ARTICLES

CONSTRAINED BY PRECEDENT

LARRY ALEXANDER

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LARRY ALEXANDER**

I. INTRODUCTION

The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems. Indeed, there is probably no experience more emblematic of legal education in America than the first year (and frequently upper division) emphasis on the case method: the task of training students to discern the "holdings" of cases and to determine whether those precedent cases have been followed, appropriately distinguished, or overruled in subsequent cases.

Despite the centrality of the practice of following precedent to common-law legal systems and its adjunct, the case method of instruction, I think it is fair to say that our theoretical understanding of the practice is still at a very primitive stage. Although what it means to follow precedent has been debated for hundreds of years by some of the top minds in legal theory,[1] and still receives regular attention in contemporary literature,[2] if one were to ask law students, lawyers, judges, or legal academics what following precedent entails, one would almost surely get a variety of inconsistent answers.

** Professor of Law, University of San Diego. B.A., 1965, Williams Coll.; LL.B., 1968, Yale University. I received helpful comments, some of them extensive enough to count as articles, from a large number of people: Elaine Alexander, Ron Allen, Carl Auerbach, Randy Barnett, Myke Bayles, Kevin Cole, Tony D'Amato, John Garvey, Paul Horton, Heidi Hurd, Bob Klonoff, Gary Lawson, Evan Lee, Bill Marshall, Michael Moore, Michael Perry, Joseph Raz, Martin Redish, Carol Rose, Henry Schwarzschild, Steven Schwarzschild, Fred Schauer, Rod Smith, Tim Terrell, Richard Warner, Chris Wonnell, and members of the faculty at Northwestern University School of Law who attended a forum at which I presented a version of this Article. Those who believed I was on the right track gave me confidence in my thesis. Those who thought my views on precedent entirely wrongheaded helped me to see which of my arguments needed strengthening or clarification. Thanks to all of you.

1. *See, e.g.*, 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 290-378 (1861); 1 W. BLACKSTONE, COMMENTARIES *70-71; B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); O.W. HOLMES, THE COMMON LAW (1881); K. LLEWELLYN, THE COMMON LAW TRADITION 62-212 (1960).

2. *See, e.g.*, PRECEDENT IN LAW (L. Goldstein ed. 1987); Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367 (1988); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215 (1987); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

In this Article I hope to advance the theoretical understanding of precedent following through an elucidation of three different models of the practice. More particularly, I intend to explore the distinctive contribution each model makes to the understanding of why a decision by a prior court might constrain a subsequent court of lesser or equal authority to reach a decision different from the one the latter court would have reached in the absence of the precedent case. In other words, I shall focus on those situations, however frequent or rare, in which a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect. In short, *I shall be dealing with constraint by incorrectly decided precedents.*

A few comments on my choice of focus are in order. First, when I speak of precedents that are "incorrect" in the eyes of the subsequent court, I am referring to cases of first impression, cases that were directly governed by principles of political morality (or policies derived therefrom) and in which those principles (or policies) were misapplied (in the view of the subsequent court). I reserve to Appendix B my discussion of precedential constraint by cases that are "incorrect" because of the different problem of the precedent courts misapplying applicable precedents.

Second, I shall not deal directly with a court's use of precedent cases that it believes were *correctly* decided. Frequently courts use precedents as authoritative support for decisions they would deem correct (on the basis of political/moral principles) in the absence of those precedents. The principal reason that I shall not address explicitly this use of precedents is that the power of precedents to *support* decisions a court believes are otherwise justifiable depends upon the power of precedents to *constrain* a court from reaching decisions it believes are justifiable. Thus, *until we understand how and to what extent precedents can constrain a subsequent decision, we cannot understand how and to what extent they can support one.* In addition, I shall not deal with the use of precedents to support decisions because the principles governing such use are easily deducible from the discussion of precedential constraint.

Third, I shall not deal directly with the overruling of incorrect precedents. What I say, however, will be relevant to an understanding of what overruling is and whether and how it can be justified.

Finally, I shall assume throughout this Article a pure common-law decisionmaking context and reserve to Appendix A the discussion of precedent following where the meaning of statutes or constitutional provisions is at issue.

The three models of precedent following that I shall describe are, I believe, exhaustive of the possibilities. The first, the *natural model*, does not admit of any variation. The second, the *rule model*, has quite a few possible variations depending upon how the rules are identified. Each of these variations, however, have sufficient features and problems in common to allow them to be dealt with as one model. The third, the *result model*, has both a pure and an impure version, each of which shall be discussed separately. As far as I can determine, both from reading the literature and from thinking about other possibilities that might be plausible, there are no other models of precedent following worthy of consideration.

In the final analysis, I conclude that the natural model of precedent, however normatively attractive, is not really a model of precedential constraint at all. I also conclude that the result model, in both its forms, is quite unattractive and perhaps ultimately incoherent. That leaves the rule model, with all of its variations and problems, as the only reasonable alternative. But that is to get ahead of myself.

