

The Holistic Theory of Precedent

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Standard theories of precedent limit the legal effect of a precedent to cases within the scope of its holding. Yet the widespread use of analogies to precedent in legal reasoning presupposes that precedents have legal implications for cases outside the scope of their holdings. This Article suggests that arguments from analogy to precedent have the currency they do in our legal system because respect for a precedent requires more than treating the precedent's holding as true: It also requires the judge, for purposes of deciding the case, to update her other beliefs around the assumption that the precedent's holding is true. This Article employs the framework of Bayesian epistemology to develop this idea and demonstrate its fit with judicial practice. Recognizing the full breadth of precedent's legal effect has significant scholarly and doctrinal payouts related to, inter alia, the workings of the Marks rule, the soundness of the Erie doctrine, the scope of indeterminacy in how far precedents extend, the degree to which it is legally proper for a judge to consult her priors when deciding whether to extend or cabin a precedent, and the way to solve the "problem of the second best" as applied to precedent.

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INTRODUCTION

Precedent is a topic of “perennial” interest¹ both because it has significant implications for virtually every area of law and because it is so hard to understand. Courts and scholars debate which parts of a judicial decision carry the authority of precedent,² which institutional actors have an obligation to respect the authority of precedent,³ what conditions defeat an obligation to

¹ William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 313.

² *Contrast, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–28, 48–53 (1989) [hereinafter Alexander, *Constrained by Precedent*] (defending the traditional view that the opinion’s “holding” is what carries the authority of precedent), *with* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 190–99, 230 (2014) (arguing that the traditional view is neither descriptively nor normatively adequate).

³ *Contrast, e.g.*, Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1727–28 (2017) (arguing that “precedent does not bind outside the judiciary”), *with* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1381 (1997) (arguing that all officials have “an obligation to follow judicial interpretations”).

respect the authority of precedent when that obligation is defeasible,⁴ and what it even means to respect the authority of precedent in the first place.⁵

This Article takes up the last question. Drawing on formal epistemology, it offers a fresh take on what it is to respect the authority of precedent. Roughly, the idea is that a person respects a precedent's authority by pretending that the proposition for which the precedent stands (traditionally, the precedent's holding) is true and asking what else she would believe if she really were convinced that this proposition is true. More formally: A person respects a precedent's authority in a given domain if and only if, for purposes of making decisions within that domain, the person treats the precedent as decisive evidence for the proposition for which it stands and updates her other doxastic states (beliefs, confidence levels, etc.) around that assumption. This Article dubs this the Holistic Theory because it implies that respecting a precedent's authority involves a holistic reconfiguring of one's doxastic states around the assumption that the proposition for which the precedent stands is true.

If sound, the Holistic Theory has several important implications. First, it offers an unorthodox account of the precedential value of decisions without a controlling opinion under *Marks v. United States*.⁶ The conventional view is that such decisions have no legal effect beyond binding the parties to the judgment.⁷ The Holistic Theory suggests otherwise: Even if a precedent stands only for the judgment that a particular defendant is (or is not) liable to a particular plaintiff on a particular set of facts, courts subject to the precedent's authority must update their doxastic states around the assumption that this judgment was correct.

⁴ Contrast, e.g., Nina Varsava, *Reconstructing Precedent*, in INTERPRETIVISM AND ITS CRITICS: NEW WORK IN LEGAL PHILOSOPHY (Nicos Stavropoulos ed., forthcoming 2027) (manuscript at 4–13) [hereinafter Varsava, *Reconstructing Precedent*] (available on SSRN) (developing a Dworkinian, merits-sensitive account of when a court should overrule nonbinding precedent), with RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 118–21 (2017) (arguing that the justification for overruling nonbinding precedent must be merits neutral except in extreme cases).

⁵ See, e.g., Bill Watson, *Obstructing Precedent*, 119 NW. U. L. REV. 259, 273–76, 306–09 (2024) [hereinafter Watson, *Obstructing Precedent*] (discussing the phenomenon of “obstructing” precedent and arguing that it can be legally and morally permissible); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 927–51 (2016) [hereinafter Re, *Narrowing Supreme Court Precedent*] (discussing the phenomenon of lower courts “narrowing” Supreme Court precedent and proposing conditions under which it is legitimate).

⁶ 430 U.S. 188 (1977).

⁷ See *infra* notes 134–37 and accompanying text.

Second, the Holistic Theory supports the view that a precedent erroneously holding that a certain rule is the law does not make it so by changing the law but merely triggers an obligation for future courts to pretend that the rule had been the law all along.⁸ The fact that the law on a particular question changed does not normally give one reason to question one's views about the law more generally. So, if respecting an erroneous precedent's authority simply means recognizing that the precedent changed the law, then it is hard to see why respecting the precedent's authority would require a holistic reconfiguration of one's doxastic states. But the fact that the law on a particular question was never as one's views portrayed it does give one reason to question one's views about the law more generally. So, if respecting an erroneous precedent's authority means pretending that the precedent was rightly decided, then it is easy to see why respecting the precedent's authority requires a holistic reconfiguration of one's doxastic states. The Holistic Theory therefore supports the view that precedent determines only what courts must treat as if it were the law and not what the law actually is. Because the central holding of *Erie Railroad Co. v. Tompkins*⁹ presupposes the contrary view,¹⁰ the Holistic Theory undermines *Erie*'s central holding.

Third, the Holistic Theory supplies formalists, who maintain that the law rarely if ever runs out, with a response to realists' skepticism "about how often precedent really permits the court to justify one and only one decision on legal grounds."¹¹ If the Holistic Theory is right, then the formalist can say that precedent directs the court to the outcome that the court would believe is correct if the proposition for which the precedent stands were true.

Fourth, the Holistic Theory provides a charitable explanation for why judges often disagree along ideological lines about whether a precedent can properly be distinguished. To assess a precedent's legal impact under the Holistic Theory, a judge must update her priors around the assumption that the proposition for which the precedent stands is true. This means that judges with different priors may in good faith reach different conclusions about a precedent's legal impact.

⁸ See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 563–67 (2019) [hereinafter Sachs, *Finding Law*] (defending this view).

⁹ 304 U.S. 64 (1938).

¹⁰ See *id.* at 79.

¹¹ Brian Leiter, *Realism About Precedent*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 312, 313 n.6 (Timothy Endicott et al. eds., 2023).

Fifth, the Holistic Theory offers a solution to a version of what scholars call the “problem of the second best” as applied to precedent.¹² Faced with a case that is closely analogous to an erroneous but binding precedent, should a court extend the precedent and thus “extend the error,” or should the court cabin the precedent and thus draw an arbitrary distinction between similar cases?¹³ The Holistic Theory suggests that the court should reach the outcome that the court would believe is correct if it were convinced that the proposition for which the precedent stands is true, which will mean extending the precedent in some cases and cabining it in others.

This Article is organized as follows. Part I uses the framework of Bayesian epistemology to illustrate the workings of the Holistic Theory. Part II situates the Holistic Theory in the literature by distinguishing it from existing theories. Part III marshals evidence from judicial practice in favor of the Holistic Theory against alternative theories. Part IV highlights some of the Holistic Theory’s scholarly and doctrinal payouts.

I. THE HOLISTIC THEORY OF PRECEDENT

According to the Holistic Theory, a person respects a precedent’s authority in a given domain if and only if, for purposes of making decisions within that domain, she treats the precedent as decisive evidence for the proposition for which it stands and updates her other doxastic states around that assumption. This Article focuses on contexts in which the person and domain are a judge and a case, respectively. Thus, for purposes of this Article, the Holistic Theory’s claim is that a judge respects the authority of a precedent in a given case by treating the proposition for which the precedent stands as true and updating her other doxastic states around that assumption for purposes of deciding the case.

Unpacking this idea requires saying a little about what it means to update one’s doxastic states in response to evidence. For purposes of exposition, this Article assumes a simple Bayesian model of how rational updating in response to evidence works. But it is important to note that the Holistic Theory is compatible with other models, too.¹⁴

¹² See Baude, *supra* note 1, at 324–29, 334 (discussing the problem and concluding that it remains unsolved).

¹³ *Id.* at 326.

¹⁴ For an overview and criticism of alternatives to Bayesianism, see 2 MICHAEL G. TITELBAUM, *FUNDAMENTALS OF BAYESIAN EPISTEMOLOGY: ARGUMENTS, CHALLENGES, ALTERNATIVES* 445–83 (2022).

A. The Basics of Bayesian Updating

The literature on Bayesian updating is vast and technical. Fortunately, a nontechnical sketch of the basic framework suffices for this Article's purposes.¹⁵

Suppose that we are interested in how a person should think about a proposition q in light of new information that p . We can divide the space of possibilities into four: (1) the possibility that both p and q are true, (2) the possibility that p is true but q is false, (3) the possibility that p is false but q is true, and (4) the possibility that both p and q are false. These possibilities are represented in Table 1, where a strikethrough indicates that the proposition is false:

TABLE 1

p	p	p	p
q	q	q	q

Corresponding to each possibility is the person's "credence" in that possibility.¹⁶ A person's credence in a possibility is her assessment of the likelihood that the possibility is actual, ranging from zero (complete certainty that the possibility is not actual) to one (complete certainty that the possibility is actual).¹⁷ A person's credences in a mutually exclusive and logically exhaustive set of possibilities such as the set represented in Table 1 should sum to one because at least one of the possibilities in a logically exhaustive set must be true.¹⁸

Suppose that, prior to acquiring the new information that p , the person's credences in the four possibilities in question were as follows:

TABLE 2

p	p	p	p
q	q	q	q
0.3	0.1	0.2	0.4

¹⁵ For a high-level introduction to Bayesian epistemology, see generally Hanti Lin, *Bayesian Epistemology*, STANFORD ENCYCLOPEDIA OF PHIL. (June 13, 2022), <https://perma.cc/XJR5-27ZT>, especially the "introductory tutorial" in the first section. For a more comprehensive yet still accessible explanation and defense of Bayesian epistemology, see generally 1 TITELBAUM, *supra* note 14, and see 2 *id.* at 445–83.

¹⁶ Lin, *supra* note 15.

¹⁷ *Id.*

¹⁸ *Id.*

These credences represent the person's "priors."¹⁹

Then the person acquires the new information that p . On the Bayesian model, assuming the person is rational, she will drop her credence in any possibility in which p is false to zero and normalize her credences in all remaining possibilities upward so that they retain their ratios to one another but sum to one.²⁰ That is, the person should update her priors as follows:

TABLE 3

p	p	\bar{p}	\bar{p}
q	\bar{q}	q	\bar{q}
0.75	0.25	0	0

In Table 3, the person's credences in the possibility that p is false but q is true and the possibility that both p and q are false have dropped to zero. The remaining possibilities are that both p and q are true and that p is true but q is false. The person's credences in these possibilities have been normalized upward from 0.3 and 0.1 so that they retain their 3:1 ratio but sum to one, bringing them to 0.75 and 0.25.²¹

A person's credence in a proposition is the sum of her credences in the possibilities in which that proposition is true.²² In our example, the person's initial credence in p is $0.3 + 0.1 = 0.4$, and her initial credence in q is $0.3 + 0.2 = 0.5$. After Bayesian updating, her revised credence in p is $0.75 + 0.25 = 1$, and her revised credence in q is $0.75 + 0 = 0.75$.

Thus, the Bayesian theorist would answer the question with which we began as follows: In light of new information that p , the person should revise her credence in q upward from 0.5 to 0.75.

Note that the "should" here is subjective in the sense that it is relative to the person's priors. The Bayesian account just sketched is an account of the rational norms that govern updating one's priors in response to evidence. Therefore, the account specifies what one's updated credences rationally ought to be given one's priors and has nothing to say about what one's priors rationally ought to be.

¹⁹ *Id.*

²⁰ *Id.*

²¹ For a more comprehensive discussion of the mechanics of Bayesian updating, see TITELBAUM, *supra* note 14, at 90–122.

²² Lin, *supra* note 15.

It is important to emphasize that the Bayesian model describes an ideal against which to evaluate the rationality of human responses to new information. The model is not supposed to describe anyone's actual mental processes. Indeed, the model's requirements of sharp credences distributed coherently across indefinitely many possibilities "are so demanding that they can be followed only by highly idealized agents."²³ So if the model were supposed to describe actual mental processes, then it would be subject to "pervasive counterexamples . . . : all human beings."²⁴ The point of the Bayesian model is not to describe how people respond to new information but to articulate the rational ideal that defines how they *should* respond. Even if the standard of perfection established by that ideal is unattainable for finite reasoners such as us, it provides a benchmark against which to assess our responses to new information as more or less rational according to how closely they approximate it.

B. The Core of the Theory: A Simplified Example

Let us apply the Bayesian model to the Holistic Theory of what it is to respect the authority of precedent. To keep things simple, let us start with a stylized case in which only one precedent is relevant, that precedent is limited to one simple holding, and that precedent is binding.

Suppose that you are a district court judge in 1971, just before the Supreme Court decides *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.²⁵ The question presented in *Bivens* is whether the Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures.²⁶ You are skeptical that the Bill of Rights contains implied causes of action. That said, you are inclined to think that, if any of the first eight amendments did contain an implied cause of action, then all of them would. The reason you think this is because although you find no putative explanation for an implied cause of action in any given amendment plausible, the explanation that you find least implausible is an explanation that applies to all eight.

Now suppose that a plaintiff files a lawsuit on your docket asserting as her cause of action unconstitutional quartering in

²³ *Id.*

²⁴ *Id.*

²⁵ 403 U.S. 388 (1971).

²⁶ *See id.* at 389.

violation of the Third Amendment. The defendant files a motion to dismiss. You decide to wait until the Supreme Court decides *Bivens* before ruling on the motion to dismiss, reasoning—correctly, as it turns out—that the Court’s decision might affect how you should rule on the motion.

As we did in the previous Section, we can divide the space of possibilities into four, according to every permutation of truth values the two propositions in question could have. Here, the two propositions are (1) that the Fourth Amendment (4A) includes an implied cause of action for unconstitutional searches and seizures and (2) that the Third Amendment (3A) includes an implied cause of action for unconstitutional quartering. Suppose that before the Court decides *Bivens*, your credences in these possibilities are as follows:

TABLE 4

4A cause of action	4A cause of action	4A cause of action	4A cause of action
3A cause of action	3A cause of action	3A cause of action	3A cause of action
0.10	0.05	0.05	0.80

Your high credence in the fourth possibility (the rightmost column) reflects your skepticism that any of the amendments in the Bill of Rights includes an implied cause of action. Your especially low credences in the second and third possibilities, even compared to your credence in the first possibility, reflect your belief that the least implausible theory on which any of the first eight amendments includes an implied cause of action is a theory on which all of them include an implied cause of action.

Then the Court decides *Bivens*, holding that the Fourth Amendment *does* include an implied cause of action for unconstitutional searches and seizures.²⁷ According to the Holistic Theory, the doctrine of precedent requires you to treat this holding as certain and revise the rest of your doxastic states accordingly for purposes of deciding the case before you. In the Bayesian model, this means dropping your credences in possibilities that are incompatible with *Bivens*’s holding to zero and normalizing your credences in the remaining possibilities so that they sum to one, yielding the following, revised set of credences:

²⁷ See *id.*

TABLE 5

4A cause of action	4A cause of action	4A cause of action	4A cause of action
3A cause of action	3A cause of action	3A cause of action	3A cause of action
0.67	0.33	0	0

Thus, *Bivens* requires you to adjust your credence in the proposition that the Third Amendment includes an implied cause of action for unconstitutional quartering from $0.10 + 0.05 = 0.15$ to $0.67 + 0 = 0.67$.

This means that *Bivens* is outcome determinative in your case. You should grant the motion to dismiss if and only if your credence in the proposition that the Third Amendment includes an implied cause of action is less than or equal to 0.5.²⁸ Prior to *Bivens*, your credence in the proposition that the Third Amendment includes an implied cause of action was 0.15, which is less than or equal to 0.5; therefore, but for *Bivens*, you should grant the motion to dismiss. But given how the doctrine of precedent requires you to update your credences in light of *Bivens*, your credence in the proposition that the Third Amendment includes an implied cause of action is 0.67, which is greater than 0.5; therefore, because of *Bivens*, you should deny the motion to dismiss.

Again, the “should” here is subjective in the sense that it is relative to your priors. Given your priors, you should deny the motion to dismiss only because of *Bivens*. Perhaps your priors are off base. In that case, it might objectively be that you should deny the motion to dismiss regardless of *Bivens* or that you should grant the motion to dismiss notwithstanding *Bivens*. But interrogating your priors would require examining the underlying legal issues on the merits, which falls outside the scope of this Article. This Article concerns what it is to respect the authority of precedent in the ordinary, subjective sense of “respect”—the sense in

²⁸ A tie in this case would go to the defendant. Although the defendant bears the burden of persuasion on a motion to dismiss, *e.g.*, *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991), what the defendant must persuade the court of is that the plaintiff has not stated a claim upon which relief can be granted, FED. R. CIV. P. 12(b)(6). And because the plaintiff bears the burden of persuasion on the underlying claim, *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005), any claim that leaves the court in equipoise is not a claim on which relief can be granted. Therefore, if the defendant manages to argue the court into equipoise on the critical legal issue, then the defendant has carried its burden to persuade the court that it cannot grant the plaintiff's request for relief.

which a person who sincerely tries to obey a superior's command is respecting the superior's authority even if, due to an honest mistake, what the person does is not what the superior commanded, as well as the sense in which the person who tries to disobey the command is not respecting the superior's authority even if, due to a mistake, what the person does is what the superior commanded. Accordingly, this Article focuses on how judges legally ought to respond to precedent given their priors.

Before moving on, note that variants of the Holistic Theory are possible on which the doctrine of precedent requires judges to treat authoritative holdings as probably, but not necessarily certainly, true. In other words, one might think that the doctrine of precedent requires judges to assign a credence of greater than 0.5, but not necessarily as high as 1, to authoritative holdings. For example, perhaps respect for a precedent's authority means adjusting one's credence in the proposition for which a precedent stands to 0.5 plus half one's prior credence in the proposition. This procedure sets 0.5 as the minimum credence one could have in the precedent's holding but allows one's priors to determine where between 0.5 and 1 one's revised credence will be.²⁹ For example, a prior credence of 0.8 will result in a revised credence of 0.9, 80% of the way from 0.5 to 1, because $0.5 + (0.8 \div 2) = 0.9$. On this variant of the Holistic Theory, the proper response to *Bivens*, given your priors as stipulated in Table 4, is to revise those priors as follows:

TABLE 6

4A cause of action	4A cause of action	4A cause of action	4A cause of action
3A cause of action	3A cause of action	3A cause of action	3A cause of action
0.383	0.192	0.025	0.400

²⁹ Strictly speaking, to ensure fidelity to the precedent's holding even where the judge's prior credence in the proposition that constitutes the holding was zero and the party relying on the precedent bears the burden of persuasion, the theory would need to require a baseline of 0.5 plus an arbitrarily small number. That is, where p designates the judge's prior credence in the proposition for which a precedent stands and ε designates an arbitrarily small number, respect for the precedent's authority would require the judge to adjust her credence in the proposition from p to $0.5 + \varepsilon + (0.5 - \varepsilon)p$. A value of 1 for p will still result in a revised credence of 1, but a value of 0 for p will result in a revised credence of $0.5 + \varepsilon$.

