A CONSTITUTIONAL SIGNIFICANCE FOR PRECEDENT: ORIGINALISM, STARE DECISIS, AND PROPERTY RIGHTS

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INTRODUCTION

Imagine a judicial opinion that does not cite or refer to a prior opinion of that court on the same issue. An older case, significantly parallel in real facts, is knowingly disregarded without mention by the same court a few years later. Even Karl Llewellyn—who with legal realists earlier in the twentieth century observed that judges have a huge amount of leeway in choosing relevant prior precedent[1]—termed such willful disregard of authority to be "[f]latly illegitimate" if engaged in by appellate courts in the United States.[2] One would be hard pressed to find any observer of the U.S. legal tradition to dispute Llewellyn's characterization. Such an opinion would invite immediate scrutiny of the court's competence—raising the possibility of disregard for the obligation to dispense even-handed justice, if not of outright corruption. A judge's obligation to consult precedent before deciding a case has been a core feature of the rule of law in the United States whether the relevant source of law at issue is statutory, constitutional, or common law.[3] Consistency, equal treatment of similarly situated parties, judicial restraint, and efficiency concepts are some of the reasons put forward to require consideration

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1. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62–120 (1960) (examining the many permissible approaches to deciding cases outside the context of a case of first impression).

2. *Id.* at 85.

3. *Id.*

of prior court judgments that are inarguably relevant to a present controversy.[4]

Even if there is general agreement that a court's precedent has *some* significance for future decisions, there is virtually none about the *extent* to which the later court is obligated to defer to that precedent. The command of stare decisis has never been absolute in the United States, but neither has it been insignificant.

The topic of this symposium asks whether, as a matter of original understanding, the doctrine of stare decisis poses some constraints on judges when dealing with interpretations of the federal Constitution, and, in particular, whether an originalist owes some obligation to a non-originalist precedent. My answer to this question is a qualified "yes," and I conclude, as have others, that the original understanding of "judicial power" in Article III[5] encompassed significant respect for prior precedent as a starting point for judicial decision making.[6] My contribution here is to explore in greater detail a shared historical understanding, evident from the period immediately following the Revolution through the Civil War, that compelled judges to protect expectation rights when faced with the choice of disregarding prior precedent.

This Article considers the origin and elaboration of a stare decisis property rule as a form of argument in state courts from the Founding period through the American Civil War. Although recent scholarship addresses the development of the doctrine of precedent in the early decades of the United States, thus far scholars have neglected to emphasize that the earliest articulations of the concept explicitly link stare decisis to property rules. In the United States, the concept of stare decisis assumed the larger rhetoric of property rights from the

4. *See* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–77 (2005); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–71 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987).

5. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

6. *See, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577 (2001); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 83 (2000). *But see* Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 762–68 (2004) (arguing that the issue of the authority of judicial precedent "cannot be resolved by an originalist-oriented inquiry into the Framers' understanding of the 'judicial Power'" and that "some other analytical framework must be used" to decide the issue); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 50 (2001).

Founding era. State court judges gave the concept of stare decisis a distinct "vested rights" flavor and believed that the protection of settled expectations about property and contracts was essential to the preservation of property rights.[7] Lawyers, as well as judges, clearly expected courts not to deviate from precedent in a way that would unsettle property transactions. There is no reason to believe that federal judges in this era—who had significantly fewer opportunities to address these issues than did state judges—held materially different views.[8]

The discussions in this Article proceed as follows. Part I briefly introduces several areas of contemporary debate for which this inquiry is relevant. In Part II, I examine previous scholarly evaluations of the doctrine of precedent in the formative period.[9] I provide an alternative explanation for the adoption by American courts of rhetoric favoring stare decisis, one that links the rhetoric used by these courts with the predominant property discourse of the Founding period and with the Marshall Court's subsequent emphasis on vested rights and the Contracts Clause. I suggest that the stare decisis property rule gained widespread acceptance as a powerful form of argument because of the considerable emphasis on vested property rights in the formative era. In Part III, I use the formative era's invocations of the stare decisis property rule to suggest that in this period state courts tended to preserve property rules that they believed were necessary to avoid disrupting a large number of transactions. The cases that I discuss form the basis for an argument that jurists in the antebellum era held distinctly "conservative" ideas about the nature of change in the common law, at least when property reliance interests were at stake. The conclusion of this historical study is a modest contribution to the contemporary debate about the binding nature of precedent in constitutional law.

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7. *See, e.g.*, Hole v. Rittenhouse, 25 Pa. 491, 493 (1855); *see also* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 648 (O.W. Holmes, Jr., ed., Boston, Little, Brown & Co., 12th ed. 1896) (the same work also is listed as the fourteenth edition with John M. Gould as the editor). The history of state courts' preservation of property rights through stare decisis is more thoroughly examined *infra* at Part II.

8. Indeed, Thomas R. Lee has noted the emergence at a later period of a similar emphasis on property reliance interests in the federal courts. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 691–98 (1999).

9. Throughout this Article, I will refer to the years from the American Revolution to the Civil War as the "formative period."

I. PRECEDENT AND JUDICIAL METHOD IN CONTEMPORARY DEBATE

Scholars have recently given renewed attention to the formation of the doctrines of precedent and stare decisis in the American Founding period. The impetus for this renewed scholarly attention was the claim—by Judge Richard S. Arnold of the Eighth Circuit Court of Appeals—that some expectation of a doctrine of precedent was implicit in the Founders' understanding of Article III of the U.S. Constitution. In *Anastasoff v. United States*, a three-judge panel, whose opinion Judge Arnold authored, held the Eighth Circuit's rule against citing unpublished opinions as "precedent" to be unconstitutional based upon an original understanding of "judicial power" in Article III.[10] The claim provoked immediate debate about the origins of stare decisis in the United States.[11]

In *Anastasoff*, Judge Arnold posed an important question that no critic has effectively answered. When is it acceptable for a court to ignore its own prior precedent on a controlling point of law, one directly on point, decided a few years earlier? Or, when is it acceptable for a court to dispense justice unevenly, or to treat like cases differently? This is the greatest sin identified by Llewellyn in *The Common Law Tradition*, lesser only to outright corruption in an individual judge.[12] Rules that prevent citation to the vast majority of a court's prior work allow judges to ignore the resolution of cases from the week, month, or year before, and to opt for a different rule apparently on a whim.

Judge Arnold's original point has morphed into a broader debate about originalism and stare decisis. The common law tradition of adherence to decided cases is at issue in the debate about originalism

10. Anastasoff v. United States, 223 F.3d 898, 900–04 (8th Cir. 2000), *vacated as moot* 235 F.3d 1054 (8th Cir. 2000) (en banc). Some years earlier Henry Paul Monaghan suggested the location of an obligation to consult precedent in the meaning of "judicial power" under Article III. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988).

11. *See generally, e.g.*, Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citations to Unpublished Dispositions*, CAL. LAW., June 2000, 43 (2000); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L. J. 1235 (2004); Price, *supra* note 6; Lauren Robel, *The Practice of Precedent:* Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

12. *Cf.* LLEWELLYN, *supra* note 1, at 459–60 (noting the judicial sin of "divergent lines of deciding which deliberately ignore each other").

and precedent for constitutional decisions. No one suggests that the Supreme Court treat each case as a brand new issue, not even referring to how it decided a similar case in the past.[13] Instead, the quest is to determine whether some rules can be agreed upon for the doctrine of stare decisis.

For modern courts, it is common to recognize a hierarchy for the degree of respect owed to prior precedent.[14] First, court decisions interpreting statutes are often said to be owed the highest degree of stare decisis because legislatures require stability of interpretation of statutes from the courts for the efficacy of the law-making power. If courts have interpreted a statute incorrectly, the legislature may respond by amending the statute. If, however, the interpretation of a statute changes from year to year, the legislature has less control over the content of the statutory command. Second, common law interpretations by courts should remain stable for much the same reason: common law adjudication is gap filling to provide a source of law in the absence of express (and superior) legislative direction. If a particular common law rule is changed one year, changed in the next, and quickly changed again, the legislature is unsure of the need for a response to endorse one view or reject another. Third and last in the hierarchy of decisions to which stare decisis has a claim are constitutional decisions. The rationale for this lesser degree of deference is a separation of powers argument based upon the fact that the federal Constitution is difficult to amend. The argument is that, in constitutional law, more so than for other sources of law, the "people"

13. Thirteen years ago, Gary Lawson "suggested that the [Supreme] Court, if it wants to conform to the Constitution, should *never* choose precedent over direct examination of constitutional meaning." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3 (2007) (citing Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994)). His argument for treating a case as a new issue, without reference to prior judicial decisions, appears to be limited, however, to constitutional cases. Lawson relies on the Supremacy Clause, arguing that it acts as a choice-of-law provision and commands judges to prefer the text of the Constitution over prior Supreme Court decisions, which are "conspicuously" absent from the Clause. *Id.* at 6; *see* U.S. CONST. art. VI, cl. 2. But now even Lawson would agree that *sometimes* (though rarely) there is reason to give "weight" to prior decisions. Lawson, *supra*, at 21 ("Thus, if all of the epistemological stars align properly—and one suspects that this would be a relatively rare event—there is some constitutional warrant for giving weight to prior decisions.").

14. *See generally* Brian C. Kalt, *Three Levels of* Stare Decisis*: Distinguishing Common-Law, Constitutional, and Statutory Cases*, 8 TEX. REV. L. & POL. 277 (2004); Lee, *supra* note 8; *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. J. 1361, 1361–63 (1988).

have no effective recourse to correct errors in legal interpretation by the judicial branch.

This hierarchy of degrees of respect for precedent based upon source of law is not historical. Instead, the Founding period and later generations viewed stare decisis as an important tool to protect reliance interests, regardless of the source of law. As I illustrate in this Article, further examination of historical practices suggests that earlier judges considered protection of expectation interests akin to constitutional command. The Founding generation did seem to expect that constitutional decisions by courts would generally follow the common law tradition of judicial decision making. A study of early state court practices is important for this conclusion. For primarily jurisdictional reasons, federal judges had fewer opportunities than did state judges to expound upon the meaning of stare decisis in the early decades following the establishment of the U.S. Constitution. In addition, state judges generally enjoyed greater prestige than did most federal appointees. For these and other reasons, an understanding of early state court practices is necessary to understand the relationship between originalism and precedent.

State court judges exhibited a strong commitment to stare decisis in cases in which property interests were at stake. This is important because most civil cases of that period involved property or contract disputes, and these judges tended to view the common law as a mechanism for ordering relations between individuals in terms of property rights. This commitment to the protection of the stability of law for property expectation interests also limited how governments could behave—the best example being *Fletcher v. Peck*.[15] These early practices reveal that the modern dichotomy between "constitutional" and "private" law was not so evident in the formative period.

15. 10 U.S. (6 Cranch) 87 (1810). This was the first decision by the U.S. Supreme Court to address in detail the significance of the federal Contracts Clause with respect to state legislation affecting property rights. In 1795, the Georgia legislature sold huge tracts of land, for about a penny an acre, to several land companies that had bribed members of the legislature. A number of Georgia legislators were major stockholders in the companies. Public outcry following the sale resulted in election of a new legislature, which promptly rescinded the prior sale. The state refunded the money paid for the land, but some of the land had already been sold by the companies to other persons, a large number of whom lived in other states. One such purchaser brought suit in federal court, claiming that the Georgia legislature could not rescind the deal with respect to innocent purchasers of the land because of the federal Contracts Clause. The Supreme Court struck down the Georgia legislature's attempt to rescind its original land grant. *Id.* at 139.