II. THE FIRST MODEL: GIVING PRECEDENT ITS NATURAL WEIGHT

A. THE NATURAL MODEL OF PRECEDENT DESCRIBED

The first model of precedent following is what I call the natural model. Under this model the court in deciding a case gives prior judicial decisions the weight that those decisions carry independently of any formal requirement that precedent be followed. In other words, the constrained court looks to the "precedential" effects of the prior decision and assigns them a moral weight, which it then factors into its overall decisionmaking calculus.

To understand the natural model better, let us look at an instance of nonlegal decisionmaking where the model clearly does operate. Suppose that when my daughter reaches the age of thirteen, she requests permission from me to attend a rock concert. I weigh the possible risks involved in her going and the potential benefits to her and to our relationship, and I decide to grant her permission to go. When my son reaches the age of thirteen and also seeks permission to attend a rock

concert, he predictably will cite my previous decision granting permission to his sister as a reason for a decision in his favor, a reason in addition to the risks and benefits I would normally consider. The natural model of precedent requires that I give the previous decision its true weight as an independent reason.

The natural model would have the same features in the legal system. In the precedent case, which I am assuming is not governed by any statute or constitutional provision that speaks to its substantive merits, and which I shall also assume is not itself governed by an applicable precedent case, the court—which I shall hereafter call the "precedent court"—will assess the reasons why the dispute should be resolved in one party's favor or the other's. Those reasons might primarily be the parties' relative moral desert or some other deontological consideration—a sort of "What if these parties were alone on a desert island?" inquiry. Alternatively, those reasons might primarily be the social consequences of the alternative decisions.[3] Although it is interesting to reflect upon how a court should resolve a dispute in the absence of controlling statutory rules or precedent, we do not need to assume anything beyond the fact that the precedent court does in fact resolve the dispute based on reasons—deontological, consequentialist, or some mixture—that it believes correct political/moral theory approves.

The important point here is that once the precedent court decides the case, the existence of that decision can be invoked as an independent reason for subsequent courts to decide "similar" disputes in the same way. This is true even in the absence of a formal practice of precedent following. Similarly, my decision to allow my daughter to attend a rock concert at age thirteen can (and will) be invoked by my son as a reason for permitting him to attend a rock concert at the same age. The earlier decision is invoked as a reason for a similar decision, a reason that did

3. Of course, the distinction between justice in the case and the long-range consequences of a decision may be quite subtle and slippery, given that the location of the line between what norms are morally ideal and what norms are concessions to real world limitations is quite controversial. *See* Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 317-30 (1985); Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123, 123-30 (1987); *see also* Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913, 984-85 (1989) (discussing the role of forward-looking considerations in common-law adjudication); Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1209-12 (1989) (discussing Perry's use of forward-looking precedents); *infra* text accompanying notes 13-17 (discussing the value of general rules). Nonetheless, let us assume the distinction can be drawn. If the precedent court determines cases based on the long-run social consequences of its decisions, then it primarily will be interested in how others will modify their behavior in reaction to that decision. Moreover, even without a formal practice of precedent following, people can and will draw inferences from decisions in earlier cases about how future cases will be decided.

not exist in the precedent case and that is to be added to the other reasons for such a decision. More precisely, the precedent decision gives rise to reasons for a similar decision, such as equality and reliance, that did not exist in the precedent case.

Moreover, even if the subsequent court—which I shall hereafter call the "constrained court"—believes the precedent case was decided incorrectly because the balance of reasons favored the losing party, the constrained court might believe that the new reasons generated by the precedent decision tip the balance in favor of the party who would have lost had the constrained court decided the precedent case. Similarly, I might decide that although I should not have let my daughter attend the rock concert, and should not let my son attend were this my first decision on the point, the decision in my daughter's case now tips the balance of reasons in favor of permitting my son to go.

B. The Rationale Behind the Natural Model of Precedent

I suspect that we all recognize the natural model, if not in the legal system, at least in other areas of our lives. But how can a past decision that we now believe was incorrect convert a present decision that would otherwise be incorrect into a correct decision? The arguments on behalf of following incorrect decisions on the natural model of precedent boil down to two reasons: furthering equality of treatment and respecting justified expectations on which people have relied.

It is easy to see why one might argue that equality supports the constrained court's decision that, but for the precedent court's decision, would be incorrect. If I tell my son that I will not permit him to attend the rock concert and that I should not have permitted his sister to go, he predictably will claim that I have not treated him equally with respect to her. By saying so, he will be making more than the obvious descriptive point that my treatment of his sister and him with respect to attending rock concerts at age thirteen is dissimilar. Rather, he will be making the normative claim that such dissimilarity in treatment is wrong in the absence of countervailing considerations of substantial moral weight. In other words, he will be asserting that the value of equality is a sufficiently weighty reason in support of letting him go to the concert that it tips the balance of reasons in his favor.