Your updated credence in the proposition that the Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures is $0.383 + 0.192 = 0.575$, which is 15% of the way from 0.5 to 1, reflecting the fact that your prior credence in the proposition was $0.10 + 0.05 = 0.15$. And your updated credence in the proposition that the Third Amendment includes an implied cause of action for unconstitutional quartering is $0.383 + 0.025 = 0.408$. Because $0.408 \leq 0.5$, you should grant the motion to dismiss even after accounting for *Bivens*. On this variant of the Holistic Theory, *Bivens* is not outcome determinative in your case.

Although hypothetically the doctrine of precedent could work like this, there are reasons to doubt that it does. One reason is that even if the law were to incorporate elevated standards of proof for certain legal questions,³⁰ it seems that the doctrine of precedent would still require following a binding precedent in cases within the scope of its holding. In any event, the remainder of this Article operates with the version of the Holistic Theory on which respect for a precedent's authority requires treating the proposition for which the precedent stands as certainly true.

C. Accounting for Multiple Precedents

The role of precedent in adjudication is usually more complicated than in the stylized example in Part I.B. One of the simplifying assumptions in the example is that *Bivens* is the only relevant precedent. Let us examine how the Holistic Theory operates within the Bayesian model when we relax that assumption.

The year is 2023. You are still on the court. Because the parties to your 1971 lawsuit settled before you had an opportunity to rule on the motion to dismiss, neither you nor any other judge has ruled on whether to extend *Bivens* to the Third Amendment. But in 2022, the Supreme Court decided *Egbert v. Boule*³¹ and held that the First Amendment does not include an implied cause of action for unconstitutional retaliation for speech.³² For simplicity's sake, suppose that this was *Egbert's* only holding and that no other relevant precedents exist. Now, shortly after *Egbert*, another lawsuit is filed on your docket asserting a cause of action

³⁰ See, e.g., *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 733 (Minn. 1990) ("The party challenging a statute on constitutional grounds must show a constitutional violation beyond a reasonable doubt.")

³¹ 142 S. Ct. 1793 (2022).

³² *Id.* at 1807.

for unconstitutional quartering in violation of the Third Amendment. Again, the defendant files a motion to dismiss on the ground that the Third Amendment includes no implied cause of action.

Because we must contend with two precedents, we must divide the space of possibilities into eight parts corresponding to all permutations of truth values the three propositions in question could have. These propositions are (1) that the Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures, (2) that the First Amendment (1A) includes an implied cause of action for unconstitutional retaliation, and (3) that the Third Amendment includes an implied cause of action for unconstitutional quartering. Suppose that prior to considering either *Bivens* or *Egbert*, your credences in these possibilities are as follows:

TABLE 7

4A	4A	4A	4A	4A	4A	4A	4A
1A	1A	1A	1A	1A	1A	1A	1A
3A	3A	3A	3A	3A	3A	3A	3A
0.09	0.01	0.01	0.04	0.01	0.04	0.04	0.76

Note that the values in Table 7 are consistent with the values in Table 4, suggesting that you have not changed your mind since 1971 about the plausibility of implied causes of action in the Bill of Rights. For example, the leftmost two columns in Table 7 indicate that your credence in the proposition that the Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures and the Third Amendment includes an implied cause of action for unconstitutional quartering is $0.09 + 0.01 = 0.10$, which matches the leftmost column of Table 4.

Note also that your credence in possibilities in which only one amendment includes an implied cause of action (0.04) is significantly higher than your credence in possibilities in which only one amendment does not include an implied cause of action (0.01). This reflects your belief that, although the most likely possibility is the one in which none of the amendments includes an implied cause of action, and the second most likely possibility is the one in which all of the amendments include an implied cause of action, the least implausible theory on which some but not all of the amendments include an implied cause of action is one on which there is something special about a single amendment that gives

it an implied cause of action (rather than something special about multiple amendments).

Now consider how, according to the Holistic Theory, the doctrine of precedent requires you to update your credences in light of *Bivens* and *Egbert*. You should drop your credences in possibilities in which either the Fourth Amendment does not include an implied cause of action for unconstitutional searches and seizures or the First Amendment does include an implied cause of action for unconstitutional retaliation to zero. Then you should normalize your credences in the remaining possibilities so that they sum to one. Following this procedure yields the following, revised set of credences:

TABLE 8

4A	4A	4A	4A	4A	4A	4A	4A
1A	1A	1A	1A	1A	1A	1A	1A
3A	3A	3A	3A	3A	3A	3A	3A
0	0.2	0	0.8	0	0	0	0

Thus, although *Bivens* had required you to adjust your credence in the proposition that the Third Amendment includes an implied cause of action for unconstitutional quartering upward from 0.15 to 0.67, *Egbert* requires you to readjust downward from 0.67 to 0.20.

This means that *Egbert* is outcome determinative in your case. But for *Egbert*, respect for *Bivens*'s authority would have required you to deny the motion to dismiss because $0.67 > 0.5$. However, respect for *Egbert*'s authority in addition to *Bivens*'s requires you to grant the motion to dismiss because $0.2 \leq 0.5$.

D. Accounting for Complex Holdings

So far, we have been assuming that the part of a judicial decision that carries the authority of precedent consists of one simple holding. Let us examine how the Holistic Theory operates within the Bayesian model when we relax that assumption.

For purposes of exposition, I assume that all and only those propositions that figure as premises in the court's basis for its disposition are "holdings" with precedential authority.³³ But it is

³³ Cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 14–15 (1994) (adopting for purposes of

important to note that the Holistic Theory is also compatible with other accounts of what parts of judicial decisions carry the authority of precedent, including accounts that offer different interpretations of the distinction between holdings and dicta³⁴ as well as accounts that limit a decision's precedential authority to its judgment.³⁵

Moreover, although for ease of exposition I assume that a case's holdings can be identified independently of the holistic analysis involved in revising one's doxastic states around acceptance of those holdings, the defender of the Holistic Theory is free to reject this assumption. For example, the defender of the Holistic Theory is free to maintain that the only way to adjudicate between two plausible interpretations of a precedent's holding is to "peek ahead" at what Bayesian updating around each set of candidate holdings would entail and select the interpretation that would do less damage to one's priors.³⁶ But to keep things simple, I assume for now that a precedent's holdings can be identified independently of such considerations.

With these stipulations in place, let us revisit *Egbert*. The Court did rest its disposition of the First Amendment claim on the proposition that the First Amendment does not include an implied cause of action for unconstitutional retaliation. But the Court did not simply assert that proposition without purporting to justify its assertion. Instead, at least on one plausible reading of the majority opinion, the Court rested its assertion that the First Amendment does not include an implied cause of action for unconstitutional retaliation on the following premises:

E1: Outside the contexts in which the Court has already found an implied cause of action, no amendment includes an

discussion the view that, setting aside fractured decisions with no majority opinion, "the disposition and the doctrinal reasoning justifying it" carry precedential authority).

³⁴ *E.g.*, Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1566–74 (2020) (describing a view on which any resolution of an issue in the case is a holding); *see also* Ryan C. Williams, *Plurality Decisions and the Ambiguity of Precedential Authority*, 74 FLA. L. REV. 1, 24–27 & n.127 (2022) (discussing the "pronouncement model" of precedential authority of which Professor Charles Tyler's adjudicative model is an example).

³⁵ *Cf.* Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 823–24 (2017) [hereinafter Williams, *Questioning Marks*] (observing that "distinguished commentators on the common law have urged that *only* the result of the precedent-setting case should be treated as binding," but declining to endorse this approach (emphasis in original)).

³⁶ *Cf. infra* Part II.B.2 (noting that legal philosopher Ronald Dworkin defends a view along these lines).

implied cause of action unless there is some special reason why Congress could not create the cause of action;

E2: There is no special reason why Congress could not create a cause of action for First Amendment retaliation claims; and

E3: First Amendment retaliation claims are not a context where the Court has already found an implied cause of action.³⁷

In conjunction, *E1–E3* entail that the First Amendment does not include an implied cause of action for retaliation claims. Because the Court relied on *E1–E3* to establish this conclusion and in turn relied on that conclusion for its disposition, *E1–E3* are holdings within the definition that this Section is using for illustrative purposes.

Egbert includes other holdings, too. The conclusion that the First Amendment does not include an implied cause of action for retaliation does not by itself entail the Court's disposition of the First Amendment claim. The Court also needed to rely on other premises; for instance, that the *Egbert* complaint failed to assert a genuine cause of action unless the First Amendment includes an implied cause of action for retaliation; that if a complaint fails to assert a genuine cause of action, then the defendant who timely moves for dismissal on that ground is entitled to dismissal; and that the *Egbert* defendant timely moved for dismissal on the ground that the complaint failed to assert a genuine cause of action. Only in conjunction with additional premises such as these do *E1–E3* entail that the *Egbert* defendant was entitled to dismissal of the First Amendment claim. And we still have not said anything about how the Court disposed of the Fourth Amendment claim in the case.³⁸

But to keep things simple, suppose that *E1–E3* exhaust *Egbert's* holdings. Now consider the cumulative impact of these holdings along with *Bivens's* holding (which for simplicity's sake let us continue to treat as simply the bare assertion that the Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures) on your credence in the proposition that the Third Amendment includes an implied cause of action for unconstitutional quartering. To represent this impact, we would need a table with $2^5 = 32$ columns, corresponding to all permutations of truth values the five relevant propositions could have.

³⁷ See *Egbert*, 142 S. Ct. at 1803, 1807–09.

³⁸ See *id.* at 1804–07.

Those propositions are *Bivens's* holding, which I label *B*; *Egbert's* three holdings *E1–E3*; and the proposition at issue in your case, which I label *P*:

B: The Fourth Amendment includes an implied cause of action for unconstitutional searches and seizures.

E1: Outside the contexts in which the Court has already found an implied cause of action, no amendment includes an implied cause of action unless there is some special reason why Congress could not create the cause of action.

E2: There is no special reason why Congress could not create a cause of action for First Amendment retaliation claims.

E3: First Amendment retaliation claims are not a context in which the Court has already found an implied cause of action.

P: The Third Amendment includes an implied cause of action for unconstitutional quartering.

According to the Holistic Theory, you must modify your credences in each of the thirty-two possibilities corresponding to all permutations of truth values these five propositions could have by reducing your credence in any possibility in which any of *B*, *E1*, *E2*, or *E3* is false to zero and then normalizing your credences in the remaining possibilities so that they sum to one.

I do not produce here a pair of thirty-two-column tables displaying your credences before and after Bayesian updating. But we can presume that your updated credence in *P* would be significantly lower than its value of 0.2 in Table 8, in which we were assuming that *Egbert's* only holding was the bare assertion that the First Amendment does not include an implied cause of action for unconstitutional retaliation. The Court has not already found an implied cause of action in the Third Amendment, and there is no reason why Congress could not create one. Moreover, the least implausible theory on which Congress could not create a cause of action for Third Amendment violations is presumably a theory on which Congress could not create a cause of action for First Amendment retaliation claims either. Therefore, your credence in any possibility in which *E1* and *E2* are true and yet *P* is also true is de minimis. But after Bayesian updating, your credence in *P* is equal to your credence in such a possibility, namely, the possibility where *E1*, *E2*, and *P*, as well as *B* and *E3*, are all true. Why? Because your credence in a proposition is the sum of your credences in all possibilities in which that proposition is true.

And after Bayesian updating, your credence in all possibilities in which any of *B*, *E1*, *E2*, or *E3* is false is zero, which means that the only credence that adds anything to the sum for *P* is your de minimis credence in the possibility that *P* is true even though *B*, *E1*, *E2*, and *E3* are all true, too. Thus, *Egbert's* rationale for denying the existence of an implied cause of action for First Amendment retaliation claims makes it even clearer that you should conclude that *P* is false and grant the motion to dismiss the Third Amendment claim.

Henceforth, to keep things simple, I usually refer to the part of a judicial decision with precedential authority as its holding. But it is important to remember that the Holistic Theory is compatible with views on which decisions have multiple holdings as well as views on which it is the court's judgment or something else besides the court's holding(s) that carries the authority of precedent.

E. Stare Decisis and Nonbinding Precedent

The final simplifying assumption to relax is the assumption that the relevant precedent is binding. Suppose that instead of a district court judge, you are a Supreme Court Justice, and the Third Amendment case comes to you several years after *Bivens*. Assume there are no other relevant precedents. The petitioner has urged the Court to hold that the Third Amendment includes no implied cause of action, *Bivens* notwithstanding. In the alternative, the petitioner has asked the Court to overrule *Bivens*.

Based on the analysis in Part I.B, you conclude that respecting *Bivens's* authority would require you to conclude that the Third Amendment includes an implied cause of action. If you were a lower court judge, then your analysis would end there because you would be bound to respect *Bivens's* authority. But because you are a Supreme Court Justice and the Supreme Court has the authority to overrule its own precedents, you must ask whether the conditions for overcoming stare decisis are met.

On that question, the Holistic Theory has nothing to say. It is not a theory about what the conditions for overcoming stare decisis are but rather a theory about what the Court is supposed to do when those conditions are not met.

That said, although the Holistic Theory cannot tell the Justices how to make the choice between following and overruling a precedent, it can tell the Justices when the choice is one that they must make. Commentators often criticize the Court for claiming

“fidelity to a precedent” while really “undermining” it or “by sleight of hand or fiat simply chop[ping] the precedent to a stub.”³⁹ Usually, the complaint is not that the Court failed to apply a precedent to a case within the scope of its holding.⁴⁰ Instead, the complaint is that the Court refused to extend a precedent as far beyond the scope of its holding as fidelity to the precedent required.⁴¹ The Holistic Theory sharpens such critiques by providing an account of when and why fidelity to a precedent requires extending it beyond the scope of its holding.⁴²

In addition, the Holistic Theory sheds light on how lower courts should react when the Court acknowledges that one of its prior holdings was erroneous but concludes that reliance interests or other stare decisis considerations require continued adherence to the holding in a specified range of cases.⁴³ Assuming that the Court’s confession of error has the force of a holding, respect for the authority of its decision requires lower courts no longer to respect the authority of its prior decision—that is, no longer to make, and update their priors around, the assumption that the prior holding is true. On the contrary, given that the Court has authoritatively acknowledged that the prior holding is false, lower courts must now make, and update their priors around, the assumption that the prior holding is false. But lower courts must also accept the Court’s additional holding that stare decisis provides independent legal grounds for continued adherence to the erroneous holding within the specified range of cases. The upshot is that lower courts must continue to apply the prior holding within the specified carveout, but they must not update their priors around the assumption that the prior holding is true, and indeed they must make, and update their priors around, the assumption that the prior holding is false in all cases outside the carveout.

³⁹ Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 8–13 (2010).

⁴⁰ *See id.* at 9.

⁴¹ *Id.* at 9–13.

⁴² But the Holistic Theory also tempers the same critiques by providing an account of how good faith disagreement is possible regarding when distinguishing a precedent is consistent with respect for its authority. *See infra* Part IV.D.

⁴³ *Bivens* might be an example. *See Ziglar v. Abbasi*, 582 U.S. 120, 132–35 (2017) (repudiating the *Bivens* Court’s approach to recognizing implied constitutional causes of action, and warning against “expanding the *Bivens* remedy,” but acknowledging that “undoubted reliance upon [*Bivens*] as a fixed principle” is a “powerful reason[] to retain it” as applied to unconstitutional searches and seizures).

F. Enactment Force and Gravitational Force

This Part's presentation of the Holistic Theory is now complete. All that remains is to introduce some vocabulary to mark an important distinction within the theory. The Holistic Theory recognizes two parts to respecting the authority of a precedent when deciding a case: (1) assuming that the precedent's holding is true and (2) updating one's priors around that assumption. Borrowing vocabulary from legal philosopher Ronald Dworkin, this Article uses "enactment force" to refer to the part of a precedent's legal impact that a judge respects by assuming that the precedent's holding is true and "gravitational force" to refer to the part of a precedent's legal impact that a judge respects by updating her priors around the assumption that the precedent's holding is true.⁴⁴

The key innovation of the Holistic Theory is its account of precedent's gravitational force. The Holistic Theory's attribution of gravitational force to precedent is not only what justifies calling the theory "holistic"; it is also what makes the theory distinctive. All plausible theories of precedent recognize its enactment force. But the only well-known theory of precedent that recognizes its gravitational force is Dworkin's,⁴⁵ which differs from the Holistic Theory in other important ways, detailed in Part II.B.

II. SITUATING THE HOLISTIC THEORY

Distinguishing the Holistic Theory from existing theories of precedent is important for two reasons. First, where the Holistic Theory diverges from existing theories, it is the Holistic Theory that better tracks judicial practice and thus has the better claim to describe what it is to respect the authority of precedent in the U.S. legal system.⁴⁶ Second, the differences between the Holistic Theory and its closest cousin in the literature, Dworkin's theory, mean that the Holistic Theory, unlike Dworkin's theory, is compatible with positivist and positivist-adjacent theories of law.⁴⁷

⁴⁴ See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 111 (1977) [hereinafter DWORIN, *TAKING RIGHTS SERIOUSLY*] (introducing the terms "enactment force" and "gravitational force").

⁴⁵ See *id.*

⁴⁶ See *infra* Part III.

⁴⁷ See *infra* Part II.B.3.

A. Distinguishing Non-Dworkinian Theories

The most popular theories of precedent, which this Article calls “standard” theories, limit a precedent’s authority to its enactment force.⁴⁸ According to these theories, to respect the authority of precedent is simply to treat the proposition for which the precedent stands as true.

Such theories are often called “rule based” in the literature.⁴⁹ It is easy to see why. In principle, one could combine the idea that to respect the authority of precedent is simply to treat the proposition for which the precedent stands as true with the view that the proposition for which a precedent stands is the court’s judgment—that is, a proposition about the parties’ legal rights in the context of the particular case. But the result would be a theory on which, apart from *res judicata*, precedents never have any legal effect in future cases. And that would hardly qualify as a theory of precedent at all.⁵⁰ So it is no surprise that theories of precedent that limit a precedent’s authority to its enactment force generally

⁴⁸ See *infra* note 51 (providing examples); *infra* note 52 (indicating their popularity).