Historians have identified two defining characteristics of judicial method for the years from the Founding period to the American Civil War. The first is the attribution of a "Grand Style" of adjudication, in which judges openly and "joyously" made law, in contrast to the formalism of the latter part of the nineteenth century.[16] The second is the characterization of judges as "instrumentalists," in that they collectively and consciously transformed the common law to further specific goals. The instrumentalist paradigm emphasizes the role of economic thought in shaping judicial decisions, leaving the purpose of this instrumentalism open to debate. James Willard Hurst, for instance, characterized judicial purpose in the period as favoring "property in action" over static uses.[17] Other scholars, most notably Morton J. Horwitz, have suggested that judges furthered the interests of those who would become key players in the developing industrial economy.[18]

These generalizations, however, do not account for the emergence among antebellum judges of a widely shared value with respect to private property. Many judges imposed upon themselves external limits on discretion to change law in property cases, and these limits are readily linked to Founding-era political rhetoric that emphasized the sanctity of private property. Beginning early in the formative period, state court judges with some frequency articulated what they termed a "rule of stare decisis" for common law property rights. This view, itself a law-making choice, recognized the undesirability of changing common law rules that had created property reliance interests.

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16. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 36–40 (1977). Gilmore maintained that "[a]s anyone who has the slightest familiarity with late eighteenth-century English case law knows, the judges were quite consciously aware of what they were doing: they were making law, new law, with a sort of joyous frenzy." *Id.* at 6–7. Gilmore, in turn, attributed his designation of the pre-Civil War period as the "Age of Discovery" to Llewellyn's characterization of a "Grand Style" of adjudication, in which society recognized "both the need and the opportunity to create a rational system of law." *Id.* at 39.

17. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 25 (1956).

18. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 32–34 (1977) (noting the necessity of judicial protection of property "to induce investors into a high-risk enterprise"). For a description of the reigning paradigm in that period and its various proponents, see generally Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1163–66 (1999) (reviewing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997)).

The evidence here suggests that most state judges in the formative era did consider judicial abandonment of precedent potentially to be a retroactive impairment of property rights. In this era state courts tended to preserve those property rules that they believed were necessary to avoid disrupting a large number of prior transactions.[19] Courts were willing to change property rules only if they were first satisfied that the change would improve the law, usually in the sense that it would better reflect community practice, and if they were also satisfied that the change would not greatly disturb settled expectations.[20] This preference for legislative, rather than judicial, change in property law indicates great awareness of the difference between the retroactive nature of judicial decision making and the prospective nature of legislation, a critical distinction for the reliance interests these courts identified.

On the other hand, it is well documented that state courts prior to the Civil War did modify existing common law property rules with some frequency. Together with the portrayal of the formative period as one in which courts self-consciously and joyously made new law, progressive change in the American common law of property created a disjuncture with judicial rhetoric espousing settled rules of property. Although state courts, as well as the attorneys who argued before them, frequently articulated the view that stare decisis mandated adherence to rules that had generated settled property interests, such rhetoric seems inconsistent with other cases in which courts changed property rules, whether for utilitarian or instrumentalist reasons, to rationalize the common law, or in response to statutory changes.

Stare decisis was never absolute, even with respect to property interests. Nonetheless, the rhetoric of courts indicates that in this period stare decisis was viewed as a property "meta-rule," or a rule about rules. The quest is to explain the types of cases in which judges seemed to be constrained by stare decisis in the interest of protecting settled property expectations, recognizing that in other cases they did

19. *See, e.g.*, Payne v. St. Louis County, 8 Mo. 473, 476 (1844) (noting that judicially settled rules of property should stay that way when "on the faith of [those decisions] an immense property has been advanced" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819))).

20. *See, e.g.*, Garner v. Stubblefield, 5 Tex. 552, 563 (1851) (Lipscomb, J., concurring) ("[I]f by its long usage and its having entered into the contracts of mankind it has become the law of property, it ought not to be disturbed.").

not. If a coherent explanation is possible, we might learn more about the "Grand Style" of joyous law making and thus gain a deeper understanding of general characteristics of judicial method in this era.

II. ORIGINS AND DEVELOPMENT OF THE STARE DECISIS PROPERTY RULE IN THE FORMATIVE ERA

A. *Prior Scholarly Views*

Scholars have debated the extent to which a judicial commitment to stare decisis is evident in the late eighteenth and early nineteenth centuries in the United States. This debate reflects considerable imprecision about the origins of the doctrine of stare decisis in the United States, stemming possibly from different views on whether a relatively "strict" form had emerged.[21] Some writers have said, for example, that only in the late nineteenth century did courts begin to follow the doctrine of stare decisis.[22] This disagreement presumably is not about whether courts uttered the words "stare decisis" in judicial opinions, because use of that term to mean adherence to previously articulated principles of law is clearly evident early in the Founding period. Instead, the disagreement seems to be whether courts exhibited a strong commitment to the concept of stare decisis, or, whether by "stare decisis," courts meant more precisely that a holding by a court in a single previous case was binding on the same court.[23]

Locating an "arrival" of a relatively firm doctrine of stare decisis is also difficult because debates about adherence to precedent during

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21. *See* Monaghan, *supra* note 10, at 770 n.267 ("The whole idea of just what precedent entailed was unclear."). Monaghan cites E.M. Wise for the proposition that "because [the] doctrine of stare decisis did not become firmly established in England until [the] nineteenth century, colonial and early American courts had no such doctrine to incorporate." *Id.* (citing E.M. Wise, *The Doctrine of* Stare Decisis, 21 WAYNE L. REV. 1043, 1049 (1975)).

22. *See, e.g.*, Joseph E. Brooks, Note, *Jurisprudence: The "New Haven School" and the Emergence of Secondary Authority—Is Number Two Trying Harder?*, 41 FLA. L. REV. 1031, 1036 (1989); Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 604 (1984) ("Precise theories of precedent and stare decisis are creatures of the late nineteenth century.").

23. *See* Wise, *supra* note 21, at 1045 (distinguishing the "strict form" from the "less strict, permissive, lax, or latitudinarian form" of the rule of stare decisis); HAROLD J. BERMAN ET AL., THE NATURE AND FUNCTIONS OF LAW 514 (6th ed. 2004) ("In the late nineteenth century for the first time there developed the rule that a holding by a court in a previous case is binding on the same court (or an inferior court) in a similar case. The doctrine was called *stare decisis*—'to stand by the decisions.' It was never absolute.").

the formative period reflect most of the ways we talk about it today. It was common, for example, for the radical codifiers (those who wanted to codify existing common law not only to make it more intelligible to non-lawyers, but also to reform it) in the 1820s and 1830s to argue that the very problem they sought to remedy was a moribund, slavish adherence to precedent that prevented needed reforms,[24] which left codification as a means to "reliev[e] judges from the obligation now imposed upon them of obeying precedents not consonant to the spirit of the age."[25] These radical codifiers probably exaggerated the extent to which courts in fact followed stare decisis, but objections to the practice commonly focused upon particular areas of the law that state legislatures had not yet found the will to change.

Opponents of codification, on the other hand, stressed the mutability of the common law, probably equally overstating the extent to which judges either reacted to changed social preferences in reforming the American common law or at least purged it of its undesirable English elements. Few seemed fully persuaded by the argument that the "binding authority of precedent" was a safeguard to judicial integrity: "If judges may be supposed to be in fact corrupt, the slender web of authority and precedent is wholly insufficient to restrain them."[26] If we assume that this sort of realism about judicial

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24. *See, e.g.*, *Review of William Sampson's An Anniversary Discourse Delivered Before the Historical Society of New York, on Saturday, Dec. 6, 1823, Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law*, 19 N. AM. REV. 411, 419–20 (1824) (No reviewer is listed in the journal during the publication period, but a 1967 article in another journal attributes this review to Henry D. Sedgwick. *See* Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820–1830*, 11 AM. J. LEGAL HIST. 234, 243 n.19 (1967)). The author of the review explains:

> It would be unfair to press an objection of this description against an ancient system, if the rigid principle of adherence to precedent only manifested itself in a few rare and extravagant instances, of the nature of that which we have just cited. But the truth is not so. Large portions of the law receive their character from this principle, and it is to a great extent infused into the whole mass. . . .
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> . . . The question which now concerns us, is, whether an extreme deference to precedent and authority does not rather increase than diminish th[e] uncertainty [inherent in the law]?

Id. at 422, 425.

25. *Id.* at 426–27.

26. *Id.* at 427.

method appears only in the twentieth century, we would be mistaken.[27]

Two of the more important contributions to the question of stare decisis in the formative era are a recent article by Caleb Nelson[28] and an earlier examination by Frederick G. Kempin, Jr.[29] Nelson considered cases from the Founding period through the Civil War and concluded that "Americans viewed *stare decisis* as a way to restrain the 'arbitrary discretion' of courts."[30] But this constraining feature, according to Nelson, operated within a limited sphere of rules that were considered indeterminate, and courts were not expected to adhere to past decisions that were seen as erroneous. He argued that this theory accounts for the appearance of stare decisis in American law:

> Antebellum Americans embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges, and they did not extend *stare decisis* farther than this purpose seemed to demand. In particular, when convinced of a precedent's

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27. *See id.* In an 1848 article in the Western Law Journal, Daniel Raymond noted the ability of judges to avoid or hide behind stare decisis by manipulation of prior precedent, reminiscent of later observations by Llewellyn. Raymond wrote:

> [Stare decisis] is a very convenient and comfortable maxim for an ignorant or lazy Judge, as it saves him the trouble and labor of investigating a case and forming his own opinion. It is a wholesome maxim when judiciously followed and faithfully applied, but a most pernicious one when the letter and not the spirit is regarded. There is often an apparent resemblance or analogy between cases, when upon closer scrutiny they are found to be entirely diverse, and hence it is a matter of daily experience, that while Courts profess to follow the decisions, they merely follow their letter, and not their spirit and meaning; the consequence of which is, that they are perpetually running themselves into difficulties and absurdities, from which they cannot extricate themselves, without the aid of the Legislature. Courts of Justice, like certain insects, have an irresistible propensity to envelop themselves in their own web, from which the legislative sword alone can cut them loose.

Daniel Raymond, *Review of Moffatt v. Cook* [sic]*, 5 Howard 295.—State Insolvent Laws,—Stare Decisis*, 6 W.L.J. 112, 112 (1848).

28. Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

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

30. Nelson, *supra* note 28, at 5 (quoting THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

> error, most courts and commentators did not indulge a presumption against overruling it.[31]

Kempin examined cases from 1800 to 1850 and concluded that these years constituted "[t]he formative period of the doctrine" of stare decisis.[32] At the beginning of this period, Kempin argued, no firm doctrine of stare decisis existed in the sense that courts considered a prior case to be "binding," as opposed to merely a source of authority entitled to consideration.[33] Although Kempin suggested that a stronger form of stare decisis was established by 1850, the distinctions he drew between stare decisis and a mere "doctrine of following prior precedent" are not entirely clear.