The role of the justified reliance argument in support of a decision in favor of the present analog to the party who won in the precedent case is also fairly easy to understand. Even if there is no formal requirement

that courts follow precedent, people frequently will look to judicial decisions and the expressed reasons on which they are based in order to predict how their contemplated courses of action will be treated by the courts should a legal dispute arise.[4] Similarly, my son may undertake action based upon his reasonable expectation that because I allowed his sister to attend a rock concert at age thirteen, I will allow him to do the same. These expectations become reasons that may justify decisions that would otherwise (in the absence of the expectations) be regarded as erroneous.

The natural model of precedent has had and continues to have its supporters. Michael Moore's recent contribution to the literature is perhaps the most sophisticated defense of the model.[5] Moore argues that, for separation of powers reasons, courts should not be deemed to have authority to lay down general rules. Rather, their authority should be limited to deciding cases. Thus, the force of the precedent case qua precedent is exhausted by the fact that the precedent court decided that case with its particular facts in favor of the plaintiff or the defendant.[6] Moore concludes that the force of the precedent case qua precedent is not found in the court's opinion or in any canonical rule laid down by the court. Rather, its precedential force comes from the value of equality and the rule of law virtues that center on the predictability of legal rules.[7]

C. Is the Natural Model of Precedent Really a Form of Precedent?

In one sense, the natural model of precedent is not a model of precedential constraint at all. The constrained court need do nothing more than decide the case before it as it believes is morally correct, even if it knows that the precedent court would strongly disagree with its decision. What is morally correct, of course, will be a function of facts about the parties and the world. Importantly, these facts might include the equality and reliance effects of earlier court decisions. This same concern for equality of treatment, however, might also arise from a decision by a court inferior in rank to the constrained court or from a decision by a

4. *See* Perry, *supra* note 2, at 248-50; Perry, *supra* note 3, at 963-80.

5. Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW, *supra* note 2, at 183. I also argue that Melvin Eisenberg should be read as a proponent of the natural model, at least as the most accurate *description* of common-law methodology. *See* M. EISENBERG, THE NATURE OF THE COMMON LAW (1988); *infra* text accompanying notes 82-90 (Appendix C).

6. Moore, *supra* note 5, at 187.

7. *Id.* at 200-05.

nonjudicial official or body. Likewise, people may have present expectations that should be given weight by the constrained court even though they are not based on the decisions of precedent courts and perhaps not based on the decisions of any courts. Thus, equality and reliance concerns founded on an earlier decision within the jurisdiction by a court of equal or superior rank are simply items that the constrained court must factor into its deliberations along with many other relevant considerations, including not only constitutional, statutory, and other authoritative rules beyond the power of the constrained court to affect but also equality and reliance concerns traceable to sources other than precedent decisions. It is perhaps misleading, therefore, to label the method of the natural model of precedent as precedent following at all.

Nevertheless, this is a semantic point, not a normative or descriptive one. The natural model may be the model our courts (or some of them) actually employ, or it may be the model they should employ. Whether it is properly labeled a model of precedent is unimportant if the model is otherwise descriptively accurate and/or normatively attractive.

D. THE NORMATIVE CASE FOR THE NATURAL MODEL OF PRECEDENT

It is difficult to assess the descriptive accuracy of the natural model of precedent before the other two models—the rule model of precedent and the result model—have been fleshed out and analyzed. This difficulty arises because the differences between the models can be quite subtle. Until we are clear as to what the other forms of precedential constraint look like, it will be very difficult to determine whether a court's use of precedent conforms to the natural model or to some other model of precedent.

We can, however, assess the natural model's normative underpinnings. What we find is that the model, correctly applied, either gives too little weight to precedent following, or, put differently and paradoxically, itself dictates the adoption of another model.

1. *The Equality Value*

Under the natural model of precedent, the constrained court should look to what the precedent court did in order to further the value of equality. Even if the constrained court disagrees with the earlier decision, the value of equality requires the constrained court to consider the

precedent case when making its decision about what is the morally correct solution to the present dispute (or so the argument goes). Equality likewise makes my decision to allow my daughter to attend a rock concert relevant to whether I ought to let my son attend.

Yet the value of intertemporal equality does not in fact carry this much weight. If the past decision was, as I am hypothesizing throughout, morally incorrect, intertemporal equality cannot render a similar decision now either correct or less incorrect. To take an extreme example, if most members of a particular group of people have been subjected to grossly unjust treatment—say, slavery or genocide—seeing that the rest of the members are subjected to the same treatment is no less wrong despite its furtherance of "equality." Neither two nor two million wrongs can make a right, however much they equalize situations. Nor is the two millionth wrong somehow less wrong than the first.

