach the best decision on the merits, irrespective of whether there is a conflicting prior decision on point. For that reason, scholars have criticized Professor Dworkin for giving insufficient weight to the role of *stare decisis* in his theory of constitutional interpretation.<sup>169</sup>

For the reasons discussed in Part II it is not clear why evidence impeaching a past decision would be relevant to the Court’s inquiry on these views. According to each of these views, the Court is primarily obligated to enforce its best understanding of the constitutional text itself rather than the Court’s case law interpreting it. Thus, for instance, under the moral reading, the only issue in *Seminole Tribe* would be whether the *Hans* decision was consistent with the best interpretation of the principle of sovereign immunity expressed in the Eleventh Amendment. Or in *Mitchell*, under a strictly originalist approach, the only issue would be whether *Hunt* was consistent with the original understanding of the Establishment Clause. In neither case should it matter one way or the other what best *explains*, as a historical matter, why the previous decision came out the way it did.<sup>170</sup>

The same conclusion follows if the Court’s past decisions *are* presumptively binding on it but only for rule-of-law reasons. Once again, this view is consistent with otherwise quite different constitutional theories. One can be an originalist and yet still think that some precedents warrant respect simply because they have become so entrenched in practice that to overrule them would be to upset political stability.<sup>171</sup> Or one could believe

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<sup>168</sup> *Id.* at 11.

<sup>169</sup> See, for example, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1, 69 (1985) (observing that under either originalist or Dworkinian theories of constitutional interpretation, “judicial precedent—the most important tool of the constitutional lawyer—drops from sight”); Fallon, 76 NYU L Rev at 577 n 27 (cited in note 165) (“Proposals to reduce or eliminate the force of constitutional *stare decisis* need not necessarily identify constitutional ‘meaning’ with the original understanding. For example, it would be possible to equate constitutional meaning with the best ‘moral reading’ of constitutional language.”).

<sup>170</sup> See Dworkin, *Law’s Empire* at 227 (cited in note 86) (observing that his theory of law “begins in the present and pursues the past only so far as and in the way its contemporary focus dictates”).

<sup>171</sup> See, for example, Bork, *The Tempting of America* at 159 (cited in note 35) (arguing that “those who adhere to a philosophy of original understanding are more likely to

that the Court should rely primarily on its own precedent, rather than the Constitution's original meaning, but for largely the same rule-of-law reasons.<sup>172</sup> In either case, it is not obvious why impeaching evidence would be relevant to the inquiry since any reliance interests that have accrued have done so irrespective of what justified the past court's holding. And the same is true of arguments from political stability, predictability, limits on judicial discretion, or formal equality.

The situation is otherwise under theories that endorse a version of common law constitutionalism based on either epistemic-deference or integrity rationales. The epistemic version sees *stare decisis* as a valuable method of developing constitutional law in a way analogous to how it works at common law.<sup>173</sup> It presumes that the Court's past decisions are correct but authorizes the present Court to make incremental changes to previous holdings in light of the new concrete factual situations it confronts. This view reflects the Burkean impulse that such a

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respect precedent than those who do not" on the ground that they are apt to care more about the value of political stability); McGinnis and Rappaport, 103 Nw U L Rev at 835 (cited in note 163) (arguing that the Supreme Court should adhere to precedent when the decision has become sufficiently entrenched that the costs of overruling it would outweigh the benefits of doing so).

<sup>172</sup> These benefits of *stare decisis* are emphasized in Fallon, 76 NYU L Rev at 582–85 (cited in note 165), and in Monaghan, 88 Colum L Rev at 744–48 (cited in note 163). See also Shapiro, 86 Tex L Rev at 935 & nn 23–24 (cited in note 163) (citing Fallon and Monaghan as scholars who emphasize the need for stability and continuity in political institutions).