Kempin did not discuss the emphasis on property reliance interests in state cases invoking stare decisis. Although Nelson noted that state courts in the formative period frequently emphasized the importance of stare decisis for property rules,[34] he did not consider that emphasis significant in his search for an account of the growth of stare decisis in American law. Indeed, none of the scholarship thus far reflects upon the reasons American courts might have had to link stare decisis explicitly to property rules. Thomas R. Lee examined the use of the stare decisis property rule in Supreme Court decisions of the mid-nineteenth century,[35] but he did not examine earlier state court articulations of the rule. His purpose instead was to show that, although the Rehnquist Court's articulation of a preference for stare decisis in property cases can be traced to Supreme Court decisions of the mid-nineteenth century, the Court's modern distinction between the precedential weight to be accorded statutory versus constitutional cases is of more recent vintage.[36]

Other explanations for the emergence of stare decisis, like Kempin's, omit reference to the stare decisis property rule altogether. For example, Thomas Healy, among others, attributed a gradual strengthening of the commitment to stare decisis during the

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31. *Id.* at 8.

32. Kempin, *supra* note 29, at 50.

33. *Cf. id.* at 33 ("It is doubtless true that the common law was viewed, by the colonists, as something other than and apart from decided cases. It may well be that decided cases were believed to contain evidence of the law and this can be seen by reference to a few different sources.").

34. Nelson, *supra* note 28, at 20.

35. *See* Lee, *supra* note 8, at 691–98.

36. *Id.* at 718–19.

nineteenth century "mainly to the emergence of reliable law reports and a positivist conception of law."[37] I argue, instead, that the nineteenth century began with a widely shared view by state court judges that stare decisis was essential to the stability of property rights. To the extent that a commitment to stare decisis was strengthened during the nineteenth century, it is attributable more to the formative era's greater emphasis on property rights than to any other factor.

B. *The Rhetoric of Stare Decisis: Examples*

There should not be any doubt that state courts enunciated the stare decisis property rule[38] from an early period and throughout the formative era. Although there is some evidence of the existence of this concept in colonial decisions,[39] in the post-Founding period the rule appeared in a Pennsylvania opinion in 1788,[40] followed a few years later by an articulation of the rule by a North Carolina court.[41] The Pennsylvania opinion articulated the common theme: "An attempt of that kind [to change a settled rule of property, which would affect the exercise of a property owners' right] would shake the very foundations of property . . . ."[42] From

37. Healy, *supra* note 6, at 87.

38. The stare decisis rule was less commonly referred to as a "maxim," *e.g.*, Brown v. Phoenix Ins. Co., 4 Binn. 445, 478 (Pa. 1812), a "doctrine," *e.g.*, Perkins v. Mayfield, 5 Port. 182, 189 (Ala. 1837), or a "policy," *e.g.*, Garner v. Stubblefield, 5 Tex. 552, 563 (1851).

39. The Court of Appeals of Maryland discussed the concept in this way:

> I apprehend the present rule must be *stare decisis*, a rule founded on great convenience. . . . Lord Talbot observed, that the rules of property being certain and known, it is not of great consequence what they are. The instances in which Judges have been governed by this consideration, are infinite.
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> What Mr. Johnson observed at the bar is certainly true, that ever since the case of *Scott v. Dobson*, the law has been in this point looked upon to be settled. The general opinions of lawyers have been accordingly; purchases have been made, and much property is held under it, and if a solemn decision . . . should not be conclusive, contentious suits would be infinite.

Somerville v. Johnson, 1 H. & McH. 348, 352–54 (Md. 1770).

40. *See* McCurdy v. Potts, 2 U.S. (2 Dall.) 98, 98 (Pa. 1788) ("It is essential to private justice and to public peace and order, that the rules of property, as well as of the other objects of society, should be settled and promulgated.").

41. *See* Cleary v. Coor, 2 N.C. (1 Hayw.) 225, 226 (1795) (upholding a doubtful but not grossly incorrect award).

42. *McCurdy*, 2 U.S. (2 Dall.) at 98–99.

1788 through 1860, courts in Pennsylvania,[43] New York,[44] South Carolina,[45] and Virginia[46] referred to the stare decisis property rule most frequently, but cases from Alabama,[47] California,[48] Connecticut,[49] Illinois,[50] Louisiana,[51] Massachusetts,[52]

43. *E.g.*, Schriver v. Meyer, 19 Pa. 87, 93 (1852); Hole v. Rittenhouse, 25 Pa. 491, 493 (1855); Keite v. Boyd, 16 Serg. & Rawle 300, 301 (Pa. 1827); Brown v. Phoenix Ins. Co., 4 Binn. 445, 478 (Pa. 1812); Kirk v. Dean, 2 Binn. 341, 357 (Pa. 1810); French v. M'Ilhenny, 2 Binn. 13, 27 (Pa. 1809) (Brackenridge, J.) (citing Doe v. Wright, 8 T.R. 64, 68, 101 Eng. Rep. 1268, 1270 (K.B. 1798) (Ashhurst, J.)); Jones's Lessee v. Anderson, 4 Yeates 569, 575 (Pa. 1808); Commonwealth v. Coxe, 4 U.S. (4 Dall.) 170, 199 (Pa. 1800) (Yeates, J.) (referring to "the judicial authority, who are compelled to deliver the law as they find it written for decision").

44. *E.g.*, Sparrow v. Kingman, 1 N.Y. 242, 255 (1848) (Wright, J.); Paige v. Cagwin, 7 Hill. 361, 381 (N.Y. 1843) (Lott, Sen.); Moore v. Lyons, 25 Wend. 119, 142 (N.Y. 1840) (opinion of the President of the Senate); Hawley v. James, 16 Wend. 61, 166 (N.Y. 1836) (Bronson, J.); Lion v. Burtiss, 20 Johns. 483, 487 (N.Y. Sup. Ct. 1823); Wilkes v. Lion, 2 Cow. 333, 394–95 (N.Y. 1823) (Cranmer, Sen.); Yates v. Lansing, 9 Johns. 395, 428 (N.Y. 1811) (Clinton, Sen.); Bayard v. Malcolm, 2 Johns. 550, 563–64 (N.Y. 1807) (Woodworth, Sen.).

45. *E.g.*, Kottman v. Ayer, 32 S.C.L. (1 Strob.) 552, 577 (1847); Lemacks v. Glover, 18 S.C. Eq. (1 Rich. Eq.) 141, 149 (1845) (Harper, J., dissenting); Young v. Burton, 16 S.C. Eq. (McMul. Eq.) 225, 267 (1841); Smith v. Henry, 18 S.C.L. (2 Bail.) 118, 122 (1831) (O'Neall, J.); Gayle v. Cunningham, 5 S.C. Eq. (Harp. Eq.) 124, 139 (1824); Mackey v. Collins's Ex'rs, 11 S.C.L. (2 Nott & McC.) 186, 189 (1819) ("[I]f we are to set afloat decisions which have been solemnly made, and which have universally acquiesced in for fifteen years, we shall never know when to consider the law as settled."); Butler v. Ryan, 3 S.C. Eq. (3 Des. Eq.) 178, 182 (1810) ("My respect for the decision of a full bench would lead me very far to accord with it; or, at any rate, to acquiesce in their construction of an act which is susceptible to some doubt."); Mason's Ex'rs v. Man's Ex'rs, 3 S.C. Eq. (3 Des. Eq.) 116, 122 (1810).

46. *E.g.*, Taylor's Adm'r v. Spindle, 43 Va. (2 Gratt.) 44, 68–69 (1845) (Stanard, J.); Black v. Gilmore, 36 Va. (9 Leigh) 446, 448–49 (1838); Tatum's Ex'r v. Commonwealth, 36 Va. (9 Leigh) 56 (1837) (Brockenbrough, J.); *Id.* at 70 (Tucker, P.); Smith v. Triplett, 31 Va. (4 Leigh) 590, 599–600 (1833) (Tucker, P.); Callava v. Pope, 30 Va. (3 Leigh) 103, 106–07 (1831) (Tucker, P.); Bells v. Gillespie, 26 Va. (5 Rand.) 273, 303 (1827) (Coalter, J.).

47. *E.g.*, McGehee v. Chandler, 15 Ala. 659, 661 (1849); Wyman v. Campbell, 6 Port. 219, 246–47 (Ala. 1838); Perkins v. Mayfield, 5 Port. 182, 186 (Ala. 1837).

48. *E.g.*, Hart v. Burnett, 15 Cal. 530, 605 (1860) (citing Lion v. Burtiss, 20 Johns. 483, 487 (N.Y. 1811)).

49. *E.g.*, Inhabitants of Middleton v. Inhabitants of Lyme, 5 Conn. 95, 98 (1823); Beckwith v. Angell, 6 Conn. 315, 324 (1823) (Hosmer, C.J., dissenting); Bulkley v. Landon, 3 Conn. 76, 82 (1819); Escopiniche v. Stewart, 2 Conn. 262, 267 (1817) (Hosmer, J.); Bush v. Bradley, 4 Day 298, 305 (Conn. 1810) (Reeve, J.).

50. *E.g.*, Mason v. Caldwell, 10 Ill. (5 Gilm.) 196, 205 (1848) ("This precise question has been fully settled by a number of decisions in other States.").

51. *E.g.*, Dehart v. Berthoud, 7 Mart. (o.s.) 440, 440 (La. 1820); Ramsey v. Stevenson, 5 Mart. (o.s.) 23, 76–78 (La. 1817) ("These points we deem it useless now to discuss; and it is believed that our decision must be directed by the principles of law recognized in the case of *Dumford v. Brooks' Syndics* . . . .").

52. *E.g.*, Elwell v. Shaw, 16 Mass. (15 Tyng) 42, 47 (1819); Oliver v. Newburyport Ins. Co., 3 Mass. (2 Tyng) 37, 56 (1807) (Sedgwick, J.) ("By sustaining the motion for a new trial, this

Mississippi,[53] Missouri,[54] New Hampshire,[55] Tennessee,[56] Texas,[57] and Vermont[58] provide evidence of relatively widespread recognition of the rule, at least as a principle worthy of consideration.

A notable champion of stare decisis in rules of property and contract was James Kent. In the first volume of his *Commentaries on American Law*,[59] published in 1826, Kent recognized the desirability of overruling "hasty and crude decisions,"[60] yet he emphasized that a light regard for prior judicial decisions would "disturb and unsettle the great landmarks of property."[61] He wrote:

> If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property.[62]

An author in the *North American Review*, writing within four years of the publication of Kent's *Commentaries*, seemed to believe that

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question was considered by the Court as not definitively settled by [previous cases,] . . . otherwise it is obvious that it would have been absurd to have received the motion and permitted it to have been argued.").

53. *E.g.*, Boon v. Bowers, 30 Miss. 246, 256 (1855).

54. *E.g.*, Payne v. St. Louis County, 8 Mo. 473, 476 (1844).