Furthermore, unless we assume the universality of immoral treatment, treating someone equally with another who was treated immorally is to deny that person equality with those who have been treated morally correctly. The member of the persecuted group who is spared genocide is treated equally with all who rightfully have been allowed to live.[8]

Even the case of deciding whether to allow my children to attend a rock concert is misleading on this point. If the dangers of allowing a thirteen-year-old to attend the concert outweigh the pleasures, and if my responsibility as a parent is such that I should not allow my children to attend under those circumstances, then my mistake regarding my daughter should carry no weight in deciding whether to grant my son's request. It would be a perversion of the role of equality as a moral value to invoke it as a reason to endanger my son's welfare. My response to my son's predictable complaint of unequal treatment is that it is his sister who has the true grievance, namely, that I endangered her by permitting her to attend. In sum, the sense of equality that carries moral weight cannot require perpetuation of otherwise immoral conduct.

I realize—due in large measure to the response my minimization of intertemporal equality provoked among several readers of an earlier draft—that this argument is controversial. Nonetheless, I believe that there is no intertemporal equality value of sufficient weight to support precedential constraint; intertemporal equality cannot convert an otherwise morally erroneous decision into a correct one.

8. *See id.* at 204.

I am not attacking mere formal equality, the empty injunction to treat like cases alike. No one believes that formal equality can constrain.[9] Rather, I am attacking a form of substantive equality: the injunction to treat present cases like past cases, even where the past cases were decided incorrectly from a moral standpoint. I am claiming that, to use the terminology of moral philosophy, intertemporal comparative justice claims cannot displace noncomparative justice claims.

There are several ways to make this claim convincing. First, if intertemporal equality claims have weight capable of displacing other moral considerations, then wrongs to cavemen should carry weight in our current deliberations. Indeed, there is no apparent reason other than epistemic uncertainty for discounting equality claims that are generated by temporally remote events.

Second, we naturally think that the more grievous the moral wrong that resulted from the past incorrect decision, the less reason there is to follow that decision in the present case. Yet the comparative justice claim is actually stronger for following a decision that is seriously wrong than for following a decision that is only minimally wrong. If we do not follow the seriously wrong decision, the present winning party will be much better off than her equally deserving but losing analog in the earlier case. The strength of comparative justice claims generated by a past incorrect decision should vary inversely with the strength of the noncomparative justice claims present in both the past and present cases. The greater the past (noncomparative) injustice, the greater the claim of noncomparative justice to depart from the past decision, but the greater the claim of comparative justice to follow it. Thus, if intertemporal equality—intertemporal comparative justice—is a substantive value of more than de minimis weight, we should have the same balance of reasons for following seriously wrong decisions as we do for following minimally wrong past decisions. Because we do not believe that seriously wrong past decisions are that compelling, we must not believe that intertemporal equality is a true (or at least weighty) substantive value.

The sense of equality used by Moore and others who find erroneous decisions by precedent courts to be morally constraining is, thus, an extremely weak moral value. In fact, I would argue that it operates, if at all, only as a tie breaker. The only possible exceptions would be two situations, though neither squarely applies to the issue of precedential constraint. First, equality generates precedential effects where the good

9. *See, e.g.*, Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

at issue is a discretionary benefit. The reason is that the distribution of these goods violates no rights and harms no legitimate interests of anyone beyond its effect on equality among recipients. Significantly, therefore, in such cases the precedent decision cannot be "wrong." Second, equality also operates where the good at issue is competitive, so that inequality is tantamount to deprivation. An example of a competitive good might be the right to vote, where, for example, giving extra votes to the members of one political party is the equivalent of taking away votes from members of the competitor party. Even here, however, the deprivation results from unequal treatment at a given time, not intertemporal inequality such as that involved in departing from precedent. Only rarely does intertemporal inequality of this type result in a present competitive disadvantage.

Beyond those two situations, equality as a moral value does not appear to carry any weight in terms of constraining a court to reach a decision that it believes would otherwise be morally incorrect merely because the precedent court reached a similar decision.[10] Whether or not equality carries any weight intratemporally—and some have denied that it does[11]—it almost certainly does not do so intertemporally, which is the relevant framework for assessing the decision whether to follow precedent. If a correct weighing of moral values would have led to a decision for the losing party in the precedent case, or to a decision refusing my daughter permission to attend the rock concert, "equality" cannot now require decisions that replicate the incorrect precedent decisions.

* * * * *

A final point that must also be considered is that if equality is a value that supports constraint by a precedent decision, then it becomes necessary to ascertain if the constrained case is factually similar to the precedent case. Yet access to the facts of the precedent case is extremely limited. For one thing, the opinion in the precedent case only reveals those facts that the precedent court thought important. Moreover, those facts will be described at the level of generality thought relevant by the precedent court. Thus, although there could be an indefinite number of

10. If equality were a reason for a constrained court to follow an erroneous decision by a precedent court of equal or superior rank within its jurisdiction, then it would also be a reason to follow an erroneous decision by courts of lower rank within the jurisdiction. Indeed, it would be a reason to follow erroneous decisions from courts outside the jurisdiction, including decisions of unlimited remoteness in time and space. Does one really believe that an unjust act toward a caveman or in Indonesia creates a reason for similar treatment of a twentieth century American?