⁴⁹ E.g., Katharina Stevens, *Reasoning by Precedent—Between Rules and Analogies*, 24 LEGAL THEORY 216, 216–17 (2018) (“According to the [rule-based] approach, . . . [a] judge identifies a rule that the precedent-opinion either sets up or refers to. Then she determines whether the present-case falls under it.”); Adam Rigoni, *Common-Law Judicial Reasoning and Analogy*, 20 LEGAL THEORY 133, 137 (2014) (explaining that, according to “rule-based theories,” where a precedent stands for the rule that “in residentially zoned neighborhoods, adult bookstores constitute a nuisance,” the precedent requires holding something a nuisance if it (1) “is an adult bookstore and” (2) “is located in a residential neighborhood” but leaves the judge “free to decide the case as she pleases” if one or both conditions are not met); Alexander, *Constrained by Precedent*, *supra* note 2, at 24 (explaining that under the “rule model” of precedent, “a court that confronts a rule [drawn from precedent] ‘A, B, C, then X’ in a case of A and B is not constrained by the rule . . . because the rule ‘A, B, C, then X’ does not cover the case of A, B.” (emphasis in original)).

⁵⁰ A version of the standard theory that collapses, or comes dangerously close to collapsing, into this position is legal philosopher Joseph Raz’s. According to Raz, courts can always add conditions to the application of a prior case’s holding provided that those conditions would not have required a contrary outcome in the prior case. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 183–89 (1979). As Professor Larry Alexander has pointed out, one can always find *some* distinction between a subsequent case and a prior case and thus *some* condition that was met in the prior case but not the subsequent case. See Larry Alexander, *Precedent: The What, the Why, and the How*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 11, at 11, 13–14. If the subsequent court can simply add the condition to the prior case’s holding and thereby distinguish it, then it seems that any legal constraint imposed by the doctrine of precedent is “illusory.” *Id.* at 14. Although Raz was interested primarily in the practice of precedent in the English legal system, see RAZ, *supra*, at 180–81, his account has been widely influential among theorists of the U.S. legal system, see, e.g., Watson, *Obstructing Precedent*, *supra* note 5, at 265–73.

treat the proposition for which a precedent stands as a general “rule” or proposition of law drawn from the court’s opinion.⁵¹

Nonetheless, this Article eschews the label of rule based for such theories and calls them “standard” theories instead. Even if most theories of precedent that limit a precedent’s authority to its enactment force also identify the proposition for which a precedent stands with a general rule, it is not the case that only theories of precedent that limit a precedent’s authority to its enactment force identify the proposition for which a precedent stands with a general rule. For example, the Holistic Theory denies that a precedent’s authority is limited to its enactment force but remains neutral on whether the proposition for which a precedent stands is the court’s judgment or a rule drawn from the court’s opinion (or something else). Using the label of rule based to describe standard theories obscures the possibility of theories that recognize the proposition for which a precedent stands as a general proposition of law but maintain that respecting the precedent’s authority entails more than just treating that proposition as true.

Unlike the label of rule based, the label of standard is not misleading. Theories that limit a precedent’s authority to its enactment force really are the standard—that is, most popular—theories.⁵² Sometimes they are contrasted with “analogy-based” theories.⁵³ But Professor Dan Hunter has shown how even some theories that highlight the role of analogy in reasoning from precedent and that have been cited as analogy based as opposed to rule based are, in fact, rule based as that term has been used in

⁵¹ See, e.g., Emily Sherwin, *Do Precedents Constrain Reasoning?*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 11, at 158, 158 (“I will argue that the only viable form of precedential constraint is a determinate judicial rule that requires a particular outcome in response to a particular set of facts.”); Alexander, *Constrained by Precedent*, *supra* note 2, at 24. Professors John Horty and Grant Lamond have developed a model of precedent that is “reason based” rather than rule based. See John F. Horty, *Rules and Reasons in the Theory of Precedent*, 17 LEGAL THEORY 1, 12–17 (2011); Grant Lamond, *Do Precedents Create Rules?*, 11 LEGAL THEORY 1, 18–19 (2005). But as Horty has noted, “[a]lthough the reason model was originally developed as an alternative to the standard [rule-based] model, it turns out that the two models are, in a precise sense, equivalent. The reason model can therefore be interpreted as providing a semantic justification for the standard model.” John Horty, *How Does Precedent Constrain?*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 11, at 185, 187.

⁵² See, e.g., Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1239 (2001) (explaining that the “typical view” is that “‘following’ [a] precedent means rendering the precedent down into a ‘holding’—which is to say a rule—and then applying this new rule deductively to the facts of the undecided case”).

⁵³ See, e.g., Stevens, *supra* note 49, at 222–23; Rigoni, *supra* note 49, at 136–40.

the literature and thus, in this Article's parlance, standard.⁵⁴ For example, Professor Edward Levi's classic discussion of the common law treats analogical reasoning as the process by which a rule is extracted from a prior decision.⁵⁵ On Levi's account, to respect the precedential authority of the prior decision is then simply to apply that rule in future cases.⁵⁶ This is a version of the standard approach.

True, the standard approach has its dissenters, and one reason for dissent is that—Levi's efforts notwithstanding—standard theories cannot adequately account for the legal force of arguments from analogy to precedent.⁵⁷ This Article echoes that criticism in Part III. But dissenters from the standard approach generally have not analyzed the legal force of arguments from analogy to precedent in holistic terms—that is, in terms of rational updating of priors around the assumption that the proposition for which the precedent stands is true.⁵⁸ In other words, although

⁵⁴ See Hunter, *supra* note 52, at 1251–53 (discussing Levi's theory); Stevens, *supra* note 49, at 217 & n.3 (citing Levi's theory as an example of an analogy-based theory as opposed to a rule-based theory).

⁵⁵ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1948):

It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.

⁵⁶ See *id.*

⁵⁷ See Hunter, *supra* note 52, at 1240–45 (rejecting Alexander's theory on the ground that it implies that "courts are actually not engaged in analogical reasoning, when we see them doing it all the time"); cf. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 749 (1993) (observing that "[a]nalogy plays no role" in theories that "operate deductively.").

⁵⁸ For example, Professor Cass Sunstein has claimed that "[a]nalogical reasoning is far less ambitious" than the holistic exercise of seeking "reflective equilibrium." Sunstein, *supra* note 57, at 753. Hunter has brought insights from cognitive science to bear on how judges draw analogies in the first place—a valuable contribution, to be sure—but has had little to say about what legal force analogies to precedent, once drawn, have and why. See Hunter, *supra* note 52, at 1204–29. Professor Katharina Stevens has argued that the doctrine of precedent can constrain judges in reasoning by analogy to precedent by requiring judges to accept the precedent opinion's characterization of the precedent case, but she has not suggested that respect for precedent requires the holistic revision of one's doxastic states that the Holistic Theory implies. See Stevens, *supra* note 49, at 242–47. The closest antecedent of the Holistic Theory (other than Dworkinian theories) that this author has discovered is Professor Scott Brewer's account of analogical reasoning as "exemplary reasoning." See generally Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996). Brewer has not described what it is to respect precedent in Bayesian terms or otherwise characterized it as involving a holistic reconfiguring of one's doxastic states around the assumption that the precedent's holding is true. But Brewer has recognized a role for "abduction"—that is,

they recognize that the legal force of arguments from analogy to a precedent is different from a precedent's enactment force, they generally have not identified the former with what this Article calls a precedent's gravitational force. Thus, the Holistic Theory is nearly unique among existing theories insofar as it attributes gravitational force to precedents.

B. Distinguishing Dworkin's Theory

The Holistic Theory is nearly unique in this regard—but not quite. There is one other well-known theory that attributes gravitational force to precedent: Ronald Dworkin's. Commentators differ in their interpretations of Dworkin. This Section presents the interpretation that brings Dworkin's theory as close as possible to the Holistic Theory to show how, even on this interpretation, Dworkin's theory differs from the Holistic Theory in important ways.

1. Overview of Dworkin's theory.

According to Dworkin, the content of the law is a function of what he calls “the best constructive interpretation” of the institutional history of the legal system.⁵⁹ For Dworkin, the institutional history of the legal system includes not only judicial decisions and the opinions explaining them but also, subject to a caveat not relevant here, other official acts such as statutes.⁶⁰ The best

inference to the best explanation—in reasoning by analogy to precedent, albeit a limited role as “only one part of a multistep reasoning process.” *Id.* at 949. There is a close connection between Bayesian updating and abduction. Bayesian updating around a new piece of evidence often takes the form of adopting the most plausible theory capable of explaining the evidence. *See, e.g., supra* Part I.B (suggesting that Bayesian updating around *Bivens*'s holding might support the claim that the Third Amendment includes an implied cause of action because “the least implausible theory on which any of the first eight amendments includes an implied cause of action is a theory on which all of them include an implied cause of action”). For more on the relationship between Bayesian updating and abduction, see section 4 of Igor Douven, *Abduction*, in STANFORD ENCYCLOPEDIA OF PHIL. (May 18, 2021), <https://perma.cc/U8Q7-3S6R>.

⁵⁹ RONALD DWORKIN, *LAW'S EMPIRE* 225–28 (1986) [hereinafter *DWORKIN, LAW'S EMPIRE*].

⁶⁰ *See, e.g., id.* at 337–38 (describing how statutes are swept into the institutional history that supplies the material of constructive interpretation); *DWORKIN, TAKING RIGHTS SERIOUSLY*, *supra* note 44, at 116–17 (“[The judge] must construct . . . a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.”). The caveat that constitutional and statutory provisions are included in the material of constructive interpretation only insofar as they are to be justified on grounds of “principle” and not merely on grounds of “policy” is not relevant to this Article's argument. *Id.* at 113–17.

constructive interpretation of the legal system's institutional history consists of the set of moral principles that provides the most plausible justification for that history.⁶¹ Ceteris paribus, the more material within the institutional history that the principles that constitute a constructive interpretation would justify, if true, the better the constructive interpretation is. Dworkin calls this the "dimension of fit."⁶² At the same time, ceteris paribus, the more plausible it is that the principles that constitute a constructive interpretation are true, the better the constructive interpretation is. Dworkin calls this the dimension of "justification."⁶³

Dworkin does not explain exactly how fit and justification are to be balanced when determining which constructive interpretation of a legal system's institutional history is best.⁶⁴ But in morally imperfect legal systems, including all actual legal systems, producing the best constructive interpretation of the system's institutional history will require compromising to some extent on both dimensions: It will not be the case either that the principles the best constructive interpretation comprises would, if true, justify the entire institutional history or that all the principles the best constructive interpretation comprises are true. As relevant here, if a prior judicial decision both is out of step with the rest of the system's institutional history and admits of no plausible justification, then the best constructive interpretation of the system's institutional history would likely forgo purporting to justify

⁶¹ See, e.g., DWORKIN, *LAW'S EMPIRE*, *supra* note 59, at 245 (explaining that the judge must strive for "a coherent theory justifying the network [of political structures and decisions of his community] as a whole"); *id.* at 255 (describing the best constructive interpretation as the one that makes the community's "[political] structure and [legal] record the best these can be").

⁶² *Id.* at 228–32, 238–39, 254–58.

⁶³ *Id.* Some view the role of "justification" in Dworkin's theory differently: In their view, a constructive interpretation yields the set of standards that courts are morally justified in enforcing (justification) given the system's institutional history (fit). See Varsava, *Reconstructing Precedent*, *supra* note 4 (manuscript at 6–7); Nicos Stavropoulos, *Legal Interpretivism*, 10 *PROBLEMA ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO* 23, 43 (2016). On this interpretation, Dworkin's theory bears less resemblance to the Holistic Theory; hence, this Article assumes that justification plays the role in Dworkin's theory described above. For an interpretation like the one presented here, see Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1299–1301 nn.28–29 (2014) (explaining that "when Dworkin seeks the principles that best justify all the past practices of a legal system, he is seeking principles that . . . will not in general be true moral principles" because "the practices are often not morally justified," but recognizing that "the view Dworkin briefly suggests in his very late work" is more like the view articulated by Professors Nina Varsava and Nicos Stavropoulos).

⁶⁴ See John Finnis, *On Reason and Authority in Law's Empire*, 6 *LAW & PHIL.* 357, 374 (1987) (criticizing Dworkin on this point).

it, compromising on fit in a small way to improve justification in a big way.⁶⁵

As noted above, according to Dworkin, the content of the law is a function of the best constructive interpretation of the institutional history of the legal system. But Dworkin did not think that the law is simply identical to the set of principles that constitute this constructive interpretation. He recognized that the best constructive interpretation of a legal system such as the U.S. legal system will comprise not only first-order standards allocating rights and duties but also second-order standards, which Dworkin called “institutional constraints,” that provide for the modification of first-order standards.⁶⁶ Institutional constraints include “legislative supremacy,” which requires courts to enforce statutory commands even when the best constructive interpretation of the legal system’s institutional history does not support them, and, as relevant here, “strict precedent,” which requires lower courts to respect the authority of higher court precedents even if the best constructive interpretation of the legal system’s institutional history does not support them.⁶⁷ Thus, for example, even if a Supreme Court decision is out of step with the rest of the U.S. legal system’s institutional history and admits of no plausible justification such that the best constructive interpretation of the legal system forgoes purporting to justify it, the doctrine of “strict precedent” requires lower courts to respect its authority anyway.⁶⁸

For Dworkin, the law consists of (1) the institutional constraints included in the best constructive interpretation of the legal system’s institutional history plus (2) the first-order principles included in this constructive interpretation as modified by those

⁶⁵ See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 44, at 121–22 (recognizing that the most plausible “justification of institutional history may display some part of that history as mistaken” if despite doing so “it is nevertheless a stronger justification than any alternative that does not recognize any mistakes”).

⁶⁶ DWORKIN, LAW’S EMPIRE, *supra* note 59, at 401–02 (noting that “any successful general interpretation of our legal practice must recognize these institutional constraints”).

⁶⁷ *Id.* at 401. According to Dworkin, the “legislative supremacy” is rooted in the principles of “fairness,” and “[s]trict doctrines of precedent” are “largely . . . matters of procedural due process,” *id.* at 405, in which the relevant principles of fairness and procedural due process are drawn from the best constructive interpretation of the legal system’s institutional history, *see id.* at 225 (referring to “the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice”).

⁶⁸ *Id.* at 401.

institutional constraints.⁶⁹ Thus, even if the best constructive interpretation throws out a Supreme Court decision, the institutional constraint of strict precedent brings that decision back into the content of the law for lower courts.

2. Comparison to the Holistic Theory.

Perhaps the most obvious difference between Dworkin's theory and the Holistic Theory as presented in Part I is that Dworkin did not present his theory in Bayesian terms. As far as this author is aware, no existing theory has suggested that the legal impact of precedent can be modeled in Bayesian terms. But Dworkin's theory and the Holistic Theory differ in other ways, too. This Section highlights two differences that are relevant to arguments that this Article advances in subsequent sections, particularly Parts III.B and IV.C.

First, the theories disagree about whether binding precedent retains its gravitational force even if it would meet the criteria for overruling if it were nonbinding. According to the Holistic Theory, yes. According to Dworkin, no. The Dworkinian judge must complete her holistic analysis, settling on the best constructive interpretation of the legal system's institutional history, *before* applying "[s]trict doctrines of precedent."⁷⁰ And Dworkin made clear that applying binding precedent does not involve a second holistic analysis. He explained that if the best constructive interpretation of the legal system's institutional history throws out a judicial decision, then although the "[s]trict doctrine of precedent" might restore the decision's enactment force, "the decision will lose its gravitational force."⁷¹ So if the law requires a court to respect a precedent's authority only because the precedent is binding, then respecting the precedent's authority means respecting its enactment force only.

⁶⁹ See Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 LEGAL THEORY 185, 234 (2000) (noting that "Dworkin speaks of interpreting law as integrity in terms of a coherent theory or a coherent scheme of principle" with the caveat that "sometimes, because of legislative supremacy, strict precedential practice, or other reasons, 'the principles and standards that would provide the most coherent account of the substantive decisions' of legal practice ought not to be considered its law" (quoting DWORKIN, LAW'S EMPIRE, *supra* note 59, at 400–02)).

⁷⁰ DWORKIN, LAW'S EMPIRE, *supra* note 59, at 405; see *id.* at 401 (indicating that the best constructive interpretation justifies and thus is prior to the application of strict precedent).

⁷¹ DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 44, at 121–22.

The second difference is not so much a disagreement as a difference in the level of abstraction at which the theories are pitched. Even setting aside the disagreement about whether precedent that would meet the criteria for overruling if it were nonbinding has gravitational force, as well as any other disagreements the theories might have, Dworkin's theory is at most compatible with, not equivalent to, the Holistic Theory. This is because Dworkin took positions on questions on which the Holistic Theory remains neutral. Consider four examples.

First, Dworkin took a position on what else (if anything) besides judicial precedents has gravitational force. For Dworkin, the propositions that the court must endeavor to fit into a plausible moral theory include not only judicial decisions and the assertions in the opinions explaining them but also the moral claims implicit in the rest of the legal system's institutional history.⁷² In the process of balancing fit and justification, the court will abandon some elements of the legal system's institutional history as not worth trying to fit.⁷³ But the moral claims implicit in the elements that remain will be claims that the court treats as true and around which the court constructs the most plausible moral theory it can for purposes of deciding the case before it. Thus, for Dworkin, not only judicial precedents but also statutes, regulations, and other elements of the legal system's institutional history have gravitational force.⁷⁴

Second, Dworkin took a position on which aspects of a judicial decision have precedential authority. According to Dworkin, these aspects cannot be identified independently of developing the best constructive interpretation of the legal system's institutional history.⁷⁵ Subject to the demands of justification, the court must endeavor to produce a moral theory that fits the entirety of past judicial opinions as well as the decisions they explain.⁷⁶ Some opinions are thrown out entirely with the decision they

⁷² See *supra* note 60 and accompanying text.

⁷³ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 44, at 118–23.

⁷⁴ Again, this is subject to the caveat that purely policy-based decisions “have no gravitational force.” *Id.* at 113–15; see also *supra* note 60.

⁷⁵ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 44, at 118 (explaining that the judge should assign previous opinions’ “argument[s], in the form of propositions that the judge t[ook] to recommend his decision . . . only an initial or prima facie place in his scheme of justification”).