55. *E.g.*, Bellows v. Parsons, 13 N.H. 256, 260–63 (1842); Hall v. Chaffee, 14 N.H. 215, 218 (1843) (Gilchrist, J.) ("Certain words and phrases . . . have received a settled construction when found in wills, and that construction it has been found necessary to adhere to, in order that the rules for the exposition of wills should be as certain as the nature of the case will permit.").

56. *E.g.*, Smith v. Craig's Lessee, 2 Tenn. (2 Overt.) 287, 291–92 (1814) (Overton, J.) (citing McCurdy v. Potts, 2 U.S. (2 Dall.) 98, 98 (Pa. 1788)).

57. *E.g.*, Garner v. Stubblefield, 5 Tex. 552, 563 (1851) (Lipscomb, J., concurring); Lynch v. Baxter, 4 Tex. 431, 443 (1849).

58. *E.g.*, Adams v. Field, 21 Vt. 256, 266 (1849); Sanborn v. Morrill, 15 Vt. 700, 704, 707 (1843).

59. KENT, *supra* note 7.

60. *Id.* at 649.

61. *Id.* at 648.

62. *Id.*

American courts widely embraced this principle: "The rule of *stare decisis*, so strictly adhered to wherever title to property, and not the mere mode of procedure, is concerned, has given to that system its certainty and general equity, though at the expense of occasional individual hardship."[63]

William Blackstone's *Commentaries on the Laws of England* (1765), an influential treatise on the English common law widely available in the United States, discussed stare decisis but did not suggest that it was important for stability of property rights or that courts should consider the extent to which property transactions may have relied on previous court decisions.[64] Instead, Blackstone's view was that a precedent need not be followed "where the former determination is most evidently contrary to reason . . . . For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*."[65] This statement fuels the tendency of modern scholars to attribute both to English law at the time, as well as to American law in the formative era, a "declaratory" theory in which prior cases were not themselves a source of law in the positivist sense.[66]

The stare decisis property emphasis by American state court judges in the formative period, then, did not originate from their study of Blackstone's *Commentaries*. Moreover, a number of state courts articulated the stare decisis property rule well before the publication of Kent's *Commentaries* in 1826. Hugh Henry Brackenridge discussed stare decisis at some length in his 1814 treatise on Pennsylvania law.[67] If anything, the treatise admonished American judges for too strict an adherence to stare decisis, especially to cases from English law not applicable to conditions and practices in the new United States.

The earliest statements of the stare decisis property rule by American courts usually do not attribute the principle to a particular

63. P. Cruise, *Review of David Hoffman's Legal Outlines, Being the Substance of a Course of Lectures Now Delivering in the University of Maryland*, 30 N. AM. REV. 135, 153 (1830).

64. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69–70 (describing the rule of following precedent to have exception only where a previous case is "manifestly absurd or unjust" and noticeably excluding any discussion of property).

65. *Id.*

66. For a compelling argument that much "declaratory theory" is overstated, especially as attributed to Blackstone, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 36–43 (1996).

67. HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 54–70 (Philadelphia, Byrne 1814).

source, although in 1809 the Pennsylvania Supreme Court cited an English case.[68] After the publication of the first volume of Kent's *Commentaries* in 1826, courts more commonly cited this source as authority for the rule. Another frequent reference was the 1823 New York case *Lion v. Burtiss*,[69] which was quoted for the proposition that "[*s*]*tare decisis* is a maxim essential to the security of property."[70] On rare occasion, courts later in this period located the rule in English authority,[71] but for the most part the concept seemed to have taken on a life of its own in American courts.

Attorneys appearing before courts also argued in favor of the stare decisis property rule with considerable frequency.[72] In 1800, an attorney is reported to have argued to the Pennsylvania Supreme

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68. It reveals the strength of stare decisis that the English opinion was short enough to quote in its entirety:

> [I]t is better for the public that the intention of one individual should be defeated, than that a series of decisions, on which the real property of this country depends, should be shaken. *Stare decisis* is a maxim in our law. Where there is a general devise of land, without any words of inheritance, the law says, that the devisee shall only take an estate for life; and such is the present case.

French v. M'Ilhenny, 2 Binn. 13, 27 (Pa. 1809) (Brackenridge, J.) (quoting Doe v. Wright, 8 T.R. 64, 68, 101 Eng. Rep. 1268, 1270 (K.B. 1798) (Ashhurst, J.)).

69. 20 Johns. 483 (N.Y. Sup. Ct. 1823).

70. *See, e.g.*, Hart v. Burnett, 15 Cal. 530, 605 (1860) ("*Stare decisis* is a maxim essential to the security of property. The decisions of Courts of law become a rule . . . and when that rule has been sanctioned and adopted in our Courts, it ought to be adhered to, unless manifestly wrong and unjust." (quoting *Lion*, 20 Johns. at 487)).

71. Mickle v. Matlack, 17 N.J.L. 86, 101 (1839) (Ford, J.) ("*Stare decisis* is the rule of law, and so essential to the repose of property, that Camden and Hardwick, Mansfield and Kenyon, Loughborough and Eldon, have bowed to it with the highest veneration."). A separate opinion by Chief Judge Parker in *Hall v. Chaffee*, 14 N.H. 215, 234 (1843), cites the case *Keiley v. Fowler*, Wilmot 308–12, 97 Eng. Rep. 115 (H.L. 1768). In *Schriver v. Meyer*, 19 Pa. 87 (1852), on the other hand, the court's opinion, referencing Lord Coke, seems to indicate (by way of omission) that the property emphasis was not so closely connected with the doctrine of stare decisis in England. The court follows this excerpt with a reference to Kent's *Commentaries on American Law*, stating an important consideration to be the "extent of property to be [a]ffected by a change of it." *Schriver*, 19 Pa. at 93–94 (quoting KENT, *supra* note 7, at 649).

72. *See, e.g.*, Mason's Ex'rs v. Man's Ex'rs, 3 S.C. Eq. (3 Des. Eq.) 116, 122 (1810). When delivering its decree, the court noted the argument of counsel:

> But it has been contended that two decisions in this country have settled this point, and that stare decisis is a maxim of judicial wisdom, of great importance to the security of property and the sound administration of justice; and that this maxim should have peculiar obligation on a judge sitting singly.

Id. The court went on, however, to note that: it was not persuaded by the cases cited by counsel because the cases were not of precedential value for counsel's point; hence, its decision was not constrained by those cases; and, there was case precedent for the other view. *See id.* at 124.

Court that "[*s*]*tare decisis*, is a maxim to be held forever sacred, on questions of property."[73] Similarly, in Massachusetts in 1807, counsel argued that the "maxim *stare decisis* is of peculiar weight in commercial questions, in which, perhaps more than in any others, it is more important that the law be settled, than how it is settled."[74] In *Lemacks v. Glover* the attorney discussed the majority's overruling of a prior decision of that court: "That case settled a rule of property which it was dangerous to interfere with. Estates had been divided in conformity with it, and purchases made on its faith."[75] The attorney "urged the policy of adhering to the maxim *stare decisis*, especially where the decision laid down a rule of property."[76] Authority for these arguments is not recorded in the reporter's notes of these and similar cases.[77]

C. *The Link Between Vested Rights and Arguments About Stare Decisis*

Even if some of the earliest articulations of the stare decisis property rule by American courts rely upon English origins, the question of judicial motivation for adopting this stance remains. Further, if the primary motivation for judges to invoke stare decisis was to legitimate common law rule making as a general matter, it is not necessarily obvious why courts would develop a distinction between property cases and other kinds of cases. I argue that the

73. Commonwealth v. Coxe, 4 U.S. (4 Dall.) 170, 192 (Pa. 1800) (argument of counsel).

74. Oliver v. Newburyport Ins. Co., 3 Mass. (2 Tyng) 37, 44–45 (1807) (argument of counsel).

75. Lemacks v. Glover, 18 S.C. Eq. (1 Rich. Eq.) 141, 153 (1845) (argument of counsel).

76. *Id.*

77. *See, e.g.*, Waffle v. Dillenbeck, 39 Barb. 123, 130 (N.Y. Gen. Term 1863) (argument of counsel) ("Where a decision may have been acted upon, and the title to real property depend upon it, or parties undoubtedly framed their contract upon it, the rule of stare decisis is one of much force . . . ."). Attorneys clearly recognized the usefulness of this form of argument. In *Bellows v. Parsons*, for example, counsel for the defendant argued in favor of stare decisis because "the title to a vast amount of real estate is dependent on this question." *Bellows*, 13 N.H. 256, 258 (1842) (argument of counsel). *See also* Napier v. Jones, 47 Ala. 90, 93 (1872) (argument of counsel) ("This decision has become a rule of property, and has been uniformly acted upon as such in this State for nearly thirty years. It is too late to disturb it. The maxim, '*stare decisis*,' must apply here or be repealed."); Coppinger v. Rice, 33 Cal. 408, 416 (1867) (argument of counsel) ("The rule has become a rule of property, and to disturb it would produce an incalculable amount of mischief.").

predominant political discourse about vested rights of property,[78] emanating from the Founding period and from the influence of the Contracts Clause decisions of the Marshall Court, accounts for the appearance and development of the concept that courts should not change rules that would unsettle property transactions. The particular rhetoric used by courts echoes larger themes about property rights in this period.[79] Moreover, this rhetoric indicates that state judges had internalized the Founding-era concern for the stability of property rights as a necessary element of economic prosperity.

A sampling of the rhetoric used by some courts supports these conclusions.[80] Courts variously described stare decisis as "essential to the repose of property,"[81] the "great landmark[] for the safety and regulation of real property,"[82] and a maxim "invaluable, as applied to the great principles affecting the right of property."[83] As stated by a New Hampshire judge, "[u]pon the faith of an established rule, and the acquiescence of judges and of the whole nation in it, property to the amount of millions may depend."[84] A Pennsylvania judge stated:

> This doctrine has been so constantly repeated by our Courts, and so generally acted upon by the people, that it has become a rule of property which cannot be changed without a manifest disregard of

78. James W. Ely, Jr., describes the doctrine of vested rights as a natural law view that property ownership was a fundamental right and, as such, was to be protected by courts from legislative interference. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 63 (2d ed. 1998). Ely also describes the emphasis on security of property in the formation of the U.S. Constitution. *Id.* at 42–58. He notes that James Madison's view was: "[L]aws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation"; and the Contracts Clause was the "bulwark in favor of personal security and private rights." *Id.* at 50 (quoting THE FEDERALIST NO. 44, at 250 (James Madison) (Clinton Rossiter ed., 1999)). As characterized by James Willard Hurst: "We identify no legal development more sharply with the nineteenth century than the judicial protection of 'vested rights.'" HURST, *supra* note 17, at 23.

79. *See* Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 669–70 (1998) (describing the standard theme of judicial protection of property rights in the nineteenth century as a "cyclical rise and fall" of the vested rights doctrine). Alexander suggests the existence of a "dialectic between two strands of pro-entrepreneurial discourse," pitting Federalist views represented by Chief Justice Marshall against "democratic entrepreneurs." *Id.* at 670–71.

80. *See* discussion *supra* Part II.B and accompanying notes.