11. *See, e.g.*, Coons, *Consistency*, 75 CALIF. L. REV. 59 (1987); Westen, *supra* note 9.

facts about the precedent case that the constrained court would find relevant to deciding what resolution effects equality with the precedent case, many, if not all, of those facts might not be revealed by the precedent court's opinion. Even the factual record of the precedent case will reveal only what the trial court thought were the relevant facts and the relevant level of generality of description. Thus, if the precedent court believes that all promises should be legally enforced, and writes its opinion in favor of the promisee revealing only that there was a promise made by defendant promisor to plaintiff promisee—and if the trial court's record reveals only those same facts—the constrained court, if it disagrees, will have no access to the facts that would determine whether equality pointed to a decision for the promisee in the subsequent case. (If the constrained court views equality as turning on the facts identified by the precedent court and not on all the facts about the precedent case, it will in effect have given the precedent court the ability to constrain by rules,[12] though the constraint will not be absolute if equality is not always an overriding value.) My point is that true equality would turn on the similarity of all relevant facts, not just on the similarity of the facts thought relevant by the constrained court.

I conclude that equality cannot account for any force that a decision in a precedent case naturally carries in subsequent cases.

2. *The Reliance Value*

The reliance value is the second value under the natural model of precedent that may justify a constrained court deciding a case differently from how it would decide in the absence of the precedent case. The reliance value is defined as the value of fulfilling expectations on which people have acted otherwise to their detriment. The argument runs as follows: If the decision in the precedent case has generated expectations of similar future decisions on which people have relied, particularly if the parties now litigating before the constrained court were among those who relied, and a decision that the constrained court would otherwise find correct would dash those expectations, then the opposite decision may in fact be the correct one. Thus, the value of reliance illustrates how, even under the natural model where a court merely has to decide its case morally correctly, an incorrect precedent can constrain.

An immediate problem with the expectations argument for natural constraint is that, because precedent courts on the natural model have

12. *See* K. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 48-49 (1960).

authority only to decide cases and no authority to legislate rules binding on other courts, it might at first glance be difficult to see how the parties before the constrained court could have formed justifiable expectations that the constrained court would follow the precedent court. The answer to this is that even if the precedent court's decision was (in the constrained court's view) incorrect, and even if the precedent court had no authority to lay down general rules binding on future courts, rational people will take into account the precedent court's decision and its opinion in predicting what other courts will do. Thus, some people, despite the lack of any formal practice of precedent following, will justifiably rely on the precedent court's opinion and will modify their behavior in response to it. A constrained court, therefore, should take that behavior into account when determining what decision to reach.

Therefore, even in the absence of the precedent court's power to legislate and a correlative formal duty of the constrained court to follow precedent, an incorrect decision in a precedent case can dispositively affect the decision of the constrained court. Moreover, the predicted decision of a court will sometimes become normative for that court. In addition, a judicial opinion may give one course of conduct a salience that makes the opinion the most eligible basis on which to establish a convention, which, once established, has normative bite. (Of course, the constrained court should announce, for the purpose of affecting future behavior, that no one should henceforth rely on the precedent court's decision, unless the reliance has become so solidly entrenched in patterns of behavior that the costs of eliminating it outweigh the gains from doing so.)

3. *The Value of General Rules*

Although under the natural model of precedent the precedent court cannot legislate for the constrained court, it can, in deciding each case "on the merits," take into account the rule of law virtues that are served by formal rules. Moore is quite clear, for example, that if it is morally best that there be a general rule rather than case-by-case particularized decisionmaking, then it is part of deciding the true moral merits of a case that it be decided "as if" there were such a rule.[13]

13. *See* Moore, *supra* note 5, at 201-04. One virtue of general rules associated with their clarity and predictability is that they make invidious discrimination by officials easy to detect and hence difficult to accomplish. In this way, general rules serve a value associated with "equality," though one that is quite distinct from the value of equality invoked on behalf of precedential constraint per se.

This is an important point for several reasons. First, it shows how complex the notion of a morally correct decision is. It may well be the case that, looked at one way, A ought to prevail over B in a dispute, but looked at another way, there ought to be a rule that mandates a decision for B over A. This divergence between the optimal rule and the optimal result in the particular case is a familiar theme in political and moral theory.[14] It points out the deep difficulty we have in identifying the correct moral decision in any situation.[15] Moreover, there are probably more than just the two levels of the individual merits and the general rules, with the rules being a concession to institutional, motivational, and epistemological imperfections that make aiming directly at the individual merits less protective of individual merits in the overall run of cases. Instead, even our conception of the individual merits is probably shaped by rule-like, strategic considerations dictated by human limitations.[16] For example, if one were able to pick any moral ideal, would it be the ideal if humans were completely altruistic? incorporeal? omniscient?