⁷⁶ See *id.* (confirming that the judge should take into account not only previous decisions but also “the arguments that the judges who decided these cases attached to their decisions” and decide “how much weight” to give these arguments).

explain.⁷⁷ Within the opinions that explain decisions that are not thrown out, some assertions will be thrown out and others will survive.⁷⁸ The assertions that survive are the holdings that constitute the assumptions around which is built the moral theory that represents the best constructive interpretation of the legal system's institutional history and that the court is to use to decide the case before it.

Third, Dworkin took a position on the kind of content had by the propositions within a judicial opinion that have precedential authority. Dworkin treated legal reasoning as a kind of moral reasoning, albeit one that differs from ordinary moral reasoning insofar as it is based not on what the reasoner actually believes but on the best constructive interpretation of the legal system as modified by application of institutional constraints. On this view, the propositions for which judicial precedents stand are moral claims.

Fourth, Dworkin's theory suggests a view on what the conditions for overruling nonbinding precedent are: A court should overrule nonbinding precedent if and only if the best constructive interpretation of the legal system's institutional history forgoes purporting to justify the precedent.⁷⁹

Each of these positions is compatible with, but none is required by, the Holistic Theory. Thus, even setting aside the theories' disagreements, Dworkin's account of precedent is but one of multiple possible versions of the Holistic Theory.

3. Positivism and the Holistic Theory.

Although it may seem like a subtle distinction, this last difference between Dworkin's theory and the Holistic Theory—the level of abstraction at which the theories are pitched—has important ramifications for the scope of the Holistic Theory's appeal. One of the points that this Article wishes to stress is that the Holistic Theory is compatible with positivist and positivist-adjacent theories of law. To date, theorizing precedent in holistic terms has been largely if not entirely a project undertaken by Dworkin and those working within the antipositivist tradition associated with

⁷⁷ See *supra* note 65 and accompanying text.

⁷⁸ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 44, at 118 (explaining that the propositions affirmed in judicial opinions have “only an initial or prima facie place” in the best constructive interpretation of the legal system's institutional history).

⁷⁹ See *id.* at 118–23 (explaining when a judge can acknowledge a prior decision as a mistake).

Dworkin.⁸⁰ From the perspective of someone such as this author who accepts both a positivist-adjacent theory of law⁸¹ and a holistic account of precedent, the close association between holism about precedent and Dworkinian antipositivism is regrettable: On the one hand, it risks misleading those rightly convinced of positivism or an adjacent theory into rejecting holism about precedent; on the other hand, it risks misleading those rightly convinced of holism about precedent to reject positivism and its cousins.

It is easy to see that the Holistic Theory is compatible with standard Hartian positivism.⁸² All that the Hartian positivist who wishes to endorse the Holistic Theory must say is that the rule of recognition in the U.S. legal system confers validity on the key elements of the Holistic Theory.⁸³ These include a standard for identifying the proposition for which a precedent stands; a set of rules determining when precedent has binding force, when it has

⁸⁰ Professor Michael Moore has offered a “holistic account of the common law” that is antipositivist and that resembles Dworkin’s account of precedent more generally. Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183, 211 (Laurence Goldstein ed., 1987); see *id.* at 201 (arguing that to identify the content of the common law, one must take all “decisions in [one’s] jurisdiction, and construct the most coherent theory that [one] can think of that has those decisions as its deductive implications,” with a preference, all else being equal, for those theories that “provide a better moral justification for the decisions than others”). Moore has described this as “a natural law theory of precedent” that views “the common law as being nothing else but what is morally correct, all things considered—with the hooker that among those things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal.” *Id.* at 210. According to Professor Barbara Baum Levenbook, Moore is the “only [] philosopher [who] claims to have a coherence theory of the meaning of precedent” other than Dworkin, whose theory, as Levenbook noted, is not a pure coherence theory due to the codicils of institutional constraints. Levenbook, *supra* note 69, at 233–35. Since Levenbook authored her paper, Varsava has developed a Dworkinian theory of stare decisis that resembles Moore’s. See Varsava, *Reconstructing Precedent*, *supra* note 4 (manuscript at 30) (“On my account of stare decisis, the doctrine never requires a suboptimal decision; on the contrary, it requires the best (which is to say the correct) decision, given the actual state of affairs, which includes previous decisions and the rest of institutional history.” (citing DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 44, at 87)). Recently, Varsava has suggested extending Dworkin’s theory by assigning gravitational force to expected future precedents. See Nina Varsava, *The Gravitational Force of Future Decisions*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 11, at 281, 288 (“[A] court that cares about the integrity of its legal system ought to aim for coherence with both the past and future of adjudication. If it foresees that future courts will depart from past cases, then it ought to decide the present case with that in mind.”).

⁸¹ See Charles F. Capps, *The Weaker Natural Law Thesis*, 36 RATIO JURIS 333, 335 (2023) [hereinafter Capps, *Weaker Natural Law*] (defending a modest version of natural law theory).

⁸² See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

⁸³ See *id.* at 94–95, 98–110 (introducing the rule of recognition as the lynchpin of a legal system, and explaining its relationship to legal validity).

nonbinding force, and when it has no force at all; a standard specifying the criteria for overruling nonbinding precedent; and the rule that a judge confronted with a precedent that has binding force, or a precedent that has nonbinding force and does not meet the criteria for overruling, must assume that the proposition for which the precedent stands is true and update her priors around that assumption. Unlike Dworkin, whose theory of precedent is implicit in his theory of law,⁸⁴ the positivist who endorses the Holistic Theory will allow that precedent could operate differently in other legal systems. But the positivist is free to say that, as a matter of contingent social fact, precedent in the U.S. legal system operates as described by the Holistic Theory. The positivist is under no pressure to accept Dworkin's antipositivist view of legal reasoning as a kind of moral reasoning.

The same point holds of positivist-adjacent natural law theories that accept the basic Hartian framework but attribute a moral function to law or to paradigmatic instances of law.⁸⁵ Nothing about the Holistic Theory is in tension with, let alone incompatible with, such theories.

III. EVIDENCE FOR THE HOLISTIC THEORY

Now that the Holistic Theory is on the table and clearly demarcated from rival theories, it is time to ask whether the Holistic Theory is true. The best evidence for or against a theory of what it is to respect the authority of precedent will be found in judicial opinions. The dispositions themselves of cases can confirm or disconfirm such a theory only insofar as courts do, in fact, respect the authority of those precedents whose authority the law requires them to respect. And although it is plausible that most courts respect the authority of such precedents most of the time, sometimes judges make mistakes or, consciously or not, contravene the authority of such precedents for political or other reasons.

⁸⁴ See DWORKIN, *LAW'S EMPIRE*, *supra* note 59, at 225–75 (describing the holistic moral theorizing involved in reasoning from precedent as a search for what the law requires). The one aspect of Dworkin's account of how precedent works in a legal system such as the U.S. legal system that is separable from his theory of law is his description of "strict precedent." *See id.* at 401. Nothing about Dworkin's theory excludes the possibility of a legal system without a doctrine of "strict precedent." *Cf. id.* (treating "strict precedent" as an institutional constraint requiring judges to follow past decisions even when mistaken rather than as a necessary feature of legal systems).

⁸⁵ *E.g.*, Capps, *Weaker Natural Law*, *supra* note 81, at 341–47; MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* 25–60 (2006); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–19 (1980).

But even a court that makes an honest mistake or succumbs to political bias will at least purport in its opinion to be giving precedents the respect that they are due by law. Judicial opinions are therefore the best place to look for evidence confirming or disconfirming a theory of what it is to respect the authority of precedent.⁸⁶

Within judicial opinions, the best places to look will generally be passages in which a court recognizes a precedent as one whose authority the law requires the court to respect (either because the precedent is binding or because the conditions for overruling the precedent are not met). These are the passages in which the court will purport to do whatever it is that respecting precedent amounts to in the U.S. legal system.

Accordingly, this Part uses representative examples of such passages to test the Holistic Theory, first against other non-Dworkinian theories and then against Dworkin's theory. This Part's analysis is deliberately brief and schematic: Because this Article is devoted primarily to introducing the Holistic Theory, a more comprehensive survey of the evidence must wait for future work.⁸⁷

A. The Holistic Theory Versus Non-Dworkinian Theories

The key difference between the Holistic Theory and other non-Dworkinian theories is that the Holistic Theory attributes gravitational force to precedent. Every plausible theory agrees that a court must treat the holdings of precedents that are binding or that do not meet the criteria for overruling as if they were true.⁸⁸ What distinguishes the Holistic Theory from other non-Dworkinian theories is that the Holistic Theory adds that the

⁸⁶ Cf. Leiter, *supra* note 11, at 314 (endorsing an account of precedent whose "primary evidence is the actual decisions of the courts" (emphasis omitted)); Hunter, *supra* note 52, at 1243 ("[A]ny description of legal analogical and precedential reasoning must be based in the actual practice of lawyering and judging.").

⁸⁷ Cf. Leiter, *supra* note 11, at 314 n.12 (noting that although "[o]nly a very sophisticated empirical study could settle the matter [of which theory of precedent is true] decisively," nonetheless "familiarity with what courts do, emerging from practice or reading cases," can suffice to draw certain preliminary conclusions, such as ruling out certain theories).

⁸⁸ Again, subject to the caveat that where this Article speaks of holdings some theories would speak of "judgments" or something else. The point is that all plausible theories recognize a requirement to treat the proposition for which binding precedent, or precedent that does not meet the criteria for overruling, stands is true. See *supra* Part I.D.

court must also update its priors around the assumption that the precedents' holdings are true.

Thus, for purposes of testing the Holistic Theory against other non-Dworkinian theories, the most probative evidence will be found in passages in which the court not only recognizes the precedent as one whose authority the law requires the court to respect, but also recognizes the case before it as falling outside the scope of the precedent's holding—that is, outside the scope of the precedent's enactment force. In that case, the Holistic Theory predicts that the court will nonetheless feel the need to demonstrate that it respects the precedent's gravitational force. Other non-Dworkinian theories will not. According to standard accounts, the court will not feel the need to accord any legal force to the precedent beyond its enactment force and thus, given that the case falls outside the scope of the precedent's holding, will feel free to set aside the precedent as irrelevant.⁸⁹ Non-Dworkinian dissenters from the standard approach may predict that the court will feel the need to accord some legal force to the precedent beyond its enactment force, but insofar as they do not analyze this additional legal force in the way that the Holistic Theory does, they will not identify it with what this Article calls gravitational force.

The evidence largely bears out the prediction of the Holistic Theory. Hardly anything is more common in judicial opinions than reasoning by analogy to precedent.⁹⁰ And whenever courts reason by analogy to precedent, they are asking what else would probably be true if the precedent's holding was true. In other words, they are asking about the scope of the precedent's gravitational force.

It is surprising that legal scholars have yet to take stock of this fact. In the sciences, it has long been understood that evidence confirming one hypothesis can raise the plausibility of an

⁸⁹ Of course, even on standard accounts, a court may face extralegal pressure (arising from fear of reversal, for example) to extend a precedent beyond its holding. But a lower court bowing to such pressure will likely seek legal cover for its decision. And if standard accounts are right, then the precedent provides no legal cover unless its holding extends to the case. So, if the court wished to invoke the precedent as legal cover, then it would need to characterize the case as within the scope of the precedent's holding. That is why this Part focuses on passages in which the court locates the case outside the scope of the relevant precedent's holding and thus, if standard accounts are right, forfeits any legal argument that the precedent controls.

⁹⁰ See Sunstein, *supra* note 57, at 742 (“[A]nalogical reasoning maintains its status as an exceedingly prominent means by which [] lawyers . . . think about legal . . . questions.”).

analogous hypothesis via Bayesian updating.⁹¹ For example, pharmaceutical compounds developed for use in humans are commonly tested on lab rats first. In light of known similarities between human and rat biology, scientists' initial credence in the possibility that the drug is safe for rats but unsafe for humans is very low, much lower than their credence in the possibility that the drug is safe for rats and safe for humans. Thus, the analogy between humans and rats makes scientists confident that, if the drug is safe for rats, then it is also safe for humans. Bayesian updating around test results confirming that the drug is safe for rats will then yield a high credence in the proposition that the drug is safe for humans.⁹²

Similarly, an analogy to precedent is supposed to show that if the precedent's holding is true, then some legal proposition relevant to the instant case is also true. Someone who accepts the analogy and then updates her doxastic states around the assumption that the precedent's holding is true will conclude that the latter proposition is also true. Legal scholars sometimes characterize analogical reasoning in law as if it were *sui generis*, fundamentally different from reasoning in other domains.⁹³ That would be remarkable if it were true, but there is no reason to think that it is.⁹⁴ On the contrary, analogical reasoning in the law has the same structure as analogical reasoning in the sciences.

Take the following humdrum example, drawn from the Seventh Circuit in a case called *Mayle v. United States*⁹⁵:

[I]f, as the Supreme Court has held [in *Town of Greece v. Galloway*, 572 U.S. 565 (2014)], public or legislative prayer does not force religious practice on an audience, it is difficult

⁹¹ On the idea that analogies can determine the conclusions that scientists draw from evidence by shaping their priors, see PAUL F.A. BARTHA, *BY PARALLEL REASONING: THE CONSTRUCTION AND EVALUATION OF ANALOGICAL ARGUMENTS* 30–32, 290–91 (2010), and WESLEY C. SALMON, *Rationality and Objectivity in Science*, in *REALITY AND RATIONALITY* 93, 102 (Phil Dowe & Merrilee H. Salmon eds., 2005).

⁹² See, e.g., Christian J. Feldbacher-Escamilla & Alexander Gebharter, *Confirmation Based on Analogical Inference: Bayes Meets Jeffrey*, 50 *CANADIAN J. PHIL.* 174, 177–80 (2020) (applying Bayesian principles to this kind of example).

⁹³ E.g., Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *TEX. L. REV.* 35, 57 (1981) (arguing that “the method of analogy and precedent” is “distinct” to the law).

⁹⁴ See Hunter, *supra* note 52, at 1211–28 (reviewing insights from the cognitive sciences regarding analogical reasoning generally, and arguing that they have more explanatory power as applied to “precedent and analogical reasoning within law” than “competing views . . . suggested by legal theorists”).

⁹⁵ 891 F.3d 680 (7th Cir. 2018).

to see how the unobtrusive appearance of the national motto on the coinage and paper money could amount to coerced participation in a religious practice.⁹⁶

By referring to *Town of Greece* as a Supreme Court case, the Seventh Circuit implicitly recognized it as binding precedent. By characterizing the holding in *Town of Greece* in terms of legislative prayer and the question presented in *Mayle* in terms of the national motto on currency, the Seventh Circuit implicitly acknowledged that *Mayle* fell outside the scope of *Town of Greece*'s holding. The Seventh Circuit then proceeded to do exactly what the Holistic Theory would predict: The Seventh Circuit asked whether, taking as given *Town of Greece*'s holding that legislative prayer does not coerce religious practice, it is nevertheless plausible that the national motto on currency does coerce religious practice. According to the Seventh Circuit, the answer was no, which meant that the plaintiff's claim failed. Thus, what doomed the plaintiff's claim was not that the court believed that the plaintiff's claim was false but that the court would believe that the plaintiff's claim was false if it were certain that *Town of Greece*'s holding was true.

Of course, *Mayle* is just one case. But it is no outlier. As any first-year law student knows, cases in which courts endorse arguments from analogy to precedent are legion.⁹⁷

⁹⁶ *Mayle*, 891 F.3d at 685. The Seventh Circuit supported this assertion with a citation to *Town of Greece* preceded by a "see, e.g." signal. *Id.* For simplicity's sake, this Section assumes that *Town of Greece* was the only Supreme Court precedent relevant to whether "public or legislative prayer [does or] does not force religious practice on an audience." *Id.*

⁹⁷ A very small sampling includes, for example, *The Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544, 554 (4th Cir. 2012) ("If, as the Supreme Court has held, the test in *Wisconsin Right to Life* is not vague, then neither is § 100.22(b)."); *United States v. Newell*, 658 F.3d 1, 26 (1st Cir. 2011) (emphasis in original):

But if, as we held in *Verrecchia*, the fact that some guns are stored in a shed and others in a truck parked next to it is sufficient to constitute two distinct transactions, then there is a compelling claim that misapplying funds from agency A in March and misapplying funds from agency B in July is *also* sufficient to constitute two distinct transactions.

See also, e.g., *Waterbury Hotel Mgmt. v. N.L.R.B.*, 314 F.3d 645, 650 (D.C. Cir. 2003) (citation omitted):

But if, as the Supreme Court has held, an ALJ is not disqualified from presiding over the remand of a case in which he previously ruled against the same employer, then New Castle could not have obtained the ALJ's disqualification simply because he had ruled against a different employer, Waterbury's predecessor, in an unrelated case.

See also, e.g., *Hamilton v. Oswego Cmty. Unit Sch. Dist.* 308, 2023 WL 6388148, at *6 (N.D. Ill. Sept. 30, 2023) ("If the search of a child could raise Fourth Amendment concerns

Nor is the evidence confirming the existence of precedents' gravitational force limited to cases in which courts endorse arguments from analogy to precedent. Even when courts reject such arguments, they often make clear that they acknowledge the gravitational force of the precedent in question; they just view that gravitational force as failing to extend to the case at hand.

Take another humdrum example, this one drawn from the District of South Dakota in a case called *United States ex rel. Bryant v. Williams Building Corp.*⁹⁸ The court in *Bryant* faced the question whether an employer can be vicariously liable for punitive damages based on its employees' violations of the False Claims Act⁹⁹ (FCA).¹⁰⁰ The defendant argued no, citing the Supreme Court's decision in *Kolstad v. American Dental Ass'n*¹⁰¹ holding that an employer cannot be liable for punitive damages based on its employees' violations of Title VII¹⁰² absent a showing of culpability. The district court rejected the analogy:

Because the Supreme Court's modification of the scope of employment rule was compelled by concerns unique to Title VII, this Court is not convinced that the *Kolstad* decision has any bearing upon the application of agency principles in the context of the FCA. Accordingly, the Court rejects [the defendant's] invitation to extend the holding of *Kolstad* to the FCA.¹⁰³

Again, by referring to *Kolstad* as a Supreme Court case, the district court implicitly acknowledged it as binding precedent. By characterizing *Kolstad's* holding in terms of Title VII and the question presented in *Bryant* in terms of the FCA, the district court implicitly recognized that *Bryant* fell outside the scope of *Kolstad's* holding. The district court then proceeded to do exactly

[as binding precedent holds], it is hard to see why the search of a child would not constitute an adverse action, too."); *Pan. City Beach Condos, Ltd. P'ship v. Adjusters Int'l Colo., Inc.*, 2008 WL 11340313, at *2 (N.D. Fla. Nov. 28, 2008):

If, as the court squarely held in *Futch*, a person with a contractual right to 10% of the proceeds of a sale can recover for breach of contract but not for conversion, then a person with a contractual right to 10% of the proceeds of an insurance claim also can recover for breach of contract but not for conversion.