81. Mickle v. Matlack, 17 N.J.L. 86, 101 (1839) (Ford, J.).

82. Bellows v. Parsons, 13 N.H. 256, 262 (1842).

83. Young v. Burton, 16 S.C. Eq. (McMul. Eq.) 255, 267 (1841).

84. Hall v. Chaffee, 14 N.H. 215, 237 (1843) (Parker, C.J.).

> the principle of *stare decisis*, producing in its result an alarming violation of the right of property, and a disastrous disturbance of the quiet of the community.[85]

The rhetoric associated with the invocation of stare decisis with respect to property rules is evident relatively early in this period. For example, in 1808 a Pennsylvania judge declared that "[u]nless the rule of *stare decisis* is adhered to in the administration of justice under a government of laws, all property must be rendered insecure."[86] The following year, the same court affirmed that "it is better for the public that the intention of one individual should be defeated, than a series of decisions on which the property of this country depends should be shaken."[87] A South Carolina court declared in 1810 that stare decisis was "of great importance to the security of property."[88] A Tennessee court linked unsettled property rules to "despotism,"[89] noting it was "too late to change the course of thinking" with respect to rules of first entry on public lands, because "[h]undreds of titles have been acquired without any person suspecting that modern notions were to be applied to them."[90] The alternative, Judge White maintained, would be to "prove that with extreme labor, after the lapse of thirty years, we have been enabled to construe our laws differently from all who practiced under them, and thereby defeat or unsettle most of our titles to land. This . . . will not promote the true interest of society."[91] Instead, as his colleague Judge Overton continued, "we will . . . leave society to fight their way through scenes of litigation in the establishment of new principles which must eventuate in great loss to individuals."[92]

Other rhetoric locates the work of courts within a larger commitment to the protection of vested property rights. In *Lion v. Burtiss*, for example, Chief Justice Spencer declared: "*Stare decisis* is a maxim essential to the security of property . . . ."[93] In the same year as

85. Hole v. Rittenhouse, 25 Pa. 491, 493 (1855).

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

87. French v. M'Ilhenny, 2 Binn. 13, 27 (Pa. 1809) (Brackenridge, J.) (quoting Doe v. Wright, 8 T.R. 64, 68, 101 Eng. Rep. 1268, 1270 (K.B. 1798) (Ashhurst, J.)).

88. Mason's Ex'rs v. Man's Ex'rs, 3 S.C. Eq. (3 Des. Eq.) 116, 122 (1810).

89. Smith v. Craig's Lessee, 2 Tenn. (2 Overt.) 287, 291 (Overton, J.).

90. *Id.* at 288 (White, J.).

91. *Id.* at 288–89 (White, J.).

92. *Id.* at 298 (Overton, J.).

93. Lion v. Burtiss, 20 Johns. 483, 487 (N.Y. Sup. Ct. 1823).

Lion, an attorney arguing before the same court referred to the maxim stare decisis as "the ark of our safety."[94] Senator Cramer, in response, wrote of the "particular evil" of departing from the maxim:

> [W]e have not, in my view of the subject, the power (and by *power* I mean *right*) now to question or impeach that judgment rendered by this Court, and founded on the uniform decisions of the Supreme Court during a period of more than *seventeen* years. Wills have been made, and estates settled, on the principles of those cases, which have been deemed and treated as a settled law of the land. They have been solemnly recognized by this Court, of the last resort, published to the world, held out to our citizens as the sure and established land marks by which they might, with perfect safety, regulate their conduct in acquiring or perfecting titles, or dispose of estates upon their dying beds, in such a manner that their honest intentions could not be defeated. It is now, however, sought to prevail on this Court, by reversing the judgment of the Supreme Court, to annul their own; and thus overturn, at one fell blow, the numerous decisions which have for many years concurred in the doctrines on which that judgment is founded. Can any good citizen, for a moment contemplate the consequences of such a measure without alarm? All the suitors, whose hopes may have been defeated by the decisions made upon these principles, will have the right to commence suits, and recover back the lands which have been awarded to their adversaries, without regard to the various intermediate alienations, or the value or extent of the improvements which may have been made by *bona fide* purchasers.[95]

Similarly, in 1836 New York's highest court declared: "[T]he maxim, *stare decisis* ought to govern on the present occasion. Litigation can never be repressed, *nor can the rights of property ever be secure*, if this court of the last resort departs from its own solemn adjudications."[96]

Although by far the majority of cases in which judges invoked stare decisis for the stability of property rights involved real estate transactions and devises, judges also emphasized the importance of stare decisis for contracts and commercial cases. In his *Commentaries*, Kent had specifically noted the "right" of the

94. Wilkes v. Lion, 2 Cow. 333, 381 (N.Y. 1823) (argument of counsel).

95. *Id.* at 394–95 (footnote omitted).

96. Hawley v. James, 16 Wend. 61, 166 (N.Y. 1836) (Bronson, J.) (second emphasis added).

community to regulate their contracts based upon prior court pronouncements.[97] This equation of contract reliance interests with certainty of land title further established a contract as a property right, underscoring the spread of Contracts Clause ideology to non-constitutional doctrines.[98] It also suggests the tendency of the vested rights concept in this period to include almost everything as a right of property.[99]

Judge Tucker of Virginia, in a dispute over assignment of a bond and the insolvency of one of the debtors, noted the "elevated ground" of property rules in order to argue that stare decisis imposed similar obligations with respect to contracts:

> The decisions of the courts on such questions, if they do not stand upon the elevated ground of being rules of property, are at least the law of contracts. Those who buy and those who sell, look for the obligations which are assumed by the assignor, to those decisions. Hence the principle *stare decisis*, is peculiarly applicable to cases of this description.[100]

A few years later, the Virginia court noted that lease terms must receive consistent interpretations by courts: "The principle *stare decisis* is in these matters not merely proper, but it is vital; since counsel advise, and conveyancers proceed, and parties contract, with reference to the declared construction of the language of an instrument."[101]

In 1823, the Supreme Court of Errors for Connecticut considered a case in which the efficacy of an endorsement of a promissory note was at issue.[102] In his dissenting opinion, Chief Justice Hosmer claimed that the majority had departed from prior law. He thought

97. KENT, *supra* note 7, at 649.

98. *See, e.g.*, Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 82 (1986) ("The protection that ordinary contracts received under the contract clause generally conformed to the protection that land received under the takings clause.").

99. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (extending the protections of the Contracts Clause to private corporations and to particular protected acts of incorporation involving private property from legislative interference).

100. Smith v. Triplett, 31 Va. (4 Leigh) 590, 599–600 (1833) (Tucker, P.).

101. Black v. Gilmore, 36 Va. (9 Leigh) 446, 448–49 (1838).

102. *See* Beckwith v. Angell, 6 Conn. 315 (1823).

the majority's willingness to consider future cases in a similar light worthy of mention:

> If the maxim *stare decisis* is any thing more than a name; if the people of this state have the privilege of certain rules of action, and are not the sport of perpetual vacillation and ruinous uncertainty; the law of *Connecticut* concerning indorsements of notes, as before expressed, is stable and unquestionable. There are many hundreds of such contracts, now, and at all times, existing among us,—the standing and almost universal mode of guaranty,—which will be evidence of obligations new and unthought of, if the present attempt at the bar to change the construction of such engagements, shall meet with success.[103]

In *Garner v. Stubblefield*, a concurring judge wrote separately on the doctrine of stare decisis to distinguish between "erroneous" decisions of recent vintage and decisions of longer usage, specifically those concerning "contracts":

> [I]f by its long usage and its having entered into the contracts of mankind it has become the law of property, it ought not to be disturbed. The court in such cases could say with great propriety, *stare decisis*. But if the decision was but recently made, and was not from its nature calculated to enter into the contracts of the country or to have regulated the transmission of property, should the decision be thought to have been wrong, it would in such case be the duty of the court to overrule it. The policy of not disturbing the settled law of property, and more especially real property, is the only argument in favor of permitting a wrong decision to stand that common sense can approve. And wherever such would be the consequence the rule of *stare decisis* should prevail.[104]

An 1821 opinion from Maryland, *Hammond v. Ridgely's Lessee*, emphasized that contracting parties relied upon settled interpretations of law: "Sound policy does indeed require, that principles laid down, and acted upon by courts of last resort, should not be lightly shaken, as it is to established principles, and not to isolated opinions, that parties look in making their contracts."[105]

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103. *Id.* at 324 (Hosmer, C.J.).

104. Garner v. Stubblefield, 5 Tex. 552, 563 (1851) (Libscomb, J., concurring).

105. Hammond v. Ridgely's Lessee, 5 H. & J. 245, 274 (Md. 1821) (Buchanan, J.).

In several cases in this period, the stare decisis property rule appears in only one judge's opinion[106] as an argument against the result reached by the other judges. In some instances, a judge suggested that his colleague's decision was in fact a departure from settled law, rather than the legitimate distinction claimed. A dissenting opinion in a South Carolina case suggested that adherence to settled law in property cases was on the level of constitutional obligation.[107] The majority in that case had noted that stare decisis required adherence to rules under which property has been transacted, but it believed the prior case at issue "ha[d] not settled any great rule of property under which rights have been acquired, which the reversal would defeat."[108] The dissenting judge vigorously urged otherwise.[109] In a Virginia case, responding to counsel's arguments, Judge Tucker wrote:

> The effort of the appellants' counsel, therefore, has rather been to keep the present case clear of the influence of those adjudications, than to attempt to call in question, what the interests of society so emphatically require to be regarded as no longer questionable. It must be admitted on all hands, that the principle *stare decisis*, is of peculiar importance in whatever relates to the title to property, and to real property in particular. Among other things, a continual fluctuation in the decisions of the courts on the construction of wills, is calculated to produce the most serious evils.[110]

The examination of the stare decisis property rule in the formative era is not intended to suggest that any great changes occurred in the rhetoric used by courts after the Civil War. If anything, the rhetoric became stronger in the post-Civil War period. The Iowa Supreme

106. Early case law in this country, as in England, often (though not always) contains an opinion by each judge who wanted to write in the case. As such, there was often no "opinion of the court," as there is today. This Section examines opinions that draw conclusions on separate rationales, which today we would term either "dissenting" or "concurring in the judgment."

107. Kottman v. Ayer, 32 S.C.L. (1 Strob.) 552, 582 (1847) (Richardson, J., dissenting).

108. *Id.* at 577 (majority opinion).

109. The judge argued:

> In [the former case], the wife regained her inheritance from the omission to record in six months; in the present case she loses it by the reversal of the former case. This inconsistency shocks the minds of men, and the Court is lessened in their respect and confidence, and loses the character of its high conservative usefulness.

Id. at 581 (Richardson, J., dissenting).