<sup>173</sup> See, for example, Strauss, *The Living Constitution* at 37–38 (cited in note 103) (arguing that the authority of constitutional law stems from its "evolutionary origins and its general acceptability to successive generations"); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 688, 691–92 (1994) (endorsing a theory of constitutional interpretation that relies heavily on precedent and "heeds Burke's suggestion that 'instead of exploding general prejudices,' we would do better to endeavor 'to discover the latent wisdom which prevails in them'"), quoting Edmund Burke, *Reflections on the Revolution in France*, in Paul Langford, ed, *The Writings and Speeches of Edmund Burke: Volume VIII: The French Revolution 1790–1794* 53, 138 (Clarendon 1989); Shapiro, 86 Tex L Rev at 942 (cited in note 163):

[P]erhaps my principal reason for finding the doctrine [of *stare decisis*] a congenial one lies in my own Burkean approach to the world in general and to law in particular. The value that I place on tradition derives . . . from a conviction that individuals, and here I include myself at the head of the list, are likely to overrate their own rationality, wisdom, or judgment.

Merrill, 19 Harv J L & Pub Pol at 519–21 (cited in note 103) (arguing that conservatives should prefer an approach to constitutional interpretation that recognizes a larger role for precedent than originalism allows on the ground that conservatives tend to be properly "skeptical about the power of human reason to reorder society in accordance with some overarching rational plan").

process offers a wiser and more prudent means of developing the law than most alternatives. On this view, impeaching evidence would be relevant because it would give grounds for thinking that the presumption of correctness underlying this process may not in fact apply in a particular case.

Meantime, the constitutional-integrity rationale for following past decisions, just like its common law analogue, emphasizes the way in which the Court's own past efforts to interpret the principles contained in the Constitution represent commitments which are themselves expressions of a kind of democratic will.<sup>174</sup> Under this view, since these commitments are supposed to be grounded in principle, evidence suggesting that a particular Court was unconcerned with such principles in a given case, and was instead bowing to political pressure or giving expression to an irrational prejudice, would again be evidence relevant to the present Court's decision of whether to fulfill its duty to remain faithful to the previous decision.

But despite the widespread debate among constitutional theorists over how the Supreme Court *ought* to treat its own past decisions, most scholars agree that, as a descriptive matter, the Supreme Court acts like a common law court, drawing heavily on precedent in its constitutional analysis.<sup>175</sup> Thus, it is hardly any surprise that the Court's most determined originalists, Justices Antonin Scalia and Clarence Thomas, both signed on to Chief Justice Rehnquist's opinion in *Seminole Tribe*, which offered the standard epistemic-deference rationale for deferring to

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<sup>174</sup> See Rubinfeld, *Freedom and Time* at 189 (cited in note 116) (arguing that the "ultimate basis of the doctrine of stare decisis in constitutional law" lies in the way in which it allows the political community to make and keep commitments over time). Although I earlier noted, see note 161, that in *Law's Empire* Professor Dworkin suggests that integrity does not require consistency over time, in *Freedom's Law* he suggests that the *Casey* Court properly upheld *Roe* on the ground that the Justices must be constrained by a "respect for the integrity of its decisions over time" if it is to be "understood as an institution of law and not just another venue for politics." Dworkin, *Freedom's Law* at 117–25 (cited in note 167).

<sup>175</sup> See Lawson, 17 *Harv J L & Pub Pol* at 33 (cited in note 166) ("The doctrine of precedent is too deeply ingrained in the legal system to permit serious inquiry into its own legitimacy."); Ryan, 97 *Va L Rev* at 1557 (cited in note 163) ("The Supreme Court undoubtedly acts like a common-law court insofar as it most often relies on past precedent to guide current decisions."); Monaghan, 88 *Colum L Rev* at 727–41 (cited in note 163) (arguing that vast areas of constitutional doctrine cannot be squared with an original understanding of the relevant constitutional provisions and that the best way to understand this is as a product of the Court following stare decisis); Strauss, *The Living Constitution* at 33 (cited in note 103) (observing that in any given Supreme Court case, "[m]ost of the real work [is] done by the Court's analysis of its previous decisions").