14. *See* Alexander, *supra* note 3, at 317-30; Schauer, *supra* note 2, at 588-91; Wonnell, *supra* note 3, at 138-43. It may be true that one's set of political/moral principles P is best furthered by promulgation of a rule R that proclaims regarding situation S, "You are P-justified in following R in S, and you shall be punished for not following R in S, even if you believe P is best furthered by not following R in S." What can we say of X's "reasons" when X believes the above statement but also believes that P is best furthered by not following R in a particular instance of S, and/or P is in fact best furthered by not following R in that situation. For a discussion of this general issue, see Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989); Perry, *supra* note 3; Raz, *supra* note 3, at 1154-1212; Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1001-40 (1989).

15. *See* Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 559-62 (1986).

16. The ability of general rules to play a significant role in the natural model creates one more problem for anyone who believes equality figures in any explanation of constraint by precedent. Assume, for example, the following situation. First, the constrained court believes that a certain case ought to be governed by a general rule that focuses on only a few of the larger number of otherwise morally relevant facts. Its reasons are the standard ones for preferring bright-line rules over case-by-case determinations. Second, the precedent case came out the wrong way under the rule the constrained court thinks should govern; a bona fide purchaser lost, but the ideal rule would be that bona fide purchasers always win. Third, on the full merits, that is, taking into account all the morally relevant facts and not just the facts the rule makes relevant, the precedent case is distinguishable; the bona fide purchaser in the precedent case was a quite unsavory and undeserving sort, unlike the bona fide purchaser in the constrained case. If the constrained court repudiates the precedent case, announces the rule that bona fide purchasers always win, and decides for the bona fide purchaser, has the constrained court offended equality given that some unsavory bona fide purchasers will win under the new rule and some litigants more deserving than the winner in the precedent case will lose? The parties in the constrained case (and subsequent cases as well) have been treated "unequally" with respect to the parties in the precedent case on the factors the rule deems to be relevant. In addition, the parties sometimes have been treated "equally" and other times "unequally" with respect to the totality of morally relevant factors, i.e. the nonrule merits.

Alternatively, would it be the ideal if one had fallen in among brigands, or lived in a time of war, revolution, anarchy, or impending holocaust?

The second reason why it is important that, under the natural model of precedent, the courts should decide cases as if the best rule were in place is that it exposes the instability of the natural model itself. If on the natural model courts can recognize the moral superiority of rules, why can they not lay those rules down? Why can they not legislate for future courts? Moore claims that precedent courts should not lay down rules for future courts, yet he admits that they can decide the moral merits of cases as if such ideal rules existed.

The principal difference between the natural model and a model of precedential constraint under which courts could legislate rules is that under the natural model, the constrained court is not constrained by the rule announced by the precedent court but only by the rule that the constrained court takes to be the ideal rule. *But it may very well be the case that one such ideal rule that a constrained court should follow as if it had been authoritatively promulgated is a rule requiring it to follow nonideal rules laid down by precedent courts.* If so, the natural precedent model paradoxically dictates its own replacement by another model.

But here I am getting ahead of myself. I shall deal with how the model of natural precedent might paradoxically dictate its own abandonment in favor of a different model after I have discussed the remaining models of precedential constraint.[17] I will conclude by summarizing the features of the natural model and assessing its strengths and weaknesses.

E. An Assessment of the Natural Model of Precedent

The natural model of precedent leaves the constrained court free to decide the case before it in the way that, all things considered, it believes is morally correct. Among the considerations the model looks to are the advantages of formal rules, advantages that might outweigh the costs of some decisions under the rules that would be incorrect in the absence of the rules. Among the factors that would incline the constrained court to follow an erroneous decision by the precedent court are equality and reliance. Equality, however, is a very weak reason at best, and more plausibly no reason, for following an incorrect decision. Reliance is a more plausible reason, but the constrained court is never bound to adhere to any rule announced in the precedent case merely because it was so

17. *See infra* text accompanying notes 59-68.

announced. No court can legislate under the natural model, though any court can "discover" and follow rules it believes are appropriate.

In one sense, the natural model of precedent cannot be criticized because it never requires of any court a decision other than the decision that the court deems best, all things considered, including the virtues of rules. In another sense, however, the model seems defective. Because each court is free to reject the rules announced in prior decisions, inferior courts and people generally will be unable to predict future decisions with much security. Although they will know that their acts in reliance on past decisions will be considered along with everything else that is morally relevant, this knowledge will not generate the predictability and concomitant security that a stronger doctrine of precedent will generate. The fear is that reliance may be outweighed—or more to the point, may be mistakenly believed outweighed—by other values. This unpredictability and insecurity may produce a state of affairs that is morally inferior to the state of affairs a stronger doctrine of precedent would produce.[18] Paradoxically, if the courts always attempt to do what is morally best it may in the end be morally worse than if the courts had acted under greater constraint (and occasionally followed an incorrect precedent).

Thus, although the model of natural precedent will generate some impetus in the direction of following precedents, even incorrect ones, its very freedom to achieve the morally best result and the weakness of its precedential constraint is a source of great, perhaps fatal, disvalue.