Additional examples of arguments from analogy to precedent are discussed in note 109 and Part III.B.

⁹⁸ 158 F. Supp. 2d 1001 (D.S.D. 2001).

⁹⁹ 31 U.S.C. §§ 3729–3733.

¹⁰⁰ *Bryant*, 158 F. Supp. 2d at 1006–09.

¹⁰¹ 527 U.S. 526 (1999).

¹⁰² 42 U.S.C. § 2000(e) et seq.

¹⁰³ *Bryant*, 158 F. Supp. 2d at 1008.

what the Holistic Theory would predict: The district court asked what “bearing” the assumption that *Kolstad*’s holding is true had on the plausibility of the claim that an employer is not strictly liable for punitive damages based on its employees’ FCA violations.¹⁰⁴ The reason that the district court offered for rejecting the defendant’s position was not just that the court believed that the defendant’s position was false; it was that the court would still believe that the defendant’s position was false even if it were certain that *Kolstad*’s holding was true.

Arguments from analogy to precedent are so common in legal reasoning that it is easy to overlook their significance. But they upset the common assumption that the legal impact of a precedent is limited to the precedent’s enactment force. It is only because precedents also have gravitational force that arguments from analogy to precedent have the currency in our legal system that they do.

It is thus no coincidence that, apart from a few outliers such as Edward Levi, defenders of standard theories of precedent deny that arguments by analogy to precedent have legal force. According to Professor Emily Sherwin, “[a]nalogical reasoning . . . does not provide legal answers to disputes.”¹⁰⁵ Professor Larry Alexander has asserted that “analogical reasoning has absolutely no role to play in common law decisionmaking based on precedent.”¹⁰⁶ After adopting the standard account articulated by legal philosopher Joseph Raz, Professor Bill Watson has claimed that “there is no legal obligation to accept an argument by analogy.”¹⁰⁷ Or as Raz himself put it, “there is no point in saying that judges are *legally* obliged to use analogical arguments.”¹⁰⁸

But that is not how courts treat precedent-based arguments from analogy in practice. Quite often courts recognize that they are legally obligated not just “to *consider*,” or “to explain [their reactions to],” an argument from analogy to precedent, but “to

¹⁰⁴ *Id.*

¹⁰⁵ Sherwin, *supra* note 51, at 159.

¹⁰⁶ Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 72 (1996); see also Frederick Schauer, *Why Precedent in the Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSPS. ON PSYCH. SCI. 454, 459 (2008) [hereinafter Schauer, *Why Precedent*] (arguing that “the structure of an argument from precedent is very different from the structure of an argument by analogy”).

¹⁰⁷ Watson, *Obstructing Precedent*, *supra* note 5, at 272.

¹⁰⁸ RAZ, *supra* note 50, at 206 (emphasis in original).

accept” it.¹⁰⁹ The cases considered in the next Section make this even clearer.

B. The Holistic Theory Versus Dworkin’s Theory

Showing that precedent in the U.S. legal system has gravitational force may vindicate the Holistic Theory vis-à-vis other non-Dworkinian theories, but it does not settle the debate between the Holistic Theory and Dworkin. As noted in Part II.B, Dworkin also attributed gravitational force to most precedents. But Dworkin’s theory parts ways with the Holistic Theory insofar as it does not attribute gravitational force to precedents that would meet the criteria for overruling but for the fact that they are binding.

What does the evidence say about this disagreement? Judges bound by a precedent do not often announce that they would overrule it if they could. But occasionally they do. On courts of appeals, given that a panel cannot overrule circuit precedent but the en banc court can, judges occasionally write panel concurrences in which they criticize the circuit precedent that compelled the outcome in the case in an effort to convince their colleagues to rehear the case en banc and overrule the precedent. If ever judges did this when the precedent compelled an outcome by virtue of its gravitational force rather than its enactment force, then that would supply evidence for the Holistic Theory vis-à-vis Dworkin’s theory.

Indeed, there are cases in which circuit judges acknowledge the gravitational force of the very precedents they are calling for

¹⁰⁹ *But see* Watson, *Obstructing Precedent*, *supra* note 5, at 272 n.60 (emphasis in original). *E.g.*, *Kiesling v. Holladay*, 859 F.3d 529, 535 (8th Cir. 2017) (“Based on *Messerschmidt*’s factual similarity with the present case, we conclude that this precedent compels the same result [here].”); *United States v. Anderson*, 809 F.2d 1281, 1289–90 (7th Cir. 1987) (explaining that “*Payne* mandates our holding in this case” and that “[t]he close similarity of *Payne* to this case compels our conclusion”); *Pan. City Beach Condos*, 2008 WL 11340313, at *2 (concluding after drawing an analogy to binding precedent that the precedent was “controlling on this issue in this case”); *Martineau v. ARCO Chem. Co.*, 25 F. Supp. 2d 762, 767 (S.D. Tex. 1998) (explaining that while imperfect, “the analogy is apt, and compels the Court” to reach the conclusion it suggests); *United States v. Sellitto*, 1990 WL 211549, at *3 (E.D. La. Dec. 7, 1990) (concluding that “the similarities between the waiver and a guilty plea compels this Court to apply” precedent about the latter to a case about the former). Tellingly, even Watson admits that respect for precedent places *some* “constraint” on “the grounds for distinguishing” a precedent by requiring “nonarbitrariness.” Watson, *Obstructing Precedent*, *supra* note 5, at 270 n.48; *see also id.* at 282 n.105 (allowing that obstructing precedent might violate “customary practice” by “contraven[ing] legal practitioners’ shared sense of ‘how we do things around here’”); *cf.* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 587 (1987) (“Precedent rests on similarity, and some determinations of similarity are incontestable.”).

the en banc court to overrule.¹¹⁰ Consider *McNeal v. LeBlanc*.¹¹¹ There, a Fifth Circuit panel reasoned by analogy to a prior Fifth Circuit case called *Parker v. LeBlanc*¹¹² to conclude that the plaintiff's allegations supported an inference of supervisory liability under 42 U.S.C. § 1983.¹¹³ The governing standard was whether “a pattern of similar constitutional violations by untrained employees” had placed the defendant on notice of the need for training to prevent such violations.¹¹⁴ The *McNeal* court observed that two of the three facts that the *Parker* court had relied on to hold that this standard was met in *Parker* were also present in *McNeal*, along with additional facts that supported the inference of liability.¹¹⁵ The *McNeal* court concluded that if the allegations in *Parker* supported liability, then so did the allegations in *McNeal*.¹¹⁶

Writing separately, Judge Stuart Kyle Duncan explained that he concurred “only because [Fifth Circuit] precedent require[d]” the panel’s conclusion on the issue of supervisory § 1983 liability.¹¹⁷ But he characterized that precedent as “mistaken” and urged the Fifth Circuit to take the case en banc “[t]o repair [the precedent’s] far-reaching error.”¹¹⁸

Judge Edith Jones also concurred separately.¹¹⁹ She agreed that binding Fifth Circuit “precedent currently require[d]” the panel’s conclusions and “further agree[d] with Judge Duncan’s special concurrence advocating en banc review of this ‘mistaken’ precedent.”¹²⁰

Both concurrences in *McNeal* support the Holistic Theory against Dworkin’s theory. According to Dworkin, when a court is confronted with precedent that deserves to be overruled but that is binding on the court, the court should accord the precedent

¹¹⁰ Thus, Professor Frederick Schauer was mistaken to claim that analogy is used only “as a friend” “supporting . . . decisions that have already been made” on other grounds, in contrast to precedent which comes to a judge “as a foe” binding her to make a certain decision even if “she believes [it] is the wrong decision.” Schauer, *Why Precedent*, *supra* note 106, at 456–57. Sometimes an analogy to precedent comes to judges “as a foe” in Schauer’s sense. *Id.* at 456.

¹¹¹ 90 F.4th 425 (5th Cir. 2024) (per curiam).

¹¹² 73 F.4th 400 (5th Cir. 2023).

¹¹³ See *McNeal*, 90 F.4th at 431–32.

¹¹⁴ *Id.* at 432 (quotation marks omitted) (quoting *Parker*, 73 F.4th at 405).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 435 (Duncan, J., concurring).

¹¹⁸ *McNeal*, 90 F.4th at 435 (Duncan, J., concurring).

¹¹⁹ *Id.* at 433 (Jones, J., concurring).

¹²⁰ *Id.* (quoting *id.* at 435 (Duncan, J., concurring)).

enactment force only and no gravitational force. But Judges Duncan and Jones both acceded to *Parker*'s gravitational force even though they believed that *Parker* should be overruled by the en banc court. Because at least one of the facts that *Parker* relied on to conclude that the standard for supervisory liability was met was not present in *McNeal*, *McNeal* did not fall within the scope of *Parker*'s holding. Therefore, *Parker* did not require the *McNeal* court's conclusion by virtue of its enactment force. Instead, both concurrences (as well as the panel opinion) in *McNeal* rested their conclusion on the strength of the analogy to *Parker*; that is, they acknowledged *Parker* as requiring their conclusion by virtue of its gravitational force. Judges Duncan and Jones therefore acted as the Holistic Theory, not Dworkin's theory, would predict.

Other examples show that the *McNeal* concurrences are not outliers. In the Eighth Circuit case *United States v. Feather*,¹²¹ Judge Gerald Heaney concurred because he accepted the panel's analogies to circuit precedent regarding what meets a totality-of-the-circumstances test for when crimes are "unrelated"¹²² but believed that the en banc court should overrule that precedent.¹²³ In *Novak v. United States*,¹²⁴ a Ninth Circuit panel extended circuit precedent to a "somewhat analogous" case,¹²⁵ and Judge Michelle Friedland concurred because the precedent was binding even though she believed that the en banc court should overrule it.¹²⁶ In *Advanced Indicator and Manufacturing, Inc. v. Acadia Insurance Co.*,¹²⁷ Fifth Circuit Judge Kurt Engelhardt concurred because the panel based its disposition on a "natural extension"¹²⁸ of binding

¹²¹ 369 F.3d 1035 (8th Cir. 2004) (per curiam).

¹²² *Id.* at 1036 & n.2 (drawing the analogies and noting that the court "considers all relevant circumstances"); see also *id.* at 1037 (Heaney, J., concurring) (agreeing that "under our circuit precedent, [the defendant] cannot show that his prior convictions were related for purposes of the Sentencing Guidelines").

¹²³ *Id.* at 1037–39 (arguing that "we have taken too narrow a view of what type of cases qualify for treatment as a single conviction," and suggesting "that our court reconsider its approach to this issue" and allow district courts more flexibility to recognize crimes as related).

¹²⁴ 795 F.3d 1012 (9th Cir. 2015).

¹²⁵ *Id.* at 1019 (citing *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996)).

¹²⁶ *Id.* at 1023 (Friedland, J., concurring) ("I concur in Judge Clifton's thoughtful opinion, which faithfully applies our circuit precedent. I write separately to express my view that *San Diego County Gun Rights Committee v. Reno*, which drives the opinion's conclusion that Plaintiffs lack Article III standing, should be reconsidered in an appropriate case." (citation omitted)).

¹²⁷ 50 F.4th 469 (5th Cir. 2022).

¹²⁸ *Id.* at 474.

circuit precedent, albeit precedent that he described as “weav[ing]” a “wicked web” worthy of “further consideration in a future appropriate case.”¹²⁹

IV. IMPLICATIONS

Part III’s preliminary survey of the evidence from judicial practice provides reason to take the Holistic Theory seriously as an account of what it is to respect precedent in the U.S. legal system. If indeed the Holistic Theory is true, then it has several interesting implications.

A. Fractured Decisions and Summary Dispositions

When no majority of the Supreme Court agrees on the rationale for the Court’s disposition, the *Marks* rule dictates that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”¹³⁰ For *Marks* purposes, one opinion supporting the judgment is “narrower” than another only if “the former is a logical subset of the latter” in the sense that “the legal rule of decision in the latter entails the legal rule of decision in the former.”¹³¹ But what if no opinion supporting the judgment is a “logical subset” of the other(s) in this sense? Courts of appeals have generally concluded that in such circumstances the *Marks* rule is unworkable and “the only binding aspect of the decision is its specific result.”¹³²

Similarly, if the Supreme Court issues a summary disposition without opinion, then the only binding aspect of the decision is the “precise result.”¹³³

Courts and commentators have wrestled with what it means for only the “result” of a case to be binding. Many find themselves pulled to conclude that a case whose only binding aspect is its result is “wholly nonprecedential,”¹³⁴ binding only the parties to

¹²⁹ *Id.* at 478–79.

¹³⁰ *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (quotation marks omitted)).

¹³¹ *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 789 (8th Cir. 2021) (Gruender, J., concurring in part and dissenting in part).

¹³² *Id.* at 785; *accord, e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999).

¹³³ *Tedards v. Ducey*, 951 F.3d 1041, 1048 (9th Cir. 2020).

¹³⁴ *Williams, Questioning Marks, supra* note 35, at 813; *accord, e.g.*, *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (stating that a fractured decision “has no precedential effect” when “no single

the judgment.¹³⁵ It is easy to see why. The Court's basis for its judgment in any given case may include a general legal rule applicable in other cases too. But the judgment or result itself is particular to the case. So, if "no rule" can be drawn from the case,¹³⁶ then it seems that the case has no legal effect on how courts should decide future cases.¹³⁷

Yet even as they find themselves pulled to this conclusion, courts and commentators are clearly uncomfortable with it. After asserting that a fractured Supreme Court decision in which no opinion controls under *Marks* has legal effect only "as applied to [the particular parties in the case]," the Third Circuit immediately hedged, saying that this means that the facts of a future case must be "*substantially* identical" for the decision to control.¹³⁸ Of course, that is not what it means. But it is easy to see why the Third Circuit felt compelled to insert the weasel word "substantially."¹³⁹ The result alone of a Supreme Court decision does seem to rule out-of-bounds some lower court actions in future cases, such as contrary decisions on very similar facts. It is on this basis that the D.C. Circuit has denied that a fractured decision whose only binding aspect is its judgment "has no binding impact on" future cases.¹⁴⁰

The D.C. Circuit is right, and the Holistic Theory can explain why. If the only binding aspect of a Supreme Court decision is its judgment, then lower court judges must update their priors

rationale was agreed upon by the Court"); Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 2007 (2019) [hereinafter Re, *Beyond the Marks Rule*] ("[M]ere judgment agreement establishes no precedent at all.").

¹³⁵ See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 784–85 n.5 (1983) (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182–83 (1979)):

We have often recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.

See also, e.g., Re, *Beyond the Marks Rule*, *supra* note 134, at 1998 (asserting that future courts can "freely set aside fragmented rulings" in the absence of a controlling opinion).

¹³⁶ *United States v. Robles-Sandoval*, 637 F.2d 692, 693 n.1 (9th Cir. 1981).

¹³⁷ See *Williams*, *Questioning Marks*, *supra* note 35, at 813 & n.78 (inferring from the Third Circuit's statement that "no particular standard" emerged from a fractured decision and the Ninth Circuit's statement that "no rule can be said to have resulted" from a fractured decision that each court deemed the decision in question "wholly nonprecedential" (first quoting *Anker Energy*, 177 F.3d at 170; then quoting *Robles-Sandoval*, 637 F.2d at 693 n.1)).

¹³⁸ *Anker Energy*, 177 F.3d at 170 (emphasis added).

¹³⁹ *Id.*

¹⁴⁰ *King v. Palmer*, 950 F.2d 771, 784 (D.C. Cir. 1991) (en banc).

around the assumption that the law did not require an incompatible judgment. On Part I's Bayesian interpretation, this means that lower court judges must drop their credence in possibilities where the law required an incompatible judgment on the case's facts to zero and normalize upward their remaining credences so that they sum to one. Unless the judge had been absolutely certain prior to the Supreme Court's decision that the outcome the Court would reach was legally proper, the process of Bayesian updating will change the judge's credences in various general legal propositions and thus affect how the judge should decide hypothetical future cases.

Take *King v. Palmer*,¹⁴¹ the case that prompted the D.C. Circuit to insist that a decision has meaningful precedential impact even if its only binding aspect is its judgment.¹⁴² *King* "concern[ed] the circumstances in which a court making an award of reasonable attorney's fees under federal fee-shifting statutes may augment the lodestar with a contingency enhancement designed to compensate the prevailing party's attorney for the risk of losing the case."¹⁴³ After observing that the Supreme Court had recently issued a fractured decision in which it reversed a contingency enhancement and after concluding that neither opinion supporting the judgment controlled under *Marks*,¹⁴⁴ the D.C. Circuit continued:

To say that [the Supreme Court's decision] provides no controlling legal holding is not to say that it has no binding impact on us. Because the Court's result was to deny a contingency enhancement without even a remand, we think we could not authorize the routine awarding of contingency enhancements of whatever size. We furthermore believe . . . that there simply is no practical middle ground between providing enhancements routinely and not providing them at all. . . . [W]e think the appropriate course is to hold that contingency enhancements will not be available in this Circuit.¹⁴⁵

Thus, the D.C. Circuit reversed the contingency enhancement that had been awarded by the district court.¹⁴⁶

¹⁴¹ 950 F.2d 771 (D.C. Cir. 1991) (en banc).

¹⁴² See *id.* at 784 (offering an example of a legal position that the precedent set by the result of a fractured decision would preclude).

¹⁴³ *Id.* at 773.

¹⁴⁴ See *id.* at 776, 782.

¹⁴⁵ *Id.* at 784 (citation omitted).

¹⁴⁶ *King*, 950 F.2d at 785.

King is a prime example of the Holistic Theory in practice. The judges in the majority in *King* may have believed prior to the Supreme Court's decision that a contingency enhancement should be available in *King*. But they also believed that if contingency enhancements should not be routinely available, then they should never be available. Therefore, updating their priors around the assumption that the Supreme Court was right (for whatever reason) to reverse a contingency enhancement in another case, an assumption that strongly implies that contingency enhancements should not be routinely available, meant concluding that contingency enhancements should never be available.