the Court's decision in *Hans*.<sup>176</sup> Justice Scalia also joined Justice Thomas's opinion condemning *Hunt* as an expression of anti-Catholic bigotry.<sup>177</sup> Neither of these arguments would be relevant to the constitutional issues involved if the only reason to depart from the Constitution's original understanding were for rule-of-law reasons. But they are consistent with a view of the Court, according to which it acts as common law court in the area of constitutional adjudication, using past decisions to *develop* the law on the basis of either integrity or epistemic-deference rationales. Such facts suggest that, as with the common law, the rule-of-law benefits associated with stare decisis do not alone explain that doctrine's role in constitutional law.

#### IV. OBJECTIONS

The argument so far has sought to establish that under certain circumstances historical evidence that impeaches a past decision—that is, evidence that bears on whether the decision was motivated by “extralegal” considerations—is relevant to a court's analysis of precedent. But even if, in theory, such evidence is relevant to the issue a court confronts under some rationales for following precedent, excluding such arguments may still be justified if allowing lawyers to employ them in court would incur burdensome administrative costs or would undermine legitimate judicial policies. Below I consider some specific objections along these lines and suggest why they may not be as persuasive as they first appear.

##### A. Impeaching Evidence Wastes Time and Is Susceptible to Abuse

First, it might be argued that the historical evidence on which impeaching arguments are premised will often point in different directions and will therefore be insufficiently determinative of the issues on which it is brought to bear.<sup>178</sup> This overabundance of historical materials both makes it susceptible to abuse by judges and threatens to waste judges' and lawyers'

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<sup>176</sup> *Seminole Tribe of Florida*, 517 US at 54, 64.

<sup>177</sup> *Mitchell*, 530 US at 828–29.

<sup>178</sup> Professor John Orth's historical explanation of *Hans*, for instance, has not gone unchallenged. See, for example, Michael G. Collins, Book Review, *The Conspiracy Theory of the Eleventh Amendment*, 88 Colum L Rev 212, 229–34 (1988) (reviewing Orth's book and suggesting that Supreme Court doctrine likely helps explain the *Hans* Court's interpretation of the Eleventh Amendment more than Orth acknowledged).



time.<sup>179</sup> The problem is further aggravated by the fact that such historical inquiry is conducted by lawyers, who are not known for being very good historians.<sup>180</sup>

The concern is a reasonable one, but it is worth asking what the relevant comparison ought to be. After all, at least in the constitutional domain, adjudication already invites fairly extensive historical inquiry, due in large part to the rise in popularity of originalism as a theory of constitutional interpretation. These days, even those justices who are not otherwise wedded to that theory often feel the need to meet originalists' arguments with historical arguments of their own.<sup>181</sup> Furthermore, the argument applies equally to nonimpeaching uses of history to evaluate precedents, such as those already discussed.<sup>182</sup> In other words, to borrow a phrase from evidence law, originalism has already opened the door to historical inquiry, so it may be a little late to try to shut it now.<sup>183</sup>

## B. Impeaching Evidence Undermines the Rule of Law

Another reason to exclude such evidence is a stronger version of the objection just mentioned. The problem with allowing historical evidence about the true basis for decisions is not merely that it wastes time but that it undermines the rule of law by rendering the law deeply indeterminate. Because virtually any decision would be potentially vulnerable to impeachment, and because it is rarely possible to establish conclusively why a court

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<sup>179</sup> See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 36 (Princeton 1997) (observing that if courts were to stop relying on legislative history, then “[j]udges, lawyers, and clients will be saved an enormous amount of time and expense”).

<sup>180</sup> See Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 *Const Comm* 271, 282 (2005) (“Very few lawyers or judges have the skills of a professional historian seeking to imaginatively reconstruct the past.”); Strauss, *The Living Constitution* at 20 (cited in note 103) (“When historical materials are vague or confused, as they routinely will be, there is an overwhelming temptation for a judge to see in them what the judge wants to see in them.”).