III. THE SECOND MODEL: THE RULE MODEL OF PRECEDENT

A. THE RULE MODEL OF PRECEDENT DESCRIBED

The second model of precedential constraint is the rule model of precedent. Under the rule model, the precedent court has authority not only to decide the case before it but also to promulgate a general rule

18. *But see* Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 508 (1986) (arguing generally against taking into account reliance on nonideal legal rules). In my opinion, however, Kaplow overstates the ability to predict transitions from less ideal to more ideal legal rules, and understates the costs associated with his proposal.

I do not deal in this Article with the practice of prospective overruling. Prospective overruling may or may not be warranted in particular cases under the natural model of precedent. If, however, prospective overruling is chosen for reliance reasons in any case where the natural model would prescribe ordinary overruling, we are dealing with a stronger model of precedential constraint than the natural model. For a more general discussion of prospective legal change and its relation to the models of precedential constraint, see the discussion *infra* note 65 and accompanying text.

binding on courts of subordinate and equal rank. The rule will operate like a statute and will, like a statute, have a canonical formulation.

Versions of the rule model can vary along two dimensions. First, they can vary according to the strength by which the precedent court's rule binds the constrained court. On some versions, the constraint may be absolute, like that of a statute or constitutional rule on a court. On those versions, the constrained court may never overrule a precedent rule. On other versions, the constraint may be much weaker. On no version, however, is a constrained court as free to disregard a precedent rule as it is on the natural model. The constrained court cannot decide to overrule merely because, having weighed equality and reliance against the advantages of a different rule or decision, it has found the balance slightly tilted in favor of the latter.

The second dimension along which versions of the rule model vary is in their methodologies for identifying the precedent rule. Some versions try to locate a statement of a canonical rule in the opinion of the precedent court.[19] Other versions look for rules that the precedent court implicitly as well as explicitly used as necessary steps in reaching its decision[20] or facts that it deemed material to its decision.[21] On all versions of the rule model, however, the identification of the rule must meet three

19. *See, e.g.*, 26 HALSBURY'S LAWS OF ENGLAND 292-93 (4th ed. 1977); E. MORGAN & F. DWYER, INTRODUCTION TO THE STUDY OF LAW 154-56 (2d ed. 1948); J. SALMOND, SALMOND ON JURISPRUDENCE 177 (P. Fitzgerald 12th ed. 1966); R. WASSERSTROM, THE JUDICIAL DECISION 35-36 (1961); Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 53-55 (1979); Postema, *Some Roots of our Notion of Precedent*, in PRECEDENT IN LAW, *supra* note 2, at 9, 14-15. Hardisty is the source for the names I give my second and third models.

20. *See, e.g.*, R. CROSS, PRECEDENT IN ENGLISH LAW 75-76 (1977). For a striking example of the position that a judge may be bound by a narrow, but still general, rule with which he disagrees, but not be bound by the broader rule that the previous court endorsed and from which it derived the narrow rule, see the dissenting opinion of Justice Harlan in Duncan v. Louisiana, 391 U.S. 145, 181 n.18 (1968) (Harlan, J., dissenting). That position, unlike most that Justice Harlan held, is theoretically indefensible.

21. There is a lengthy and infamous debate in the literature over the "material facts" version of the rule model and whether it is sufficiently determinate to be constraining or whether it is completely indeterminate. *See* J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 267-80 (1964); J. STONE, THE PROVINCE AND FUNCTION OF LAW 185-89 (1950); Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169-83 (1930) [hereinafter Goodhart, *Determining the Ratio Decidendi*]; Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413 (1957); Simpson, *The* Ratio Decidendi *of a Case*, 21 MOD. L. REV. 155 (1958); Stone, *The* Ratio *of the* Ratio Decidendi, 22 MOD. L. REV. 597 (1959); *see also* MacCormick, *Why Cases Have Rationes and What These Are*, in PRECEDENT IN LAW, *supra* note 2, at 155, 181 (briefly outlining the debate over the determinacy of Goodhart's "material facts method" for determining the *ratio decidendi* of a case). If the "material facts" are those facts in the precedent case that the precedent court, either explicitly or implicitly, and under a particular description at a particular level of generality, deems to be relevant facts under the norm the precedent court wishes to promulgate, then the "material facts" view of precedent is consistent

conditions. First, the rule must have a canonical formulation, even if that canonical formulation does not appear in the original opinion, such as, "Whenever facts A, B, and C, and not fact D, decide for P." Second, the rule must be treated as separate from the reasoning that led to its adoption by the precedent court; it is only the rule, and not the reasoning, that binds the constrained court. Third, the formulation of the rule must be fixed at the time of the precedent decision; that is, it must not be dependent on what any court other than the precedent court did.

As long as these three conditions are met, coupled with the condition that the constraint be greater than under the natural model of precedent, we are dealing with the rule model. Thus, issues such as whether an announced rule can be a precedent when the precedent court (mistakenly) reached a decision opposite from that which its rule dictates or, relatedly, whether rules intended to apply prospectively only can be binding are issues that arise within the rule model of precedent.[22] The resolution of these questions as well as the resolution of the general debate over how to identify the precedent rule do not affect the general points that I wish to make about the rule model. If the model is otherwise attractive, however, their resolution will become necessary.