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

Court noted, for example, that "[o]scillating decisions of a court of last resort tend to disturb the tenure of property and the rights of the people, and weaken confidence in the courts."[111] In *Hays v. Cockrell*, the Alabama Supreme Court stated:

> [T]his court has decided that the doctrine of *Weems v. Bryan* is a law of property, and has twice distinctly announced that it would not overrule that case, but suffer it to stand as an exposition of the law, according to which the people might act, and shape their transactions without apprehension. Men must be presumed to have acted in reference to it, and in reference to the assurance of its stability; property has been received, and delivered, and transferred . . . by many persons . . . .[112]

The Supreme Court of Maryland also maintained that "[t]he rule '*stare decisis*,' is one of the most sacred in the law. . . . Authorities established are so many laws, and receding from them, unsettles property, etc."[113]

We cannot be certain, of course, that in the formative era state court judges actually accomplished what their rhetoric suggested—that they in fact promoted certainty in legal rules. The perception that stare decisis protected settled expectations about property may have been purely a fantasy. Critical legal historians are especially skeptical of claims that legal rules promoted capitalism by providing certainty, and one characteristic of critical legal scholarship is to show that "rules as implemented often did not have their intended effect."[114] This may be true for the stare decisis property rule if the underlying doctrines at issue were not so widely known that people acted upon them.

Nonetheless, the rhetoric accompanying invocation of the stare decisis property rule—that property rights were dependent upon stability of judicial rules—is surely significant, even if the effect cannot be precisely measured. Stare decisis in property cases was a powerful form of argument for attorneys, one that was difficult for

111. City of Dubuque v. Ill. Cent. R.R., 39 Iowa 56, 82 (1874).

112. Hays v. Cockrell, 41 Ala. 75, 90–91 (1867) (Walker, C.J.).

113. State v. Baltimore & Ohio R.R. Co., 48 Md. 49, 98 (1878). *See also* Taliafero v. Barnett, 1 S.W. 702, 703 (Ark. 1886); Comm'rs of Leavenworth County v. Miller, 7 Kan. 479, 540 (1871) ("These decisions have been published by legal authority, and have become rules of property, and precedents for future decisions.").

114. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 81–82 (1984).

courts to ignore given the wider political emphasis on vested rights. The stare decisis property rule is symbolic of a larger reification of property associated with the vested rights doctrine.[115]

III. PATTERNS OF JUDICIAL PRESERVATION OF PROPERTY RIGHTS IN THE FORMATIVE ERA

A. *The Judicial Takings Debate*

The modern debate about judicial takings, which can be related to the quest for an original understanding of stare decisis, asks whether state courts can effectively police their own boundaries with respect to the settled property expectations that legislatures are constitutionally bound to respect. The rhetoric used in the post-Founding period through the Civil War suggests that many state court judges believed that they could. These judges did not explicitly invoke due process or "just compensation" guarantees in their rhetoric, but the motivation to protect property transactions and expectations was surely informed by the political rhetoric associated with these constitutional provisions as well as by the Contracts Clause. Many state courts recognized the possibility that changes to common law rules could deprive citizens of property interests and sought to guard against such changes. The rhetoric of courts in the formative era makes clear that the stare decisis property rule had an ideological purpose.

The U.S. Supreme Court has not explicitly endorsed the view that a state court's abandonment or modification of common law property rules may constitute a taking or violate due process. In 1994, however, Justice Scalia, joined by Justice O'Connor, dissented from the denial of certiorari in *Stevens v. City of Cannon Beach* on the ground that the Oregon Supreme Court's recognition of the doctrine of custom may have effected an uncompensated taking.[116] More

115. The origin of the stare decisis property rule in the formative era seems to confirm the observation that "law" does not exist independently of ideological struggles in society. I mean to suggest that the stare decisis property rule reflects more widespread views of vested rights in property, rather than generating those views. Gordon, summarizing the debate over autonomy of law, has said: "It seems much more probable that the specific legal practices of a culture are simply dialects of a parent social speech and that studying the speech helps you understand the dialect and vice-versa." *Id.* at 90.

116. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari).

recently, in (of all cases) *Bush v. Gore*, Chief Justice Rehnquist implied in his concurring opinion that the Supreme Court would review state court determinations of "background principles" of common law in the same way that it reviews retroactive legislative interference with property rights.[117]

Justice Brandeis apparently would have disagreed with this view. Writing for the majority in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*,[118] Brandeis explained:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.[119]

By contrast, Justice Stewart, writing only for himself, would impose a "reasonable expectations" test for a judicial taking:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.[120]

In 1905, the Supreme Court in *Muhlker v. New York & Harlem Railroad* ruled in favor of a property right when the court invalidated

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117. Bush v. Gore, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring).

> Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

Id. Justices Scalia and Thomas joined Chief Justice Rehnquist's concurring opinion. *Id.* at 111.

118. 281 U.S. 673 (1929).

119. *Id.* at 681 n.8.

120. Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

a retroactive change in state common law.[121] The New York Court of Appeals initially had recognized, consistent with its own precedent, a right of landowners to be compensated when elevated railroads were constructed over their property. Later, the same court reversed its decision and held that no property interests of the owners were infringed by the presence of the elevated railroads.[122] Although the Supreme Court reversed the New York court's decision, the Court could not agree on a rationale. A plurality opinion by Justice McKenna, invoking the Contracts Clause, indicated that state courts could not abrogate a preexisting property right by changing precedent. To do so would "take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."[123] As James W. Ely, Jr., has concluded, "[T]he Fuller Court debated but failed to resolve the notion that judicial changes in existing law might constitute a taking of property."[124]

B. *Relevance of the Formative Period*

Barton H. Thompson, Jr., noted a series of Supreme Court decisions from 1853 through the 1870s in which the Court "actively applied the Contract Clause to proscribe state courts from nullifying contracts by changing relevant law after the contract was written."[125] These cases are the earliest point where the Supreme Court seemed willing to recognize the concept of a judicial taking by a state court. An example is *Gelpcke v. City of Dubuque*,[126] in which the Iowa Supreme Court, reversing a prior decision, held that the city had no authority under the Iowa Constitution to issue municipal bonds. The United States Supreme Court intervened through diversity

121. 197 U.S. 544, 570 (1905) (plurality opinion). *See* JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 109–10 (1995).

122. Muhlker v. New York & Harlem R.R., 66 N.E. 558, 560 (N.Y. 1902).

123. *Muhlker*, 197 U.S. at 570 (plurality opinion).

124. ELY, *supra* note 121, at 110.

125. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1462 (1990). As an example of this, Thompson cites *Ohio Life Insurance & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 432 (1853) (Tawney, C.J.), as the first of several cases to sound the common theme: if a "contract when made was valid by the laws of the State, . . . its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law." *Id.*

126. 68 U.S. (1 Wall.) 175 (1863).

jurisdiction[127] to protect the bondholders. In effect, the Court held that the Contracts Clause protected property expectation interests from retroactive judicial impairment.[128]

As previously demonstrated, one could conclude that state courts in the formative period of American law recognized the potential for retroactive disruption of property rights and sought to guard against it. Thompson, however, assumed it would be anachronistic to ask whether judges in the formative period appreciated this concept:

> Given the original, limited understanding of a taking, . . . no one in the late-eighteenth century would have considered a mere judicial abandonment of precedent to constitute a taking—even where the abandonment expanded public rights in land and other resources. They were simply different creatures. Moreover, a court that abandoned an "erroneous" precedent could not be faulted because, unlike today, there was a widely shared assumption that there were correct legal answers to all issues. Property law was no exception. Confronted by new and unique economic and geographic perils, most eighteenth century Americans believed that it was especially important to "correct" various common law precedents to meet those perils.[129]

Contrary to Thompson's view, I suggest that state courts did not search for "correct" legal answers, but rather endeavored to rationalize property law in a way that would not disturb what they viewed to be existing property rights. Further, even with the admittedly limited understanding of a taking (because it did not include the modern concept of a regulatory taking), state courts in the formative era did consider judicial abandonment of precedent potentially to be a retroactive impairment of property rights. I argue that many state judges in the formative era appreciated at least the potential for judicial takings, and the evidence comes from the early development of the doctrine of stare decisis and its application to prior court decisions that the judges believed had settled property expectations.

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127. For a discussion of the Supreme Court's use of diversity jurisdiction to accomplish these results, see generally Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000).

128. *Gelpcke*, 68 U.S. (1 Wall.) at 206.

129. Thompson, *supra* note 125, at 1459 (footnote omitted).

The predominant view in the formative era of American law—characterized by the themes of the Grand Style of joyous law making and instrumental purposes in property law in particular—not only influences the debate over the degree of respect for precedent in that era, but also contributes to the tendency to overlook the concern that drove the concept of a stare decisis property rule. In that era, state courts tended to preserve property rules that they believed were necessary to avoid disrupting a large number of transactions. When this larger potential effect was missing, however, judges were not necessarily concerned with the vested rights of the parties immediately before the court.

No court in this period appears to have challenged the basic proposition that stare decisis was an important principle for the stability of property rights, and courts invoking the stare decisis property rule were openly utilitarian about its purpose. Judge Tucker, for example, noted that fluctuation in law produces bad results for "what the interests of society so emphatically require to be regarded as no longer questionable."[130] A dissenting judge in a Connecticut court was concerned that property transactions not be "the sport of perpetual vacillation and ruinous uncertainty"[131] by rejecting stare decisis. Another judge suggested that abandoning "landmarks" of the law would "greatly interfere with the enjoyment of property, and open the door to fraud and litigation."[132] They meant, in their rhetoric at least, that instability of the common law potentially unsettled security of land title and frustrated the intentions of devisors.[133]

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130. Callava v. Pope, 30 Va. (3 Leigh) 103, 106 (1831) (Tucker, P.).

131. Beckwith v. Angell, 6 Conn. 315, 324 (1823) (Hosmer, C.J., dissenting).

132. Paige v. Cagwin, 7 Hill. 361, 381 (N.Y. 1843) (Lott, Sen.).

133. *See, e.g.*, Elwell v. Shaw, 16 Mass. (15 Tyng) 42, 47 (1819). The court reasoned:

> The current of authorities being thus strong, we must remember that *stare decisis* is a rule of no inconsiderable importance, if we wish to preserve the stability of judicial decisions, and to relieve the law, as much as possible, from the reproach of uncertainty, which has so often been urged against it.
>
> It is important that the forms respecting the transfer of real estate should be strictly observed; otherwise great looseness may be introduced, and titles may thus become involved in great uncertainty.

Id. *See also, e.g.*, Boon v. Bowers, 30 Miss. 246, 256 (1855) ("All questions which have an important bearing upon titles to property, and which have, as in this instance, been once carefully considered, and solemnly settled by this court, ought not to be treated as open for further investigation . . . .").

C. *Application of Stare Decisis to Reliance Interests: Three Categories*

In a number of instances, state courts cited the stare decisis property rule but explained why that principle was not applicable to the case at hand. On the basis of these cases, one can generalize about the specific circumstances in which courts citing the stare decisis property rule would nonetheless entertain arguments that a precedent should be overruled. First, if the precedent in question was a recent case, judges noted that there would be less disruption to settled expectations if it were to be changed. Second, courts would also depart from stare decisis if the change in the law was needed to reflect more closely actual practices with respect to property transactions. Third, and most important, courts would overrule prior precedent only if they believed an insignificant number of persons would be affected by the change. Examples from each category below provide further elaboration of these concepts.