<sup>181</sup> See, for example, *District of Columbia v Heller*, 554 US 570, 639–82 (2008) (Stevens dissenting) (observing that “[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing . . . [the Court’s] dramatic upheaval in the law,” but then engaging in a lengthy historical analysis of the original meaning of the Second Amendment) (citation omitted).

<sup>182</sup> See Part I.A–C.

<sup>183</sup> See FRE 404(a)(2)(B) (providing that the defendant’s attack on the victim’s character trait will open the door to the prosecutor attacking the defendant’s same character trait).

decided the way it did, people would have little sense of how courts would interpret the case law and therefore little idea of what the law is on a given legal issue.

Again, this is a powerful objection, but one less persuasive once we pull it apart. To begin with, we must distinguish between metaphysical and epistemic versions of this objection. As a metaphysical claim, this objection must assert that the law is determinate now but would be indeterminate if precedential authority were permitted to be attacked in this way. But there is little reason to think that is true. To begin with, it may well be the case that the law, at least in many areas, including constitutional law, is not determinate now, in which case the premise of the objection is false. Even if it is determinate in some areas, however, the objection must show why permitting evidence that bears on the sincerity of a past court's reasoning would render it indeterminate.

The intuition might be that the essential causal question involved—Why did the court decide the case the way it did?—does not yield a determinate answer because the but-for causes of such a decision are literally infinite. That intuition is sound, but it misunderstands the nature of the question courts must answer. In those cases where impeaching evidence is relevant, courts must decide whether to treat a particular case as an *authority*—that is, they must decide either (depending on the rationale) to defer to that court's judgment about the relevant legal issue (epistemic rationale) or to remain faithful to that court's judgment about the issue (integrity rationale). Either way, the question a court must answer is a *normative* question—in the broad sense of one that is responsive to evaluative criteria, either of rationality or of political morality. It need not answer the *metaphysical* question about causation at all.<sup>184</sup>

As an epistemic claim, however, this rationale for exclusion has more force. For even if the law in some areas is determinate and would remain so while inviting impeaching evidence, it may still be the case that allowing such evidence in, simply by virtue of having added more variables to the analysis, makes it more

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<sup>184</sup> Of course, one might respond that it is impossible to give a rational judgment about something if the judgment depends on assuming the truth of an assertion that has no determinate truth value. But that charge applies with equal force to conventional legal reasoning about issues as to which there is arguably no metaphysically determinate answer. See Brian Leiter, *Law and Objectivity*, in Coleman and Shapiro, eds, *Jurisprudence & Philosophy of the Law* 969, 977–79 (cited in note 75).

difficult to make conclusive arguments that settle disagreements.<sup>185</sup> But so framed, this objection invites the same response as the one offered earlier: As compared to what? Adjudication—particularly constitutional adjudication, but not only there—is already rife with deep and pervasive disagreement, reflected in the frequent splits on the Supreme Court, about what counts as valid sources of law and methods of interpretation. It is rife, in other words, with what Professor Dworkin calls “theoretical disagreement.”<sup>186</sup> So it is difficult to see why adding one more means of analyzing a precedent would effect a sea change in the relative determinacy of the law.

### C. Impeaching Evidence Undermines the Legitimacy of Courts

A third objection expresses a concern for the reputation of courts, particularly that of the Supreme Court. Even if lawyers and judges might recognize that previous decisions are less authoritative for having been based on “extralegal” considerations, to state as much explicitly would be to undermine the Court’s legitimacy in the eyes of the public. Under this view, the problem with such arguments is that their use does a disservice not so much to the “traditional method of adjudication,” as Chief Justice Rehnquist suggested in *Seminole Tribe*,<sup>187</sup> but rather to the Court’s *reputation* for employing such a traditional method of adjudication.<sup>188</sup>

At first blush, such a concern with reputation may not seem like a very noble policy basis, especially to the extent that it entails obscuring uncomfortable facts. But there may be good reasons for it. Professor Deborah Hellman has argued, for instance, that the Supreme Court quite properly considers whether its decision will appear principled because maintaining such an appearance is important for ensuring general compliance with its decisions, and without such general compliance the Court could not enforce *any* of its judgments in a legitimate manner.<sup>189</sup> Indeed, the Court has suggested that the practice of stare decisis

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<sup>185</sup> See Gaus, *Justificatory Liberalism* at 277 (cited in note 83) (distinguishing between indeterminate and inconclusive legal reasons).