We can put the point in Bayesian terms. Let "Award in S. Ct. case" designate the proposition that the Supreme Court should affirm the contingency enhancement in the prior case, and let "Award in *King*" designate the proposition that the D.C. Circuit should affirm the contingency enhancement in *King*. Then divide the space of possibilities into four, corresponding to the four permutations of truth values these two propositions could have. Prior to the Supreme Court's decision, suppose that the credences that the judges in the *King* majority placed in these possibilities were as follows:

TABLE 9

Award in S. Ct. case	Award in S. Ct. case	Award in S. Ct. case	Award in S. Ct. case
Award in <i>King</i>	Award in <i>King</i>	Award in <i>King</i>	Award in <i>King</i>
0.89	0.01	0.01	0.09

The values in Table 9 indicate that prior to the Supreme Court's decision, the credence of the judges in the *King* majority in the proposition that they should affirm the award in *King* was $0.89 + 0.01 = 0.90$. Thus, the judges were quite confident that they should affirm.

But that changed drastically in light of the Supreme Court's decision to reverse. For the judges in the *King* majority, accepting that result meant dropping their credences in possibilities in which the Supreme Court should have affirmed to zero and normalizing their credences in the remaining possibilities so that they sum to one. On the assumption that Table 9 represents the judges' credences prior to the Supreme Court's decision, their updated credences would be as follows:

TABLE 10

Award in S. Ct. case	Award in S. Ct. case	Award in S. Ct. case	Award in S. Ct. case
Award in <i>King</i>	Award in <i>King</i>	Award in <i>King</i>	Award in <i>King</i>
0	0	0.1	0.9

This would mean that the precedential authority of the Supreme Court's judgment alone was outcome determinative: It demanded a reduction in the judges' credence in the proposition that they should affirm the award in *King* from 0.9 to 0.1.

In sum, the Holistic Theory explains how a precedent can have a meaningful legal impact even if its only binding aspect is its judgment. To be sure, Bayesian updating around a court's judgment alone will have less impact on one's priors than Bayesian updating around a court's basis for its judgment would have if such a basis could be attributed to the court, for example, if there were a majority opinion or a controlling opinion under *Marks*. But less impact does not mean no impact. Sometimes, as in *King*, the impact of judgment-only precedent will be strong enough to shift the outcome. This conclusion has at least two notable further implications.

First, commentators sometimes cite the supposed fact that, under the *Marks* rule as currently understood, fractured decisions without a narrowest opinion supporting the judgment provide no meaningful guidance to lower courts as a reason why the Court should overhaul the *Marks* rule.¹⁴⁷ This Section's conclusion undermines that argument. There may be good reasons for overhauling the *Marks* rule.¹⁴⁸ But the notion that judgment-only precedent "leave[s] lower courts without meaningful precedential guidance"¹⁴⁹ is not among them.

Second, this Section's conclusion suggests that, as a normative matter, a judgment-only system of precedent deserves serious consideration as an alternative to the practice of treating the court's stated basis for its judgment as authoritative. Maybe the latter model is better. But the judgment-only alternative cannot

¹⁴⁷ See, e.g., Williams, *Questioning Marks*, *supra* note 35, at 838 ("[T]he notion of a 'specific result,' in and of itself, lacks sufficient content to guide decisionmaking absent further specification of how broadly or narrowly the relevant 'result' should be characterized. Focusing on the domain of shared agreement between the judgment-supportive rationales [as Williams proposes] responds to this concern.")

¹⁴⁸ See, e.g., Re, *Beyond the Marks Rule*, *supra* note 134, at 2006–08 (identifying problems with the *Marks* rule even insofar as it does determine a controlling opinion).

¹⁴⁹ Williams, *Questioning Marks*, *supra* note 35, at 813.

be dismissed out of hand as failing to provide meaningful guidance to future courts.

B. Precedent as Legal Fiction

Precedent holding that a certain rule is the law is usually understood to make it so. In the famous words of Justice Robert Jackson, “[w]e are not final because we are infallible, but we are infallible only because we are final.”¹⁵⁰ If what a precedent declares is the law was not the law already, then the precedent makes it to be the law. Call this the “lawmaking” view of precedent.

Although the lawmaking view is routinely taken for granted in legal scholarship,¹⁵¹ it is not the only view available. Professor Stephen Sachs has suggested that precedent triggers a requirement—which is absolute if the precedent is binding and is defeasible if the precedent is one that the court can overrule—to treat the precedent *as if* it were true.¹⁵² Call this the “legal fiction” view of precedent. On this view, precedent resembles doctrines of waiver, preclusion, and estoppel, all of which sometimes require courts to reason openly from false premises.¹⁵³

It is hard to square the Holistic Theory with the lawmaking view. If, before the Supreme Court held that the law was *r*, the law was not-*r*, then on the lawmaking view the Supreme Court changed the law in somewhat the way that a new statute amending or repealing an old statute changes the law. On most theories, the legal effect of this sort of change is localized. Changing the law from not-*r* to *r* does just that; it does not send ripple effects through the rest of the law.¹⁵⁴ Therefore, if the lawmaking view of precedent were correct, then it would be hard to see why

¹⁵⁰ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment).

¹⁵¹ *E.g.*, Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 *LEGAL THEORY* 59, 83 (2022); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 *VA. L. REV.* 1043, 1077 (2010); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 7 (Amy Gutmann ed., 1997).

¹⁵² Sachs, *Finding Law*, *supra* note 8, at 563–67.

¹⁵³ See Charles F. Capps, *Does the Law Ever Run Out?*, 100 *NOTRE DAME L. REV.* 983, 1004 & n.108 (2025) [hereinafter Capps, *Does the Law Ever Run Out?*]; see also Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 *NOTRE DAME L. REV.* 2253, 2266 n.96, 2280–81 (2014).

¹⁵⁴ *Cf. Est. of Howard v. Comm’r*, 910 F.2d 633, 637 (9th Cir. 1990) (“An amendment of one part of a statute does not alter the meaning of that part of the statute which is independent and unamended.”).

precedent would warrant the kind of holistic reconfiguring of one's doxastic states that the Holistic Theory implies.

In contrast, it is easy to square the Holistic Theory with the legal fiction view. To treat the Supreme Court's holding that the law is *r* as if it were true is to pretend that *r* had been the law all along. So, when a judge respects the authority of what she takes to be erroneous precedent, she is not recognizing that the precedent changed the law; she is pretending that the precedent changed her mind. And when a rational person who had believed that not-*p* changes her mind in light of decisive evidence that *p*, she not only comes to believe that *p* but also updates her other doxastic states accordingly. For example, suppose that you believe that the faculty meeting starts at noon, that it will last one hour, and that it will end at 1:00 p.m. Then you are presented with decisive evidence that the faculty meeting starts at 12:30 p.m. You are rationally required not only to replace your belief that the meeting starts at noon with a belief that the meeting starts at 12:30 p.m. but also to discard either your belief that the meeting will last one hour or your belief that the meeting will end at 1:00 p.m., whichever you have less confidence in now that you know that the meeting starts at 12:30 p.m. Thus, the Holistic Theory is exactly what one would expect if the legal fiction view were correct.

The truth of the Holistic Theory is therefore evidence for the legal fiction view of precedent: Of the two principal views on offer, only the legal fiction view fits comfortably with the Holistic Theory. The point should not be overstated. The Holistic Theory is not *impossible* to square with the lawmaking view. One could adopt a holistic theory of legal change on which changing the law from not-*r* to *r* does send ripple effects through the rest of the law.¹⁵⁵ Or one could insist that it is just a brute fact about the U.S. legal system that when judges (as opposed to legislators) change the law, their changes have such ripple effects. The former position appears at odds with how judges treat statutes,¹⁵⁶ and the latter appears ad hoc, but neither can be dismissed out of hand.

¹⁵⁵ Dworkin appeared to adopt a view like this. *See supra* Part II.A (noting that Dworkin treated statutes as elements of the legal system's institutional history and thus as inputs into the holistic exercise of constructive interpretation).

¹⁵⁶ *See, e.g.*, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (describing the court's role in construing statutes as "to ascertain—neither to add nor to subtract" from—Congress's purpose as expressed in the words of the statute).

Likewise, the Holistic Theory is not necessitated by the legal fiction view. Issue preclusion requires courts to assume that the prior settlement of an issue was correct but not to update their other beliefs around this assumption.¹⁵⁷ In theory, precedent could work the same way. This would make the doctrine of precedent more artificial inasmuch as part of pretending that one has decisive evidence for a proposition is updating one's other beliefs around the assumption that the proposition is true. But the example of issue preclusion shows that nonholistic legal fiction doctrines are possible.

Still, the fact that the Holistic Theory fits more comfortably with the legal fiction view than with the lawmaking view means that the truth of the Holistic Theory is evidence for the legal fiction view. In other words, Bayesian updating around the assumption that the Holistic Theory is true should raise one's credence in the legal fiction view. And the legal fiction view itself has at least one important doctrinal implication. As Sachs pointed out,¹⁵⁸ the legal fiction view calls into question *Erie's* holding that, under the Rules of Decision Act,¹⁵⁹ federal courts are bound by state supreme court precedent on questions of state law.¹⁶⁰ The Rules of Decision Act says only that federal courts must apply the "laws of the [] state[]."¹⁶¹ If the legal fiction view is true as applied to the relevant state, then what the state supreme court holds state law is may not be what state law actually is.¹⁶² Therefore, the legal fiction view undermines *Erie's* basis for its key holding.

C. Formalism About Analogy

Legal realists are "sceptical about how often precedent really permits the court to justify one and only one decision on legal grounds."¹⁶³ The potential sources of indeterminacy introduced by

¹⁵⁷ See *Weatherford U.S., L.P. v. U.S. Dep't of Lab., Admin. Bd.*, 68 F.4th 1030, 1039 (6th Cir. 2023) (noting that issue preclusion bars litigation only of the "precise issue" previously litigated (quoting *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589 (6th Cir. 2009))).

¹⁵⁸ See Sachs, *Finding Law*, *supra* note 8, at 570–77.

¹⁵⁹ 28 U.S.C. § 1652.

¹⁶⁰ *Erie*, 304 U.S. at 79.

¹⁶¹ 28 U.S.C. § 1652.

¹⁶² Nor are federal courts "inferior" to state courts such that federal courts are required independently of the Rules of Decision Act to treat state court holdings as if they were correct. See U.S. CONST. art. III, § 1 (providing that other federal courts are inferior to the U.S. Supreme Court).

¹⁶³ Leiter, *supra* note 11, at 313 n.6; see, e.g., KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURE ON THE LAW AND LAW SCHOOL* 56–60 (11th ed. 2008) [hereinafter LLEWELLYN, *THE BRAMBLE BUSH*].

precedent are three. First, if the precedent is one that the court has the power to overrule, then the conditions for overruling precedent might permit but not require the court to overrule the precedent in whole or in part. Second, even if the precedent is one whose authority the law requires the court to respect, there might be multiple candidates for what the precedent's holding is, each of which the law permits but does not require the court to adopt (i.e., indeterminacy of holding). Third, even if the precedent is one whose authority the law requires the court to respect, and the law determines the precedent's holding, there might be extensions of the precedent to cases outside the scope of its holding that the law permits but does not require the court to make (i.e., indeterminacy of extension).

This Section focuses on the third alleged source of indeterminacy, indeterminacy of extension. Extensions of precedent depend on arguments from analogy, and arguments from analogy boil down to claims that the case at hand is similar to the precedent "in relevant respects."¹⁶⁴ As Professor Brian Leiter has explained, "judgments of 'relevant similarity'" are in realists' view "largely unconstrained by law"¹⁶⁵:

According to the realists, judgments about relevant similarity are sufficiently flexible that precedent is less a constraint on a decision than a tool that judges can either use to avoid decisions they would rather not reach on other normative grounds, or to justify decisions they want to reach on other normative grounds.¹⁶⁶

For this reason, realists doubt that the law traces boundaries to which a court must extend a precedent by analogy but beyond which the court may not extend it.

This argument has largely carried the day among scholars. Few would deny that the law often permits an extension of precedent by analogy. Yet, as noted in Part III.A, standard accounts of precedent limit its legal effect to its enactment force, which implies that the law never requires an extension of a precedent

¹⁶⁴ Leiter, *supra* note 11, at 312; *see also* Frederick Schauer & Barbara A. Spellman, *Precedent and Similarity*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT*, *supra* note 11, at 240, 242 ("Confronting the question of which previous decisions have precedential authority for which subsequent ones requires determining which previous decisions are relevantly *similar* to which subsequent ones." (emphasis in original)).

¹⁶⁵ Leiter, *supra* note 11, at 313.

¹⁶⁶ *Id.* at 314.

by analogy.¹⁶⁷ It follows that there are some extensions that the law permits but does not require. To be sure, defenders of standard accounts can and sometimes do resist realists' arguments for indeterminacy of *holding*. For example, Raz insisted that "[i]n the main," identifying a case's holding "is reasonably straightforward."¹⁶⁸ But defenders of standard accounts implicitly and often explicitly accept the existence of indeterminacy of *extension*.¹⁶⁹ And even those who dissent from standard accounts generally concede that the legal force of arguments from analogy to precedent is "far from determinate."¹⁷⁰

"The clearest" and "perhaps only" example of a formalist account that denies the existence of any indeterminacy in the law due to precedent, including indeterminacy of extension, is Dworkin's.¹⁷¹ According to Dworkin, the judge applying a precedent must construct the best theory of morality's content on which the moral propositions for which the precedent (and the other relevant aspects of the legal system's institutional history) stand are true and ask what moral judgment that theory implies in the case at hand.¹⁷² Thus, for Dworkin, whether the case at hand is relevantly similar to the precedent turns on whether the best moral theory that entails the moral propositions for which the precedent (and the other relevant aspects of the legal system's institutional history) stand entails an analogous moral judgment in the case at hand. Dworkin maintained that there is always or nearly always a "right answer" to this question.¹⁷³

Realists such as Leiter are unconvinced.¹⁷⁴ In addition to questioning whether "the law depends on constructive interpretation" in the way that Dworkin claimed, Leiter has expressed doubt that "morality takes sides" in all or nearly all legal disputes anyway.¹⁷⁵ So even if Dworkin had been right about the nature of

¹⁶⁷ See *supra* notes 105–08 and accompanying text.

¹⁶⁸ RAZ, *supra* note 50, at 184. But see Leiter, *supra* note 11, at 312 n.1 (questioning Raz's basis for this claim).

¹⁶⁹ See, e.g., RAZ, *supra* note 50, at 184, 189 (acknowledging "the well-known and extensive judicial flexibility with the doctrine of precedent," and concluding that the decision whether to extend a precedent is an exercise in making rather than applying law).

¹⁷⁰ Brewer, *supra* note 58, at 954–55; accord Hunter, *supra* note 52, at 1224–27 (noting that his account of reasoning by analogy to precedent "is consistent with the legal realist tradition").

¹⁷¹ Leiter, *supra* note 11, at 318.

¹⁷² See *supra* Part II.B.1.

¹⁷³ Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 31–32 (1978).

¹⁷⁴ See Leiter, *supra* note 11, at 318.

¹⁷⁵ *Id.*

law, realists' skepticism "about how often precedent really permits the court to justify one and only one decision on legal grounds" would be well-founded.¹⁷⁶

But here the Holistic Theory can come to the formalist's rescue. As stressed in Part II.B, the Holistic Theory preserves (with some improvement) Dworkin's holism about precedent while abstracting from his antipositivist assumptions. So, although the defender of the Holistic Theory is free, if she likes, to join Dworkin in treating legal reasoning as a kind of moral reasoning, she does not need to. And if she does not, then she can issue a positivist-friendly variant of Dworkin's response to the realists' claim of indeterminacy of extension that is immune to Leiter's objection.

According to the Holistic Theory, the judge faced with a precedent whose authority the law requires her to respect must construct the best theory of the law's content on which the legal propositions for which the precedent (and all other applicable precedents) stand are true and ask what legal judgment that theory implies in the case at hand. Thus, for the defender of the Holistic Theory, whether the case at hand is "relevantly similar" to the precedent turns on whether the best theory of the law's content that entails the propositions for which the precedent (and all other applicable precedents) stand also entails an analogous legal judgment in the case at hand. It is only if the defender of the Holistic Theory chooses to follow Dworkin in treating legal reasoning as a kind of moral reasoning that we can replace "law" and "legal" with "morality" and "moral" such that the enterprise of applying precedent becomes an exercise in moral theory. So, if the defender of the Holistic Theory chooses not to follow Dworkin in this regard, then she does not need to affirm the proposition that Leiter rejected as implausible—namely, that morality takes sides in all or nearly all legal disputes—in order to deny indeterminacy of extension. All she needs to affirm is that the law takes sides in all or nearly all legal disputes.

Of course, the realist will likely challenge that claim, too.¹⁷⁷ But to make good on this challenge, the realist will need to identify other sources of indeterminacy in the law besides precedent. Whether the realist can succeed in this endeavor is a question

¹⁷⁶ *Id.* at 313 n.6.

¹⁷⁷ See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (arguing that conflicting canons of construction also give rise to indeterminacy in the law).

beyond the scope of this Article.¹⁷⁸ Additionally, the realist will likely dispute the assumption that there is a single legal proposition or set of legal propositions for which a precedent stands. But that is a question of holding indeterminacy, which this Section has also set aside for another day.¹⁷⁹ This Section's point is simply that the Holistic Theory offers a way for the formalist to rebut the claim that indeterminacy in precedents' extension is an independent source of indeterminacy in the law—and, crucially, a way for the formalist to do so without committing herself to an antipositivist theory of law.

D. Precedent and Priors

Courts and commentators often disagree about whether a precedent's legal effect extends to a given case. Such disagreements tend to track disagreements about the merits of the underlying legal issues, which themselves often track differences in politics. This can make the disagreements seem as if they are unprincipled and politically motivated. The Holistic Theory suggests a less cynical view.

To get a sense for why one might be tempted to be cynical regarding disagreements about precedents' range of application, consider a pair of examples drawn from the struggle over campaign finance reform in the early years of the Roberts Court.

In the first, *Federal Election Commission v. Wisconsin Right to Life, Inc.*¹⁸⁰ (*WRTL*), the Supreme Court held that the Bipartisan Campaign Reform Act § 203,¹⁸¹ which prohibited corporations from mentioning candidates for office when addressing the electorate shortly before the election, was unconstitutional as applied

¹⁷⁸ See Capps, *Does the Law Ever Run Out?*, *supra* note 153, at 1001–43 (critically examining the alleged sources of indeterminacy in the law).

¹⁷⁹ I suspect that the problem of holding indeterminacy is the more serious challenge for the formalist. See Leiter, *supra* note 11, at 316 (citing LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 163, at 67–68):

Llewellyn is plainly correct that in the US legal system the doctrine of precedent affords courts enough latitude in construing the holdings of earlier cases—in identifying the “relevant similarity” between the earlier case and the present one—to make precedent a weak constraint on present decision in many cases.