1. *Less Disruption to Expectations if Precedent Were Recent*

Judges expressed a greater willingness to overrule or to decline to follow a particular property rule if it was relatively recent and conflicted with the weight of authority. For example, in *Taylor's Administrator v. Spindle*, the court was satisfied that a recent decision had not been accepted in practice and thus determined that stare decisis was not applicable.[134] Counsel often proposed (and courts accepted) that a particular precedent was not subject to the stare decisis property rule because it was inconsistent with a line of cases, and little reliance interest was likely to have occurred.[135] The quest to

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134. *See* Taylor's Adm'r v. Spindle, 43 Va. (2 Gratt.) 44, 69 (1845). The court stated:

> These views satisfy me, that the decision has not been accepted in practice and acknowledged in the frequent application of it as settling definitively a rule of law or property . . . . I therefore feel at liberty to act on my clear convictions of the law, as it was when Eppes v. Randolph was decided; and if the case in judgment required it, I should be governed by those convictions, notwithstanding the case of Eppes v. Randolph.

Id.

135. *See, e.g.*, Breedlove v. Fletcher, 7 Mart. (o.s.) 524, 527 (La. 1820). The court reasoned that:

> Such a decision as this, made without plea, without argument at the bar, and in a case of such small moment, the value only of a few hundred dollars, scarcely worthy

determine reliance interest is a relatively uniform feature in judicial opinions.[136] The more recent aberrational precedent could be excused by the "crowd of business which presses upon this court," but courts must correct "isolated blunders" because "they may invade the inviolability of contracts."[137] But if "by long usage" a precedent had been accepted in legal practice, then "it ought not to be disturbed."[138]

2. *Change in Law Needed to Reflect Reliance Interests or Community Practice*

Often the more recent case was considered "erroneous" not as an abstract question of the "right answer" under some declaratory theory of law, but in the sense that it did not adequately reflect the law in practice. As expressed by the court in *Kottman v. Ayer*:

> The effect of this [decision] is a reversal of the case of Hillegas *v.* Hartley. I feel the full force of all that has been said on the rule of "*stare decisis*," but the case of Hillegas *v.* Hartley has not settled any great rule of property under which rights have been acquired, which the reversal would defeat. Its only effect will be in a few instances to restore rights honestly, in most cases, acquired, but which would have been defeated by accident or by ignorance that the law required

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> the notice of any one, surely can never be considered as settling the law, on the maxim of *stare decisis*.
>
> Cases which pass without argument and debate are never considered as affording a precedent, nor is a single case deemed of much more effect. One case does not establish the law on the principle of *stare decisis*.

Id. (citation omitted).

136. *See, e.g.*, Sparrow v. Kingman, 1 N.Y. 242, 255 (1848) (Wright, J.). The judge reasoned that:

> Where property has been acquired, or rights matured, and exist, under an erroneous decision of the Courts, insomuch that irreparable mischief and injury must necessarily result from its overthrow, the maxim of *stare decisis* should prevail. But this is not one of those errors, from the correction of which injurious consequences may follow.

Id. *See also* Girard v. Taggart, 5 Serg. & Rawle 19, 35 (Pa. 1818) (Duncan, J.). The official reporter here notes that Justice Duncan's opinion has been "mislaid." *Id.* However, it appears to be available on Westlaw. *See* 1818 WL 2207, at *9 (Pa. 1818) (Duncan, J.) ("[The prior case] has not established any practice under it; nor will a contrary decision unsettle any rule of property or shake any right acquired on its authority.").

137. Schriver v. Meyer, 19 Pa. 87, 92–93 (1852).

138. Garner v. Stubblefield, 5 Tex. 552, 563 (1851) (Lipscomb, J., concurring).

> such deeds to be recorded within six months. It defeats no right; it only avoids a forfeiture.[139]

On occasion, judges also expressed more specific ideas about when precedent ought to be abandoned in favor of improved utility.[140] The issue most frequently arose with respect to the expediency of following English precedent, as judges seemed to look to American customs in order to decline to follow an English rule.[141] In other instances, courts employed the technique of distinguishing a case to avoid extending a principle that, "if pressed to an extreme, would be introductory of very great mischiefs."[142] But it was more common for

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139. 32 S.C.L. (1 Strob.) 552, 577 (1847).

140. *See, e.g.*, Brown v. Phoenix Ins. Co., 4 Binn. 445, 478 (Pa. 1812). Judge Brackenridge stated:

> I do not consider myself bound by the case of Watson and Paul; not merely on account of this impracticability, or my not acquiescing in it, but because it involved a consequence which the judges who decided it did not contemplate, the blowing up the whole doctrine of abandonment. It was in fact an oversight as I thought at the time, and error is not to be sanctioned because it has once got a footing. . . . *English* judges themselves are not so tenacious of their own rules, as not to change them, when experience has shown their inexpedience . . . .

Id. (emphasis added).

141. For example, Judge Nott of South Carolina stated:

> I, therefore, repeat again that finding these decisions no longer governed by principles which formerly prevailed, and that the reasons on which their former decisions were founded, no longer exist, they will not only review those decisions, but will reverse them, if other good reasons cannot be found for their support.

Bailey v. South Carolina Ins. Co., 6 S.C.L. (1 Tread.) 381, 399 (1813) (Nott, J.). A dissertation published by Vermont Chief Justice Nathaniel Chipman in 1793 discussed Vermont's statute that adopted case and statutory law; it urged that Vermont courts reject those English precedents that conflicted with the "principles and reasons, which arise out of the present state," unless they had already been "adopted in practice" and thus had become rules of property. NATHANIEL CHIPMAN, *A Dissertation on the Act Adopting the Common and Statute Laws of England, in* REPORTS AND DISSERTATIONS, IN TWO PARTS, pt. 2, 117, 128–29 (Rutland, Vt., Haswell 1793), *quoted in* Nelson, *supra* note 28, at 28–30.

142. *See* Mason's Ex'rs v. Man's Ex'rs, 3 S.C. Eq. (3 Des. Eq.) 116, 122 (1810).

> But it has been contended that two decisions in this country have settled this point, and that stare decisis is a maxim of judicial wisdom, of great importance to the security of property and the sound administration of justice; and that this maxim should have peculiar obligation on a judge sitting singly.
>
> I am very sensible of the value of that maxim, and I hope it will ever so influence my conduct as to prevent my rashly disturbing settled doctrines. I shall therefore be unwilling, sitting alone, to shake the authority of those cases, where they have a direct and clear application. But I confess that I do not feel inclined to extend the principle,

judges to state that they must maintain "incorrect" rules or wrongly decided cases even when a change in the rule would be better. For example, a Connecticut court stated: "*Stare decisis*, is a sound judicial maxim, especially in settlement cases, where the stability of a rule is of more importance than its technical correctness."[143] Even a bad rule must be maintained if changing the rule would result in greater disruption to property expectations.

3. *Effect on a Large Number of Property Transactions*

At least in opinions in which stare decisis is explicitly discussed, judges consistently stated that property rules should not be changed if the effect would be to unsettle the expectations of a relatively large number of property owners. Courts tended to avoid departing from precedent that "must eventuate in great loss to individuals."[144] In *Payne v. St. Louis County*, for example, the court was unwilling to revisit a prior judicial opinion "on the faith of which an immense property had been advanced."[145] According to this court:

> It is of little importance to the public . . . whether a tract of land belongs to A. or B. In deciding their titles, strict rules of construction may be adhered to, though sometimes at the expense of justice, because certainty of title is thereby produced, and individual inconvenience is richly compensated by general good; but when multitudes are affected by the construction of an instrument, great regard should be paid to the *spirit and intention*.[146]

Counsel pressed these arguments as well. In *Wilkes v. Lion*, an attorney suggested that "[p]erhaps hundreds of wills may have been drawn in reference to that very decision."[147] Allowing that decision to

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> contained in the cases referred to, which, if pressed to an extreme, would be introductory of very great mischiefs.

Id.

143. Middleton v. Lyme, 5 Conn. 95, 98 (1823).

144. Smith v. Craig's Lessee, 2 Tenn. (2 Overt.) 287, 298 (1814) (Overton, J.).

145. Payne v. St. Louis County, 8 Mo. 473, 476 (1844) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819)).

146. *Id.* at 477 (quoting Farmers' and Mechanics' Bank v. Smith, 3 Serg. & Rawle 63, 69–70 (Pa. 1817)).

147. Wilkes v. Lion, 2 Cow. 333, 340 (N.Y. 1823) (argument of counsel).

be questioned, he argued, would "impair that confidence in your stability which should be jealously maintained."[148]

If, on the other hand, the change in rule was not perceived to have much effect in the larger community, courts were willing to change it. In *Kirk v. Dean*, Justice Brackenridge did not consider the court to be departing from the maxim of stare decisis because "the consideration which is expressed by the Court, the 'unsettling estates,' does not weigh so much in the case of dower, which is but a life estate."[149] Courts also on occasion relaxed technical formalities in acquisition of property titles, particularly when the deficiency was the fault of a government agency, to avoid court rulings that would affect large numbers of property transactions.[150] In addition, courts were less concerned with the stare decisis property rule in questions of remedy and procedure.[151]

To summarize, courts were willing to change property rules if they were first satisfied that the change would improve the law,

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148. *Id.* (argument of counsel). *See also* Bellows v. Parsons, 13 N.H. 256 (1842). There, counsel for the defendant argued in favor of stare decisis because "the title to a vast amount of real estate is dependent on this question." *Id.* at 258 (argument of counsel). Plaintiff's counsel, on the other hand, claimed that the prior cases were so clearly erroneous "that they ought not to be regarded as precedents binding upon this court." *Id.* (argument of counsel). The court refused to overrule the prior cases because, in the nine years since the previous decision, "numerous conveyances have been made of lands, based on title now proposed to be set aside; and at this late hour, on account of some changes in the members constituting the court." *Id.* at 261.

149. Kirk v. Dean, 2 Binn. 341, 357 (Pa. 1810).

150. *See, e.g.*, Lynch v. Baxter, 4 Tex. 431, 444 (1849) ("If irregularities in the Alcalde's Courts, in the Probate Courts of the Republic, and under the State organization could nullify the decrees and judgments, property would be unsettled to an extent far more distressing than can grow out of land titles emanating from different sovereignties."). In *Wyman v. Campbell*, 6 Port. 219 (Ala. 1838), the court reasoned:

> The very great respect we entertain for the learning of the Judges who concurred in the opinions, in that case, and the propriety of upholding the doctrine of *stare decisis*, have induced us to give to this case a more careful and elaborate examination. Principles, the opposite of those we have stated, would be productive of the severest and most extensive injury. It is impossible to conjecture the vast amount of property holden under sales, made by an order of an Orphans' court . . . . Let the rule be established and continued [which requires many particular procedures heretofore largely ignored] and a large majority of the titles acquired through such a channel, would be overturned.

Id. at 246–47.

151. *See, e.g.*, Young v. Burton, 16 S.C. Eq. (McMul. Eq.) 255, 267 (1841) ("The maxim, *stare decisis*, is invaluable, as applied to the great principles affecting the right of property. But this question affects the remedy; the mode of relief, only; and that ought, and must be made, to meet the exigencies of the case.").

usually in the sense that it would better reflect community practice, and if they were also satisfied that the change would not greatly disturb settled property expectations. If a change in a common law property rule would disrupt settled expectations, these courts stated a strong preference for the legislature to be the agent of change.[152] This preference for legislative change indicates a great awareness of the difference between the retroactive nature of judicial decision making and the prospective nature of legislation, a critical distinction for the reliance interests these courts identified.[153]

Several issues merit further exploration. One concern is that judges may not have acknowledged that the result of a decision was, in fact, a change from prior law. A related problem is identifying all

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152. *See, e.g.*, McDowell v. Oyer, 21 Pa. 417 (1853). Although the court considered a prior line of cases to have been wrongly decided, the court described the "principle of great magnitude and importance" of stare decisis:

> It is this law which we are bound to execute, and not any "higher law," manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary.