<sup>186</sup> Dworkin, *Law’s Empire* at 4–5 (cited in note 86).

<sup>187</sup> *Seminole Tribe of Florida*, 517 US at 68–69 (criticizing the dissent for its “undocumented and highly speculative extralegal explanation of the decision in *Hans*”).

<sup>188</sup> *Baker v Carr*, 369 US 186, 267 (1962) (Frankfurter dissenting).

<sup>189</sup> Hellman, 37 *Ariz L Rev* at 1121–23 (cited in note 89). See generally Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 *Harv L Rev* 1563 (2012) (analyzing more generally policy arguments based on appearance).

itself is justified partly on this ground.<sup>190</sup> So the argument here might be that even if impeaching evidence may be technically relevant to the Court's analysis in some cases, the risk of harm that could be caused by admitting it is so great that the Court is justified in categorically excluding it.

This objection strikes me as the most persuasive reason to exclude impeaching evidence, but two points reduce its power. First, broadening the scope of legal argument to include impeaching evidence may actually *strengthen* the Court's reputation, rather than weaken it. By shining a spotlight on the instances in which the Court has fallen short of its commitment to decide cases according to legal principles, such arguments imply that in the mine run of cases, the Court *does* decide cases in a principled manner. And by demonstrating a willingness to own up to past mistakes when it fails by its own standards, the Court arguably betrays more strength than weakness.

Second, even if this is a persuasive reason to exclude some sorts of impeaching evidence, it does not necessarily justify a *per se* rule of exclusion. For one thing, some sorts of explanations likely undermine the Court's legitimacy more than others. Indeed, as already mentioned, one irony of the debate between Justice Souter and the majority in *Seminole Tribe* is that the "extralegal" explanation Justice Souter offered—that the Court was concerned with its capacity to enforce its judgment against the state of Louisiana—is, under some views, not even extralegal at all. The rationale would be that the court quite permissibly took into account its capacity to enforce its judgments because doing so helped preserve the perceived power, and hence legitimacy, of the Court. So even if the policy rationale is valid it does not follow that all "extralegal" explanations of past decisions inflict the same degree of reputational harm. In fact, considering it in this case would have the further benefit of raising the important question of whether it is proper for the Court to take such institutional considerations into account when deciding cases.

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<sup>190</sup> *Casey*, 505 US at 865–66:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.

#### D. Impeaching Evidence Yields No Workable Rules

The above response also provides a basis for replying to a final objection sounding in judicial policy. It might be argued that even if impeaching evidence is relevant and even if it would not undermine the rule of law or the perceived legitimacy of courts, it should nevertheless still not be considered by courts because it is not susceptible to resolution by clear rules for determining exactly what kind of evidence impeaches a decision or how much evidence would be sufficient to deprive a decision of its precedential status. It would thus produce a flood of meritless arguments that courts would have difficulty evaluating.<sup>191</sup>

Again, the concern is reasonable, but the conclusion hasty. Although there are currently no rules governing the treatment of impeaching evidence, that is largely because such arguments have gone unrecognized as a valid form of argument and so have not prompted any efforts to craft legal doctrine around them. But one could imagine various different rules that might cabin and constrain the kinds of arguments available without banning them altogether. For instance, courts could ban the use of such arguments about particularly recent decisions—say, about those decided in the last twenty years—on the theory that a certain degree of critical distance is required before one can make considered judgments about what best explains a decision. Doing so might help respond to the legitimacy objection already mentioned.<sup>192</sup> As for the relevant burden of proof, courts could develop doctrinal tests, analogous to standards of review, for establishing how persuasive impeaching historical evidence must be before a precedent is considered sapped of authority.<sup>193</sup> Finally, lest any doubt remain about the possibility for crafting rules governing impeachment, one only has to look to the rules of

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<sup>191</sup> See *Caperton v A.T. Massey Coal Co.*, 129 S Ct 2252, 2267 (2009) (Roberts dissenting) (“The Court’s new ‘rule’ provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.”).