Notably, however, it is also a challenge that largely if not entirely disappears if the only authoritative aspect of a decision—that is, the only proposition for which the precedent stands—is the judgment itself. It is hard to imagine cases in which the court reaches a judgment, yet it is indeterminate what that judgment is.

¹⁸⁰ 551 U.S. 449 (2007).

¹⁸¹ 52 U.S.C. § 30118, *invalidated by* Citizens United v. FEC, 558 U.S. 310 (2010).

to a corporation that had referred to a candidate when taking a position on an issue in an upcoming election (i.e., issue advocacy).¹⁸² In a previous case, *McConnell v. Federal Election Commission*,¹⁸³ the Court had rejected a facial challenge to § 203 brought by a corporation that had directly endorsed or opposed a candidate in an upcoming election (i.e., campaign advocacy).¹⁸⁴ Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas would have overruled *McConnell* in *WRTL*, holding § 203 unconstitutional on its face.¹⁸⁵ Instead, the controlling opinion authored by Chief Justice John Roberts and joined in relevant part by Justice Samuel Alito distinguished *McConnell* on the ground that, even assuming the First Amendment does not protect a corporation's right to engage in campaign advocacy, the First Amendment does protect a corporation's right to engage in issue advocacy.¹⁸⁶ In dissent, Justice David Souter, joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, protested that the Court had "effectively . . . overruled" *McConnell*.¹⁸⁷

A few years later, the Court did explicitly overrule *McConnell* in *Citizens United v. Federal Election Commission*,¹⁸⁸ leading to the second example: the Montana Supreme Court's decision in *Western Tradition Partnership v. Attorney General*.¹⁸⁹ In *Citizens United*, the U.S. Supreme Court held that laws restricting independent corporate political expenditures violate the First Amendment unless they survive strict scrutiny, regardless of whether they target campaign advocacy or issue advocacy.¹⁹⁰ The Court then held that the relevant federal statutory restriction on independent corporate political expenditures did not survive strict scrutiny.¹⁹¹ Although the Court suggested that such laws might be absolutely prohibited under the First Amendment, it did not adopt this suggestion as part of the basis for its disposition.¹⁹²

¹⁸² *WRTL*, 551 U.S. at 455–57.

¹⁸³ 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

¹⁸⁴ *McConnell*, 540 U.S. at 203–09 (opinion of Stevens & O'Connor, JJ.).

¹⁸⁵ *WRTL*, 551 U.S. at 483–504 (Scalia, J., concurring in part and concurring in the judgment).

¹⁸⁶ *Id.* at 464–82 (opinion of Roberts, C.J.).

¹⁸⁷ *Id.* at 504 (Souter, J., dissenting).

¹⁸⁸ 558 U.S. 310 (2010); *see id.* at 365–66.

¹⁸⁹ 271 P.3d 1 (Mont. 2011), *rev'd sub nom.* *Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012) (per curiam).

¹⁹⁰ *Citizens United*, 558 U.S. at 340–62, 366.

¹⁹¹ *Id.*

¹⁹² *Id.* at 340 (citation omitted):

Instead, the Court held that, regardless of whether statutes that target independent corporate political expenditures and *do* survive strict scrutiny are constitutional, those that *do not* survive strict scrutiny are unconstitutional, and the relevant statute did not survive strict scrutiny.¹⁹³

The next year, the Montana Supreme Court held in *Western Tradition* that a state statute targeting independent corporate political expenditures did not violate the First Amendment.¹⁹⁴ The state statute was similar to the federal statute at issue in *Citizens United*.¹⁹⁵ Nonetheless, the Montana Supreme Court concluded that even if the federal statute at issue in *Citizens United* did not survive strict scrutiny, the state statute at issue in *Western Tradition* did.¹⁹⁶

The U.S. Supreme Court summarily reversed by a vote of five to four. The breakdown was the same as it was on the relevant issue in *Citizens United* except that one of the Justices who had dissented on that issue had retired and been replaced by Justice Elena Kagan. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito were in the majority; Justices Breyer, Ginsburg, Kagan, and Sonia Sotomayor dissented. According to the Justices in the majority, “There can be no serious doubt” that the Montana Supreme Court reached the wrong decision in light of *Citizens United*.¹⁹⁷ But the Justices in dissent maintained that “even if [one] were to accept *Citizens United*,” the Montana Supreme Court may well have reached the right decision.¹⁹⁸

It is hard to resist the hypothesis that different views on the merits of the underlying legal issues were the principal drivers of the Justices’ claims about whether the U.S. Supreme Court properly distinguished *McConnell* in *WRTL* and whether the Montana Supreme Court properly distinguished *Citizens United*

While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, the quoted language [to the effect that laws burdening political speech are “subject to strict scrutiny”] provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

¹⁹³ *Id.* at 340–66.

¹⁹⁴ *W. Tradition*, 271 P.3d at 3, 13.

¹⁹⁵ Compare *id.* at 3 (quoting the relevant language from the state statute), with *Citizens United*, 558 U.S. at 320–21 (summarizing the relevant provisions of the federal statute).

¹⁹⁶ *W. Tradition*, 271 P.3d at 5–13.

¹⁹⁷ *Am. Tradition*, 567 U.S. at 516.

¹⁹⁸ *Id.* at 517 (Breyer, J., dissenting).

in *Western Tradition*. This hypothesis explains why every Justice in the majority on the relevant issue in *Citizens United* joined the per curiam opinion accusing the Montana Supreme Court of being unfaithful to *Citizens United* in *Western Tradition*. It explains why every Justice who dissented on the relevant issue in *Citizens United* and who was still on the Court when it summarily reversed the Montana Supreme Court's decision maintained that the Montana Supreme Court may well have been faithful to *Citizens United*. It explains why the same two Justices who had defended *WRTL*'s fidelity to *McConnell*, Chief Justice Roberts and Justice Alito, accused the Montana Supreme Court of infidelity to *Citizens United* in *Western Tradition*. It explains why the same two Justices who suggested that *Western Tradition* may have been faithful to *Citizens United* and who were on the Court when *WRTL* was decided, Justices Breyer and Ginsburg, had accused the Court of infidelity to *McConnell* in *WRTL*. Evidently, the principal drivers of the Justices' disagreements about the application of *McConnell* to *WRTL* and *Citizens United* to *Western Tradition* were not different views about the doctrine of precedent but rather different views about the constitutionality of restrictions on corporations' political speech.¹⁹⁹

The Justices' consideration of the merits when taking a position on a precedent's range of application strikes many as unprincipled.²⁰⁰ Worse, in the campaign finance context, as in other politically charged contexts, the Justices' views on the merits divide along partisan lines. So, it looks as if the Justices' positions on a precedent's range of application are often politically motivated.²⁰¹

¹⁹⁹ The one data point that the hypothesis does not explain is the fact that Justices Scalia, Kennedy, and Thomas agreed with the dissenters in *WRTL* in rejecting Chief Justice Roberts's attempt to distinguish *McConnell*. See *WRTL*, 551 U.S. at 499 (Scalia, J., concurring in part and concurring in the judgment) ("*McConnell* was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of § 203. They can do so only if a test is adopted that contradicts the holding of *McConnell*"). Thus, it would be an exaggeration to say that every Justice's position on the applicability of the relevant precedents in *WRTL* and *Western Tradition* was driven solely by his or her views on the merits of the underlying legal issues. But it remains hard to resist the hypothesis that such views played a major role.

²⁰⁰ See, e.g., Friedman, *supra* note 39, at 4, 9–14 (discussing the threat to "legitimacy" and "the rule of law" posed by distinguishing disfavored precedents on thin grounds and noting that critics accuse the Court of insincerity).

²⁰¹ See, e.g., Mark Joseph Stern, *The Supreme Court Is Blowing Up Law School, Too*, SLATE (Oct. 2, 2022), <https://perma.cc/PR7Z-3NDV> (accusing "a Republican-appointed supermajority" on the Supreme Court of being "eager to shred long-held precedents it deems too liberal as quickly as possible" and using "aggressive, partisan-tinged motivated reasoning" to reach politically preferred results); cf. Melissa Murray, *Stare Decisis and*

The Holistic Theory offers a more charitable perspective. It may well be that the merits are largely irrelevant for purposes of identifying a precedent's holding. If so, then a judge generally should not consider the merits or otherwise consult her priors when assessing the scope of the precedent's enactment force. But the Holistic Theory also attributes gravitational force to precedents. And a judge not only may but must consult her priors when assessing the scope of a precedent's gravitational force. The way for a judge to assess a precedent's gravitational force is to update her priors around the assumption that the precedent's holding is true. So, it should come as no surprise and does not necessarily reflect bad faith or politically motivated reasoning that judges with different priors about an area of law reach different assessments of the gravitational force of a precedent in that area of law.

For example, recall the Justices' disagreement about the implications of *McConnell* for *WRTL*. We can suppose that Chief Justice Roberts and Justice Alito agreed with Justices Breyer and Ginsburg that it is overwhelmingly likely that restrictions on corporations' right to engage in campaign advocacy and restrictions on corporations' right to engage in issue advocacy either stand or fall together. We can also suppose that Justices Breyer and Ginsburg agreed with Chief Justice Roberts and Justice Alito that in the unlikely event that the First Amendment protected only one, it would be issue advocacy. Nonetheless, provided that Chief Justice Roberts and Justice Alito were sufficiently confident that the First Amendment protects both and that Justices Breyer and Ginsburg were sufficiently confident that the First Amendment protects neither, updating their priors around *McConnell's* holding that the First Amendment does not protect corporations' right to engage in campaign advocacy would lead Justices Breyer and Ginsburg but not Chief Justice Roberts or Justice Alito to conclude that the First Amendment does not protect corporations' right to engage in issue advocacy either.

We can illustrate the point in Bayesian terms. Let "C-A protected" designate the proposition that the First Amendment

Remedy, 73 DUKE L.J. 1501, 1504 (2024) ("Some view the Court's uneven approach to precedent as ideologically driven. That is, the Court adheres to precedents that are consistent with the views of its six-member conservative supermajority while jettisoning or narrowing those precedents that do not accord with these ideological priors."); Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 3 (2023) ("[T]he Court's treatment of precedent has been inconsistent, and its decision-making has been widely criticized as unprincipled or politically motivated.").

protects corporations' right to engage in campaign advocacy and "I-A protected" designate the proposition that the First Amendment protects corporations' right to engage in issue advocacy. Suppose that, prior to accounting for *McConnell*, Chief Justice Roberts's and Justice Alito's credences in the four possibilities corresponding to all permutations of truth values these propositions can have were as follows:

TABLE 11

C-A protected	C-A protected	C-A protected	C-A protected
I-A protected	I-A protected	I-A protected	I-A protected
0.70	0.10	0.12	0.08

Bayesian updating of these credences around *McConnell*'s holding that the First Amendment does not protect corporate campaign advocacy yields:

TABLE 12

C-A protected	C-A protected	C-A protected	C-A protected
I-A protected	I-A protected	I-A protected	I-A protected
0	0	0.6	0.4

So, if Table 11 accurately captures their priors, then Chief Justice Roberts and Justice Alito concluded in good faith that *McConnell* did not require rejecting Wisconsin Right to Life's First Amendment claim.

Now, suppose that Justices Breyer and Ginsburg had identical credences prior to accounting for *McConnell* except that the values in the first and fourth columns are swapped. That is, whereas the Chief Justice and Justice Alito were 70% confident that the First Amendment protects both corporate campaign advocacy and corporate issue advocacy and 8% confident that it protects neither, Justices Breyer and Ginsburg were 8% confident that the First Amendment protects both corporate campaign advocacy and corporate issue advocacy and 70% confident that it protects neither:

TABLE 13

C-A protected	C-A protected	C-A protected	C-A protected
I-A protected	I-A protected	I-A protected	I-A protected
0.08	0.10	0.12	0.70

Bayesian updating of these credences around *McConnell's* holding that the First Amendment does not protect corporate campaign advocacy yields:

TABLE 14

C-A protected	C-A protected	C-A protected	C-A protected
I-A protected	I-A protected	I-A protected	I-A protected
0	0	0.15	0.85

So, if Table 13 accurately captures their priors, then Justices Breyer and Ginsburg concluded in good faith that *McConnell* required rejecting Wisconsin Right to Life's First Amendment claim.

Turn now to *Western Tradition*. Suppose that prior to *Citizens United*, the Montana Supreme Court justices in the *Western Tradition* majority were so confident that the state statute survived strict scrutiny that they deemed it more plausible that the state statute would survive even if the federal statute did not than that neither would survive. For them, virtually any explanation for the fact that the federal statute did not survive strict scrutiny that was specific to the federal statute and did not extend to the state statute, however ad hoc that explanation may have been, was more plausible than any explanation that was more general and did extend to the state statute. In that case, the justices in the *Western Tradition* majority were not refusing to respect the authority of *Citizens United* when they distinguished it.

Again, we can put the point in Bayesian terms. Divide the space of possibilities into four, corresponding to all permutations of possible truth values of the propositions (1) that the federal statute survives strict scrutiny (SS) and (2) that the state statute survives strict scrutiny. Suppose that the credences of the justices of the *Western Tradition* majority prior to *Citizens United* in these possibilities were as follows:

TABLE 15

U.S law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0.94	0.02	0.03	0.01

Bayesian updating of these credences around *Citizens United's* holding that the federal law did not survive strict scrutiny yields:

TABLE 16

U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0	0	0.75	0.25

So, if Table 15 accurately captures their priors, then the justices in the *Western Tradition* majority were not refusing to respect the authority of *Citizens United* when they distinguished it.

Now, suppose that the U.S. Supreme Court Justices who dissented from the summary reversal of the Montana Supreme Court's decision had somewhat more moderate but similar priors. Suppose that the dissenters from the summary reversal were not quite as confident that both statutes survived strict scrutiny. Suppose also that, whereas the Montana Supreme Court justices were more familiar with the state statute and the purposes it served and thus were more confident that the state statute survived strict scrutiny, the opposite was true of the U.S. Supreme Court Justices. Consistent with these assumptions, we can attribute the following priors to the dissenters from the summary reversal of the Montana Supreme Court's decision:

TABLE 17

U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0.70	0.12	0.09	0.09

Bayesian updating of these credences around *Citizens United's* holding that the federal law does not survive strict scrutiny yields:

TABLE 18

U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0	0	0.5	0.5

So, if Table 17 accurately captures their priors, then the U.S. Supreme Court Justices who dissented from the summary reversal of the Montana Supreme Court's decision were being candid, not cagey, when they suggested but stopped short of outright asserting that the decision may well have been sound even under *Citizens United*.

Finally, suppose that the U.S. Supreme Court Justices who joined the per curiam opinion summarily reversing the Montana Supreme Court's judgment—the same five Justices who had been in the majority on the relevant issue in *Citizens United*—had very different priors. To them, it was quite clear that the two statutes must stand or fall together. Although they deemed it more plausible that neither statute survived strict scrutiny than that both statutes survived and thus had voted to hold the federal statute unconstitutional in *Citizens United*, they recognized that the view that both statutes survived was at least colorable. The only possibilities that they were prepared to exclude out of hand were that one statute survived while the other did not. Given these priors, the Justices would be able to sympathize with a lower court that thought both statutes should survive and therefore would have held the state statute constitutional but for *Citizens United*. But the Justices deemed it obvious that accepting their decision would entail holding the state statute unconstitutional, too. So, they were unable to sympathize with the Montana Supreme Court, which not only would have held the state statute constitutional but for *Citizens United* but did hold the state statute constitutional notwithstanding *Citizens United*.

Again, we make the point concrete by putting it in Bayesian terms. Suppose that prior to their decision, the credences of the U.S. Supreme Court Justices who joined the per curiam opinion summarily reversing the Montana Supreme Court's judgment in *Western Tradition* were as follows:

TABLE 19

U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0.398	0.001	0.001	0.600

Bayesian updating around the holding in *Citizens United* that the federal law did not survive strict scrutiny yields:

TABLE 20

U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS	U.S. law satisfies SS
MT law satisfies SS	MT law satisfies SS	MT law satisfies SS	MT law satisfies SS
0	0	0.002	0.998

Thus, given their priors as stipulated in Table 19, the Justices who joined the per curiam opinion viewed *Citizens United* as dropping the believability of the proposition that the Montana statute survives strict scrutiny from doubtful but colorable ($0.398 + 0.001 = 0.399$) to totally implausible ($0 + 0.002 = 0.002$).

If the priors stipulated in the tables above represent the various Justices' actual priors, then their assessments of *McConnell's* implications for *WRTL* and *Citizens United's* implications for *Western Tradition* were all made in good faith. Those assessments were sensitive to the Justices' priors about the merits of the underlying legal issues, but in a principled and lawful way. Of course, the priors stipulated in the tables above almost certainly do not represent the actual priors of the various Justices. The point is that maybe the Justices' actual priors were sufficiently similar to the priors stipulated above that any differences would not threaten the hypothesis of good faith.

Or maybe they were not. Maybe some of the Justices did, consciously or not, permit their politics to influence their votes in a legally improper way. The Holistic Theory suggests that we should not be overly cynical, but it does not demand that we be naive. Nonetheless, even the modest point that judges are not necessarily acting lawlessly or in bad faith when they take positions on how far a precedent extends that align with their priors is a powerful antidote to the temptation that we all face to view judges whose priors are different from our own as partisan hacks.

Consider one more example: Professor Richard Re has observed that, in the wake of *District of Columbia v. Heller*,²⁰² many lower courts refused to extend the precedent beyond the context of self-defense within the home.²⁰³ One explanation is that the lower courts were refusing to respect *Heller's* authority. But the Holistic Theory suggests a more charitable explanation. Given the holding in *Heller*, refusing to recognize an individual

²⁰² 554 U.S. 570 (2008).

²⁰³ Re, *Narrowing Supreme Court Precedent*, *supra* note 5, at 961–63.

Second Amendment right to bear arms outside the home may be rather ad hoc. So, to someone for whom it was independently plausible that such a right exists, lower courts' refusal to recognize it even after *Heller* must have seemed flagrantly unlawful. This might explain Justice Thomas's concern at the time that lower courts were engaged in "noncompliance with [the Supreme Court's] Second Amendment precedents."²⁰⁴ But for a lower court judge with very different priors who deems it so implausible that the Second Amendment guarantees an individual right to bear arms outside the home that virtually any explanation for *Heller*'s holding that does not have this deeply implausible entailment, however ad hoc, is more plausible than any explanation that does, faithfully applying *Heller* really would mean refusing to extend it beyond the home. Maybe the priors of such a judge are incorrect, and those of Justice Thomas are correct. But maybe not. In any event, neither jurist is necessarily acting in bad faith, and there is no way to adjudicate their dispute about the scope of *Heller*'s precedential impact without assessing the merits of their priors about the Second Amendment.