Id. at 423.

153. *See* Bells v. Gillespie, 26 Va. (5 Rand.) 273 (1827). In that case, Judge Carr explained:

> This law is entirely prospective. The Legislature have justly thought, that to give it an *ex post facto* effect, would be wrong. Shall the Courts then give it such operation? So far from this law furnishing a fair opportunity to overturn the settled course of decisions, I think it shews us the propriety of a different line of conduct, of leaving this subject exactly where the law has left it. The great advantage which a change of the law by the Legislature, has over a change by the Courts, (even if this could properly be done) is, that the one is a public rule, binding all alike, and looking to the future only. The other is a rule, which, as the Court makes, it may break; and which affects past, as well as future cases. For the last century or two, dying without heirs, issue, &c. has been settled to mean a general failure, not tied up to the death of the first taker. If we say now, that these decisions are all wrong, will not our successors have more right to reverse our decision, than we have to reverse one with the frost of centuries upon it? But our decision will be retrospective; for, as we do not assume the power of *making*, but only *declaring*, the law, if we say that these decisions are wrong, all the estates which have been settled, all the contracts which have been made, all the titles which rest on the foundation of their correctness, are uprooted. Nor can we see the extent of the mischief. A few cases only have come before us, for some years back; because, the law being settled, counsel would generally advise against it. But, only open the door; proclaim to the world that all which has heretofore been done is wrong; and then we shall see the wild uproar and confusion among titles, which will follow. Is it not better to prevent this, by holding on in the course we have so long run? The cases which arose prior to the law of 1819, must cease after a time; and then that law settles the matter.

Id. at 285 (Carr, J.).

of the cases in which the specific motivation to protect settled property expectations was a factor. Many judges simply applied the law as they best understood it from prior cases, without discussing stare decisis. Further, not all courts specifically cited property reliance interests when they invoked the maxim of stare decisis, suggesting that some courts may have used the term in a general sense rather than for the more specific purpose of protecting expectation interests.[154]

These questions are important because we know that courts changed property law in this period and that legislatures effected even greater changes.[155] I do not suggest that on the basis of the cases examined here one could conclude that the property rules that were changed by courts *always* followed the general precepts that I have identified. However, if changes in common law property rules in the formative era usually occurred only in instances in which few settled expectations were disrupted, then the rhetoric of the stare decisis property rule probably did have both a standard meaning and a constraining effect in this period.

Moreover, the U.S. Supreme Court did not intervene in state court determinations of common law property rules until the close of the formative era, when (as noted previously) from the 1850s through the 1870s the Supreme Court overrode several state court rulings on the ground that changes to precedent by those courts violated property interests protected by the Contracts Clause. There are a number of possible explanations for the Supreme Court's apparent lack of concern before the 1850s. The Court may have been preoccupied with more pressing issues of legislative impairment of contracts, or it may have accomplished some oversight of state courts through the *Swift v. Tyson*[156] approach (at least for those who could escape state court

154. There are numerous examples one could cite in which courts may generally follow stare decisis without explicitly mentioning the importance of the principle or any specific reason it ought to be applied. *See, e.g.*, Mason v. Caldwell, 10 Ill. (5 Gilm.) 196, 205 (1848) ("This precise question has been fully settled by a number of decisions in other States."); Boggs v. Teackle, 5 Binn. 332, 340 (Pa. 1812) (Brackenridge, J.) ("I concur in allowing the motion, solely on the ground of the *stare decisis*.").

155. *See generally* HORWITZ, *supra* note 18, at 31–62; GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 72–240 (1997).

156. 41 U.S. (16 Pet.) 1 (1842) (limiting the precedential value of state court decisions in federal cases to subjects with a permanent local quality, such as land, and excluding contract decisions).

jurisdiction).[157] One might also conclude that the Court had less reason for concern until the specific issue of repudiation of municipal bonds arose. The Marshall Court did not develop a commitment to constitutional preservation of the common law, even though both state judiciaries and legislatures might frustrate the Framers' manifest "determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[158] The Supreme Court's lack of intervention prior to the 1850s may reflect a relative satisfaction that changes in common law property rules by state courts generally did not violate previously vested rights of property.

CONCLUSION

The modern debate over the binding nature of precedent echoes issues that have been part of the arguments made in American courts for over 200 years. Stare decisis developed in the formative period of American law and was a useful guide to avoid making decisions that would have the effect of changing common law rules in ways that property owners would find objectionable. As a historical matter, the stare decisis property rule provides a link between state court methods and values deriving from the Founding period. State court judges developed a system that reflected the prevailing values of the predominant political discourse of vested rights. Political ideology played some role in shaping legal rules, and I suggest that, in at least some areas of property law, the ideology was decidedly conservative. This ideology mediated between existing precedent and judges' desires to create a uniquely American law.

For a number of reasons it is difficult to use the formative era to press normative claims about either the contemporary judicial takings issue or the role of precedent for a modern court. State judges in that period do not discuss the stare decisis property rule as a taking or as a compensation issue, but rather as a limitation on judicial power. More importantly, the stare decisis property rule did not apply to use restrictions according to our relatively recent understanding of a regulatory taking. On the other hand, it is not helpful to dismiss the

157. *See* Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 822 (2002); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 601–03 (2001).

158. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

formative era on the ground that judges in that era embraced a declaratory theory of law[159] or that "there was a widely shared assumption that there were correct legal answers to all issues."[160] The cases described in this Article, at least, seem to contradict that notion.

To be sure, judicial statements about adherence to precedent in the formative period occur primarily in cases potentially affecting title to property, not the use to which the property might be put. Changes in property use doctrines that did not affect one's physical possession of land or a contract right—for example, nuisance, water allocation, and ancient lights—did not seem to be of as much concern to judges in the formative era. Such views are consistent with Takings Clause jurisprudence in the nineteenth century with respect to legislative action. Laws that restricted the use of one's property—but did not constitute a physical invasion or forced taking of title—were not considered by judges to violate takings clauses contained in the federal or state constitutions and thus did not require compensation.

For the modern question of judicial takings, perhaps the experience of the formative era merely suggests the obvious—that the efficacy of the stare decisis property rule depends upon a widely shared commitment by judges to the protection of reliance interests. State court judges for most of the formative era seem to have shared this commitment, at least in principle, well before similar opportunities were presented to the federal courts. Although the rhetoric associated with the stare decisis property rule no doubt served a legitimating function—though it probably was ignored when, for instrumental reasons, courts wanted to change the rules—the concept is invoked frequently enough that one can draw more general conclusions about judicial attitudes toward the stability of property rights in the formative era. Judges viewed abrupt changes in precedent to be undesirable when settled property expectations would be disturbed.

At another level, use of the rhetoric of stare decisis by antebellum jurists in questions relating to property rules did not reflect a concern that private property might be taken for public benefit without compensation, but instead expressed a longstanding aversion to the taking of property from A to give to B—a power courts expressly

159. *See, e.g.*, Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves* Antiquas Vias *with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 260–64 (2002) (making that very dismissal); Healy, *supra* note 6, at 90.

160. Thompson, *supra* note 125, at 1459.

denied to the legislature in this period. In this sense, it is correct to state that these state court judges would not have recognized a general prohibition against judicial takings as the issue is argued today. Many judges, however, believed it was important to honor the "reasonable expectations" of property owners and those engaged in commercial transactions based upon their general understanding of common law rules, or at least the settled understanding as those judges could discern it. The sentiments expressed by these judges are consistent with Justice Stewart's "reasonable expectations" test for a judicial taking.[161]

State court judges in the formative period claimed to abhor sudden changes in common law rules that disrupted certain property reliance interests. Stare decisis is similarly invoked by modern courts in cases implicating expectation interests,[162] but noticeably missing is the rhetoric of stare decisis as essential to the "great right" of property, the avoidance of "despotism," the "ark of our safety," a "shield against the introduction of great evil," and so on. Such rhetoric was a fairly common feature of antebellum judicial opinions.

The historical conclusion, however, is mixed. Judges clearly showed an appreciation of the potential effect of their decisions on property reliance interests. They were also utilitarian in such a way that their focus was not necessarily upon the vested rights of parties before the court but upon the potential for disrupting a larger number of transactions—a pragmatic concern for economic stability in addition to the reliance interest of a particular individual. Crediting judicial rhetoric alone, the formative era of American law is ironically also one of the eras of strongest protection against judicial takings, despite its reputation for joyous law making by judges. These conclusions suggest the need for further refinement of the standard historical interpretations of the formative era to consider in what circumstances courts viewed their role as a counterforce to democratic excesses, or as agents of change.[163]

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161. *See* Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

162. *See, e.g.*, Hughes v. State, 410 P.2d 20, 28 (Wash. 1966) ("Our conclusion is not startling. It is simply a reaffirmance of a rule of property . . . relied upon over the years in a myriad of land transactions between individuals and between the state and individuals.").

163. *Cf.* Alan Watson, *The Transformation of American Property Law: A Comparative Law Approach*, 24 GA. L. REV. 163, 164 (1990) ("[I]n the absence of comprehensive, satisfactory legislation, subordinate lawmakers such as judges and jurists may well hold differing analyses of the law over a long period of time. It is not always true that one successful approach replaces another. The older approach may also continue.").

This historical understanding of the role of precedent, which I suggest is equivalent to a ban against judicial takings, does not translate easily into a universal rule to govern the degree of respect for precedent in contemporary constitutional decision making. The lack of a specific original intent, however, does not negate lesser conclusions that one can draw about original understandings of the role of precedent in deciding controversies of the day. That answer, as I suggest here, comes from common law adjudication. We should not reject the possibility of instructive insights merely because important concepts about the rule of law developed from within the common law. This history is instructive for both sides of the question posed by originalists, whether or not one is a fellow traveler with originalist approaches to constitutional interpretation. Judges in the Founding period and subsequent generations did not regard themselves as wholly free to behave as political actors.

My contribution to the historical debate about the origins of precedent and stare decisis in the United States is modest. I do not suggest that we yet have any definitive word, if we will ever have it, on the question of the constitutional role of precedent in the minds of the Framers of the federal Constitution. Instead, I argue that conclusions about the Founding era and the years following are seriously incomplete without studying the practices of state courts with respect to economic expectation interests. This commitment spread beyond property rules to include institutions, community interests, and even limitations of legislative power, evident in the federal courts as early as *Fletcher v. Peck*.[164] With this recognition of a relatively firm commitment to stare decisis in some classes of cases, normative conclusions for modern constitutional law are even less clear. An originalist would seem compelled to honor this earlier commitment to protection of property and reliance interests, as though it were in some degree one of constitutional command.

164. 10 U.S. (6 Cranch) 87 (1810).