<sup>192</sup> Indeed, as Professor Hellman observes, overruling recent precedents at all—never mind the reason for doing so—may itself do harm to the Court’s reputation. Hellman, 37 *Ariz L Rev* at 1111 (cited in note 89).

<sup>193</sup> See *Chevron U.S.A. Inc v Natural Resource Defense Council, Inc.*, 467 US 837, 843 (1984) (holding that when reviewing an agency’s interpretation of its authorizing statute, “if the statute is silent or ambiguous with respect to the specific issue,” then the court must ask whether the agency’s interpretation is “a permissible construction of the statute”). See also Gary Lawson, *Proving the Law*, 86 *Nw U L Rev* 859, 896–98 (1992) (suggesting that there may be a role for explicit burdens of proof, analogous to those used in the fact-finding context, in courts’ interpretations of questions of law).

evidence to see that there is no shortage of ways of delimiting the precise nature and scope that impeaching arguments can take.<sup>194</sup>

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In short, the prospect of admitting impeaching evidence raises a variety of legitimate concerns bearing on its administrability and other judicial policies. But these concerns are hardly new ones. Courts have long had to figure out creative ways to handle history, appropriate ways to maintain the legitimacy of courts, and practical ways to craft new rules in uncharted domains. Impeaching evidence thus does not present a new or radical challenge to traditional adjudication.

#### CONCLUSION

The goal of this Article has been relatively modest. I cannot claim to have shown that adjudication, whether in the constitutional context or any other, would be fairer, more efficient, or more accurate if courts standardly allowed lawyers to make impeaching arguments of the sort laid out in the Introduction. Rather, I hope to have shown merely that in both the common law and constitutional domains historical evidence suggesting that a previous court based its decision on “extralegal” considerations may very well be rationally relevant to the question a present court faces when it considers whether, and if so how, to accord precedential weight to that past decision. Nor are the policy reasons offered to exclude such arguments particularly persuasive since they would condemn practices we already consider normal and proper.

The hope is that contemplating this possibility is profitable for both practical and theoretical reasons. As a practical matter, the analysis offered here might enable lawyers and historians to better frame the way in which they present historical evidence about past decisions to courts. As noted at the outset, the amici in *Hamdan* had no persuasive doctrinal hook—let alone a theoretical framework—that would enable them to connect up the

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<sup>194</sup> See, for example, FRE 608 (specifying the acceptable forms of impeachment evidence based on character and the specific character traits to which the evidence must pertain); FRE 609 (detailing precisely which kinds of criminal convictions may be introduced to impeach a witness); FRE 613 (establishing procedures for the introduction of prior inconsistent statements used to impeach a witness).

historical facts they unearthed about *Quirin* with the Court's traditional stare decisis inquiry. Recognizing that not only is there some—albeit minimal—precedent for the use of such impeaching arguments by the justices themselves, but also that there is a theoretically coherent justification for their use, may thus be of some assistance to future litigants and amici curiae.

As a theoretical matter—and here I limit my speculations to the constitutional domain, where I consider them most plausible—I hope my analysis reveals how much broader our conception of constitutional interpretation could be. Constitutional theorists and historians perpetually argue about how best to understand the Supreme Court's past decisions and doctrines: Do they systematically bend doctrine to respond to social or political pressures?<sup>195</sup> Do they reflect principled application of the relevant doctrine at the time?<sup>196</sup> Or did that doctrine itself incorporate ideological assumptions?<sup>197</sup> But those debates often proceed on the assumption that, though perhaps important for how we think of constitutional law generally, the answers to such questions do not bear on how the Court should use those decisions to decide cases.<sup>198</sup> The arguments are historical, not legal.