One of the upshots of the conclusion that a judge's priors should affect her assessment of a precedent's range of application, besides curbing the impulse to excessive cynicism, is that the actors whom our legal system empowers in the first instance to measure the "ripple effects" of higher court precedents are lower courts. The priors of higher court judges and justices determine what precedent shall be set, but the priors of lower court judges determine how far, at least as an initial matter, the precedent's gravitational field shall extend. Permitting judges to consult their priors about the underlying legal issues when assessing a precedent's range of application thus "distributes power to lower courts."²⁰⁵

E. The Problem of the Second Best

Professor William Baude has discussed what he calls "the problem of constitutional law and the second best."²⁰⁶ Although Baude focuses on constitutional law, the problem is not limited to any one area of law. The problem arises whenever there is an

²⁰⁴ *Friedman v. City of Highland Park*, 577 U.S. 1039, 1039 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari).

²⁰⁵ Re, *Narrowing Supreme Court Precedent*, *supra* note 5, at 965.

²⁰⁶ Baude, *supra* note 1, at 326.

erroneous precedent on the books that a court “for whatever reason” cannot overrule.²⁰⁷ The court confronted with a case in the vicinity of the precedent must decide whether to extend the precedent and thus “extend the error” or cabin the precedent and thus “create a sharp—and perhaps unjustified—difference in two similar types of cases.”²⁰⁸

Baude used several cases to illustrate the problem.²⁰⁹ The most interesting for our purposes is Justice Alito’s brief concurrence in *Gundy v. United States*.²¹⁰ *Gundy* concerned whether a statute lacked an “intelligible principle to guide” the rulemaking discretion it granted an agency and thus violated the nondelegation doctrine.²¹¹ Although clearly sympathetic to the argument that the statute did violate the nondelegation doctrine, Justice Alito observed that, “since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.”²¹² Justice Alito continued:

If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.²¹³

Justice Alito apparently believed that the statute did in fact violate the nondelegation doctrine. But he also recognized that holding as much would create a “freakish” distinction between the statute and others that would remain immune from nondelegation challenge under precedents that could not be overruled due to a lack of votes.²¹⁴ Justice Alito opted for the first horn of Baude’s dilemma, voting to extend the error of the Court’s nondelegation precedents rather than “single out the provision at issue [in *Gundy*] for special treatment.”²¹⁵

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See id.* at 324–29.

²¹⁰ 139 S. Ct. 2116 (2019).

²¹¹ *Id.* at 2123.

²¹² *Id.* at 2130–31 (Alito, J., concurring).

²¹³ *Id.* at 2131 (Alito, J., concurring).

²¹⁴ *Id.*

²¹⁵ *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

As a legal matter,²¹⁶ did Justice Alito resolve the dilemma correctly, given his priors? Baude did not say. He noted that “Professor Adrian Vermeule, who has written the most systematic treatment of this problem [of the second best] to date,” failed to produce a general solution and wondered whether “[p]erhaps, like *The General Theory of the Second Best* in economics, [the problem] has no general solution.”²¹⁷ Later, this pessimism deepened into despair. We cannot say whether the proper response to an erroneous precedent is to extend it or to cabin it, Baude concluded, because “there is no general solution to the existence of a suspect precedent.”²¹⁸

Baude was too quick to despair. If the Holistic Theory is sound, then we can say something general about how the law requires courts to approach erroneous precedents, including when to extend them and when to cabin them. Any puzzles that remain will concern how individual judges or justices should vote in cases in which the majority has determined to decide the case in a way that the individual judge or justice believes is contrary to the law. Interesting as these puzzles are, they have nothing to do with precedent.

The first step toward a general solution to Baude’s problem is to distinguish between legal and nonlegal reasons why a precedent cannot be overruled. Examples of legal reasons include the fact that the precedent is binding and the fact that the conditions for overruling the precedent are not met.

When there is a legal reason why the erroneous precedent cannot be overruled (that is, when the modal force of “cannot” is legal), the Holistic Theory requires the judge for purposes of the case to assume contrary to fact that the precedent’s holding is true and update her priors around that assumption. For example, imagine that in *Gundy* Justice Alito had recognized a legal impediment to overruling the Court’s nondelegation precedents.

²¹⁶ The problem of the second best, as applied to precedent, can also be posed as a question about what decision the court should reach all things considered as opposed to a question about what decision the court should reach according to the law. Strictly speaking, this Section offers an answer to only the latter question. But given that the judge swears an oath to uphold the law, any answer to the latter question has implications for the former question, too. See Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 306–12 (2016) (describing the moral force of the judicial oath).

²¹⁷ Baude, *supra* note 1, at 326 (first citing Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003); then citing R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956)).

²¹⁸ *Id.* at 329.

Imagine, for instance, that Justice Alito was actually Judge Alito, still on the Third Circuit, or that Justice Alito had recognized that reliance interests or some other consideration required respecting stare decisis. Then it seems plausible that, given Justice Alito's priors, the Court was right to extend rather than cabin its nondelegation precedents in *Gundy*. After all, Justice Alito described as "freakish" the possibility that the provision at issue in *Gundy* violates the nondelegation doctrine even though the provisions that the Court has upheld since 1935 in the face of nondelegation challenges do not violate the nondelegation doctrine.²¹⁹

As before, we can illustrate the point in Bayesian terms. Divide the spaces of possibilities into four, corresponding to all permutations of possible truth values of the propositions (1) that at least one of the provisions that the Court has upheld against a nondelegation challenge since 1935 violates the nondelegation doctrine (ND) and (2) that the provision at issue in *Gundy* violates the nondelegation doctrine. Suppose that prior to considering the Court's nondelegation precedents, Justice Alito's credences in these possibilities were as follows:

TABLE 21

Other violates ND	Other violates ND	Other violates ND	Other violates ND
<i>Gundy</i> violates ND	<i>Gundy</i> violates ND	<i>Gundy</i> violates ND	<i>Gundy</i> violates ND
0.780	0.020	0.001	0.199

Updating these priors around the assumption that none of the provisions the Court has upheld against a nondelegation challenge since 1935 violates the nondelegation doctrine yields the following, revised set of credences:

TABLE 22

Other violates ND	Other violates ND	Other violates ND	Other violates ND
<i>Gundy</i> violates ND	<i>Gundy</i> violates ND	<i>Gundy</i> violates ND	<i>Gundy</i> violates ND
0	0	0.005	0.995

²¹⁹ *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring).

Notice how the fact that the third-column credence was so freakishly low initially ensures that it remains well below 0.5 even after Bayesian updating. The third-column credence would exceed 0.5 after Bayesian updating only if the fourth-column credence were even more freakishly low initially. And it is doubtful that Justice Alito's initial credence in the possibility that neither the *Gundy* provision nor any of the provisions upheld since 1935 violate the nondelegation doctrine was even more freakishly low than his initial credence in the possibility that the *Gundy* provision violates the nondelegation doctrine even though all the provisions upheld since 1935 do not. Therefore, given Justice Alito's priors, and assuming (contrary to fact) that he confronted a legal obstacle to overruling the Court's nondelegation precedents, it is plausible that the Court was right to extend rather than cabin those precedents and thus plausible that Justice Alito was right to supply the critical fifth vote for doing so.

But what makes *Gundy* such an interesting example is that the obstacle to overruling the Court's nondelegation precedents that Justice Alito confronted was nonlegal: It was a simple lack of votes.²²⁰ Such an obstacle does not alter the Court's legal obligations. If the conditions for overruling an erroneous precedent are met, then the Court should overrule the precedent—regardless of what moral or intellectual shortcomings might prevent a majority of the Court from voting to do so. And Justice Alito appeared to believe that the conditions for overruling the Court's nondelegation precedents were met.²²¹ Therefore, given Justice Alito's priors, the Court should have overruled its nondelegation precedents rather than extend (or cabin) them.

But it does not necessarily follow that Justice Alito should have voted to sustain the nondelegation challenge. My own view is that judges should always vote to resolve the case as they believe the law requires, at least when their vote is the deciding vote in the case, as Justice Alito's was in *Gundy*.²²² But not everyone

²²⁰ See *id.* at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But [] a majority is not willing to do that.”).

²²¹ See *id.*

²²² I would qualify this statement to permit supplying the decisive vote to vacate and remand when one believes but cannot convince a majority that the proper disposition is reversal. See, e.g., *Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment) (indicating that “reversal . . . is in order,” but, “in order for there to be a controlling judgment,” agreeing to “concur in the judgment vacating and remanding . . . as that disposition is closest to my preferred approach”). Vacatur can

agrees.²²³ At any rate, nothing about the Holistic Theory of precedent entails a view one way or the other. One could maintain, consistently with the Holistic Theory, that if voting to resolve the case as the law requires would provide the crucial vote for a fractured decision in which the controlling opinion under *Marks* would endorse an erroneous and harmful legal theory, then one should vote the other way.²²⁴ If so, then perhaps Justice Alito voted the right way in *Gundy* even given his priors. But the reason would have nothing to do with how the law required *the Court* to approach its nondelegation precedents. Indeed, the reason would have nothing especially to do with precedent at all. Questions about how to vote given that the majority rejects one's theory of the case can arise even in cases of first impression in which precedent plays no role.

In sum, the Holistic Theory provides a general solution to the problem of how the law requires courts to treat erroneous precedents. If the precedent is one that the court has the authority to overrule and the conditions for overruling it are met, then the court should overrule the precedent. Otherwise, the second-best doctrine that the court should embrace is the epistemically best doctrine that respects the fiction that the erroneous precedent's holding is true. In other words, the court should assume contrary to fact that the precedent's holding is true, revise its other doxastic states around that assumption, and decide the case accordingly. In some cases, that will mean extending the erroneous precedent;

be understood as a lesser included alternative to reversal. Both deprive the lower court judgment of legal force, but only reversal replaces the lower court judgment with a contrary judgment. Thus, a vote to vacate and remand when one cannot convince a majority to reverse can be understood as a vote to reverse that is effective only insofar as reversal includes vacatur.

²²³ According to the so-called *Screws* rule, "to allow the Court to reach a majority disposition," a Justice "may vote against her own preferred judgment" in any way, not just by voting to vacate and remand when she believes that the proper disposition is to reverse. Re, *Beyond the Marks Rule*, *supra* note 134, at 1998. For example, in the case that give this informal rule its name, Justice Wiley Rutledge voted to reverse and remand even though he believed that the proper disposition was to affirm. *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in the result). For a discussion of various considerations relevant to when a judge on a multimember court should vote for an outcome other than the one she believes is correct, see generally Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012).

²²⁴ See, e.g., Re, *Beyond the Marks Rule*, *supra* note 134, at 1999 (describing as "plausible" the idea that a Justice may properly "vot[e] against [her own legal] views" in a particular case if she believes that by doing so "she can more fully or reliably achieve outcomes consistent with her own legal views" in the long run).

in other cases, it will mean cabining it. The Holistic Theory is silent on how individual judges or justices should vote when their views are rejected by a majority of the court.

Before closing, it is worth noting that the Holistic Theory's solution to the problem of the second best implies that so-called compensating adjustments are not generally lawful.²²⁵ A compensating adjustment is a departure from the law on one point that mitigates the effect of a departure from the law on another point.²²⁶ "The most famous example is the argument that we ought to compensate for the unconstitutional expansion of delegated power to agencies by upholding the otherwise unconstitutional legislative veto."²²⁷ If the Holistic Theory is sound, then the fact that an erroneous precedent leaves the legal order out of whack is not, by itself, a legal reason for adopting a compensating adjustment. It may be a reason for overruling the precedent. But if the precedent is one whose authority the law requires the court to respect, then the court must treat the precedent as rightly decided—not as a mistake whose effects must be mitigated.

That said, there is a special circumstance in which the Holistic Theory would support a compensating adjustment. If the court is confident that the law requires a certain balance, then the Holistic Theory implies that the court should consider a compensating adjustment to a precedent that throws off that balance. If, assuming the erroneous precedent was correctly decided, the court finds it less implausible that the law permits the compensating adjustment than that the law permits the imbalance, then the court should adopt the compensating adjustment.²²⁸

For example, imagine that a district court judge must decide as a question of first impression the constitutionality of the legislative veto. Suppose that, in fact, the expansion of delegated power to agencies in the modern era and the legislative veto are

²²⁵ See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 94–97 (2013) (expressing concerns about compensating adjustments).

²²⁶ See Baude, *supra* note 1, at 326.

²²⁷ *Id.* For other examples, see Vermeule, *supra* note 217, at 432–33.

²²⁸ Professor Tyler Lindley has pointed out to me that there is a sense in which, if the Holistic Theory is true, this kind of adjustment is not a departure from the law and thus not a compensating adjustment at all. After all, the Holistic Theory implies that, in adopting the adjustment, the court is following rather than departing from its legal obligations. But what the Holistic Theory implies that the court's legal obligations require is treating the adjustment as if it were the law—even though actually it is not—when what triggers this obligation is an erroneous precedent for which the adjustment compensates. That is the sense in which the adjustment satisfies the definition of a compensating adjustment as one departure from the law to compensate for another.

both unconstitutional. But suppose that the judge is extremely confident that the Constitution mandates a balance of power between the legislative and executive branches that the expansion of delegation to agencies and the legislative veto individually throw off but jointly preserve because each cancels out the imbalance caused by the other. Given her confidence that the Constitution mandates this balance of power, the judge's credence in any possibility in which the expanded delegation to agencies is constitutional but the legislative veto is not, or vice versa, will be extremely low. For example, the judge's credences might be as represented in Table 23:

TABLE 23

Agency delegation Legislative veto	Agency delegation Legislative veto	Agency delegation Legislative veto	Agency delegation Legislative veto
0.18	0.02	0.01	0.79

Bayesian updating around the assumption that, in accordance with Supreme Court precedent, the expanded delegation to agencies is constitutional yields the following set of revised credences:

TABLE 24

Agency delegation Legislative veto	Agency delegation Legislative veto	Agency delegation Legislative veto	Agency delegation Legislative veto
0.9	0.1	0	0

In this example, Bayesian updating in light of precedents holding constitutional the expanded delegation to agencies brings the judge's credence in the proposition that the legislative veto is constitutional from $0.18 + 0.01 = 0.19$ to $0.90 + 0 = 0.90$. But for Supreme Court precedents throwing out of whack the constitutionally mandated balance of power among the branches of government, the judge should hold the legislative veto unconstitutional. But in light of the precedent, the judge should hold the legislative veto constitutional.

In a situation like this, the Holistic Theory supports a compensating adjustment. But the reason is not that the balance that

the compensating adjustment would restore is desirable. The reason is not even that the balance is one that would be in place, for better or worse, if no erroneous precedents were on the books. Instead, the reason is that the balance is one that the court would still believe the law requires even if the court also believed that the precedent throwing off the balance was rightly decided.

CONCLUSION

Like competent language users who rarely try and may be unable to articulate complex rules of grammar that they are nonetheless fluent in applying, judges rarely try and may be unable to articulate exactly what they are up to when they give precedent the respect it is due by law. But the rules of the practice are implicit in what they do. This Article suggests that close attention to what judges do, especially their treatment of arguments from analogy to precedent, supports the Holistic Theory of what it is to respect the authority of precedent in the U.S. legal system.

To be sure, additional research is needed to refine the Holistic Theory and reach a more confident assessment of its fit with judicial practice. This Article's high-level introduction to and defense of the Theory leave many questions unanswered. For example: Would the most plausible version of the Holistic Theory incorporate a Bayesian model of rational updating or some other model? Is the most plausible version of the Holistic Theory one in which judges must update *all* their beliefs around the assumption that precedents' holdings are true, including beliefs about, say, the nature of law or interpretation, or only their beliefs about the content of the law? Can courts' treatment of "anticanon" cases be squared with the Holistic Theory?²²⁹ Do dicta have legal impact; if so, can that impact be modelled holistically; and if it cannot be, is that a problem for the Holistic Theory? What about "factual precedents," that is, courts' findings on general questions of fact such as whether asbestos exposure can cause mesothelioma?²³⁰ Does precedent about the doctrine of precedent require a separate treatment, or would the best version of the Holistic Theory affirm that if the Supreme Court held that precedent operates nonholistically, then lower courts would be required to assume that

²²⁹ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (defining the "anticanon" as comprising cases that stand for "propositions that all legitimate constitutional decisions must be prepared to refute," and listing examples).

²³⁰ See generally Tomer Kenneth, *In Defense of Factual Precedents*, 93 U. CHI. L. REV. (forthcoming 2026) (exploring the role of factual precedents in judicial decision-making).

precedent operates nonholistically and update their priors accordingly? How should the Holistic Theory handle cases in which a meritorious argument was not presented to and not considered by the precedent-setting court—should a precedent's holding be construed as conditional on the failure of arguments neither presented nor considered? More generally, what is the most plausible way to identify the authoritative aspects of a precedent?

Questions such as these must await future work. Nonetheless, the preliminary inquiry undertaken here suggests that, at the very least, the Holistic Theory deserves serious consideration as a plausible alternative to existing theories.

And, if true, the Holistic Theory has important theoretical and doctrinal implications. It implies that decisions without controlling opinions nonetheless have meaningful precedential value, neutralizing a common criticism of the *Marks* rule and judgment-only theories of precedent. It supports the legal fiction view of precedent, casting doubt of *Erie's* key holding. It supplies formalists with a response to one of realists' arguments for legal indeterminacy due to precedent. It offers a charitable explanation for the prevalence of disagreements along ideological lines regarding how far a precedent extends. And it provides a solution to the problem of the second best as applied to precedent.

Finally, although this Article proposes the Holistic Theory as a description of the practice of precedent as it is, it is worth noting that the theory also has considerable appeal as a description of the practice of precedent as it ought to be. Respect for precedent as defined by the Holistic Theory strikes a normatively attractive balance between constraint and flexibility. On the one hand, the Holistic Theory achieves constraint insofar as it does not countenance just any way of distinguishing a precedent as legally permitted. On the other hand, the Holistic Theory preserves flexibility insofar as it makes the merits of the underlying legal issues relevant to how far respecting the precedent requires extending it. The Holistic Theory manages to strike this balance because it distributes decision-making authority between the court applying the precedent and the court that set the precedent. The court applying the precedent must surrender its judgment to the court that set the precedent insofar as the court applying the precedent must assume that the precedent's holding is true. But the court applying the precedent is entitled—indeed, required—to rely on its own independent judgment when determining how far the legal effect of the precedent shall

extend beyond cases within the scope of its holding. In this way, the Holistic Theory strikes a healthy balance of power between past and higher courts on the one hand and future and lower courts on the other.