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<sup>195</sup> See, for example, Klarman, *Jim Crow* at 5 (cited in note 29) (“This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”).

<sup>196</sup> See, for example, David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* 3 (Chicago 2011) (defending the Court's decision in *Lochner* on the ground that “the liberty of contract doctrine was grounded in precedent and the venerable natural rights tradition”).

<sup>197</sup> See, for example, Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 9 (Oxford 1992) (arguing that the history of American law generally, including constitutional law specifically, reflects a “central aspiration of American legal thinkers” to separate law from politics, which in much of the country's history has taken the form of categorical or conceptual thinking).

<sup>198</sup> See, for example, Klarman, *Jim Crow* at 5 (cited in note 29) (“This book makes no claim about how judges *should* decide cases.”); Bernstein, *Rehabilitating Lochner* at 6 (cited in note 196):

History is also inherently agnostic on the soundness of such modern outgrowths of *Lochner* and other liberty of contract cases as the incorporation of most of the Bill of Rights against the states via the Due Process Clause, the protection of unenumerated individual rights in cases like *Griswold* and *Lawrence v. Texas*, or other manifestations of what is known today as substantive due process. I do not, therefore, reach any conclusions on these issues.

Horwitz, *Transformation* at 271–72 (cited in note 197) (criticizing the effort by legal theorists from the past to generalize abstract truths from particular moral and social controversies but suggesting as a cure only that legal thinkers adopt a pragmatic attitude that acknowledges the interrelation of law and politics and does not “deny, even to itself, its own political and moral choices”).

Of course, for strict originalists that assumption is justified since the relevance of the Court's precedent to constitutional interpretation is already only secondary. But for those who acknowledge or embrace the Court's common law approach to constitutional adjudication, there is no reason why historicist interpretations that explain away whole lines of the Court's past doctrine as a product of social, political, or economic forces could not be central to its interpretive approach.<sup>199</sup>

It is tempting to dismiss such an approach as profoundly misguided on the ground that it ignores, in Professor Dworkin's phrase, "the internal character of legal argument" and that it instead wrongly pursues "supposedly larger questions of history and society."<sup>200</sup> But that objection begs the essential question since what is in dispute is precisely the character of legal argument. And what this Article has attempted to show is that insofar as law is a practice based on sources of *authority*, the considerations that motivated that authority's statements or actions—whether in the context of fact-finding or that of interpreting case law—are rationally relevant to the decision of whether to continue treating that source as an authority.

The point is thus crucially *not* that legal reasoning could or should ever lose its formal or "artificial" character and become indistinguishable from legal history.<sup>201</sup> It neither can nor should. The point is rather that nothing about the highly structured, artificial—even fictionalized—character of legal reasoning necessarily entails that the Court adopt a method that looks only to internal reasons, rather than to external causes. Instead, it is perfectly consistent with an approach that understands the development of constitutional law as the story of a Court perpetually

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<sup>199</sup> Professor Jack M. Balkin's "living originalism" would seem to be such an effort to fuse external legal history with constitutional theory since he argues that the way in which constitutional doctrine has responded to the social and political movements of the past gives it a certain kind of democratic legitimacy. See generally Jack M. Balkin, *Living Originalism* (Belknap 2011). However, on closer examination, it is not so clear, for Professor Balkin clarifies that his theory "does not give detailed normative advice about how to decide particular cases but instead explains how constitutional change occurs through interactions between the political branches and the courts; and it endeavors to explain why and to what extent this process is democratically legitimate." *Id.* at 23.

<sup>200</sup> Dworkin, *Law's Empire* at 14 (cited in note 86).

<sup>201</sup> See Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *Tex L Rev* 35, 57 (1981) (arguing that the lawyer's distinctive knowledge lies in his ability to apply the method of "analogy and precedent," which has been dubbed "the artificial Reason of the law").



trying, but often failing, to decide cases according to its constitutional ideals and principles.