B. MODIFYING OR NARROWING THE RULE

Under the rule model, the constrained court faces a binary choice: it can either follow the precedent rule in its canonical form or overrule it. All modifications of the rule, like subsequent amendments of a statute, amount to overruling the precedent rule and replacing it with a new rule. *Any practice of precedential constraint that distinguishes between overruling a precedent and narrowing/modifying a precedent is not a practice of the rule model of precedent.*

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with the rule model. If the level of generality of description of the "material facts" has not been fixed by the precedent court, then the "material facts" view describes a different model.

22. Another problem faced by the rule model of precedent is working out the theoretical relationship between the precedent court's decision in a case of first impression and its laying down a rule in such a case to constrain future courts. Put in the form of a question, must the precedent court decide its case in the same way that the rule it lays down would have future courts decide such cases? If so, why? Rules almost always have a range of applications that includes applications that are incorrect from the standpoint of the more general policies or principles that the rules seek to implement. *See* Schauer, *supra* note 2, at 588-91. Must the precedent court apply its rule to its own case if to do so disserves the policies or principles behind the rule? Must it do so if all forward-looking gains the rule produces will be produced merely by its promulgation for the future, with no further gains achievable through its application to the case at hand? *See* Perry, *supra* note 3, at 984-85; Raz, *supra* note 3, at 1209-12.

1. *Narrowing the Rule to the Facts of the Precedent Case*

It is easy to see that restricting a rule to the facts of the precedent case is inconsistent with constraint by precedent. No matter how broad the precedent rule and how brief the description of the facts in the precedent case, there will always be some factual distinctions between the precedent case and all other cases. At a minimum, the precedent case will almost always involve different parties. Even if the parties are identical, the time of the transaction will be different. Thus, if a constrained court could escape the constraint of a precedent rule by citing *any* factual distinctions between the precedent case and the constrained case—whether or not those factual distinctions are relevant under the rule announced in the precedent case or are relevant under any plausible moral principle—a precedent case and its rule could never constrain, and the distinction between distinguishing a case and overruling it would collapse.

2. *Narrowing the Rule Based Upon the Reasons Behind It*

Allowing the constrained court to distinguish a precedent case on any factual grounds whatsoever amounts to eliminating precedential constraint altogether. Nevertheless, some urge that allowing the constrained court to modify the rule of the precedent case based on the reasons behind the rule is consistent with and the appropriate form of such constraint.[23]

There are two points worth making about this version of precedential constraint. First, as noted earlier,[24] any modification of a canonical rule overrules that rule. On the version of precedential constraint now being considered, the overruling of the announced rule is constrained by the reasons behind the rule. These reasons can be overruled, if at all, only in restricted circumstances, which depend upon the strength that we assign to precedential constraint. The rule itself, however, as opposed to its reasons, has, on this version, no real constraining power.

The first point leads to the second point: What this version really amounts to is constraint by the reasons of the precedent court, not constraint by its rule. This identification of the constraining rule with its underlying reasons threatens to take this version completely outside the rule model of precedent, where the rule stands apart from its reasons, and turn it into one of the other two models of precedent. Whether this

23. *See, e.g.*, Monaghan, *supra* note 2, at 764-65; Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707, 730-35 (1978).

24. *See supra* text accompanying note 22 (Section III, subsection B).

version can be made consistent with the rule model depends upon how it identifies the reasons (for the announced rule) that constrain. If the constraining reasons behind the rule are identified as the constellation of correct political/moral reasons with their correct weights, as assessed by the constrained court—and at the highest level of generality, all courts are attempting to do what correct political/moral reasons require of them—then this version simply amounts to the natural model of precedent previously discussed.

On the other hand, if the constraining reasons are (incorrect) political/moral reasons that "justify" the decision of the precedent court but that the constrained court does not agree with, then constraint by the precedent court's reasons amounts to the result model, the third model of precedential constraint that I shall discuss. Because I have not described that model yet, however, I will go no further at this point than to assert that constraint by (incorrect) political/moral reasons that "justify" the decision of the precedent court is in fact one way to describe that model.

Constraint by the precedent court's reasons can be a version of the rule model of precedent, however, if, but only if, the reasons meet the following criteria: (1) they are expressible in canonical form; (2) they are reasons the precedent court actually considered; and (3) they are reasons the precedent court wanted to override its stated rule in cases of conflict. In such cases, the precedent court's reasons really are its rule.

3. *Narrowing the Rule to the Facts of the Precedent Case While Limited to Factual Distinctions that Point to a Different Outcome*

A third version of precedential constraint is as follows. The constrained court should begin with the rule announced in the precedent case. If, however, the constrained court believes (1) that the factual differences between the constrained case and the precedent case make the constrained case a *weaker* case for the party analogous to the winner in the precedent case, and (2) that the party in the constrained case analogous to the winner in the precedent case should, all things considered, lose the case, then the constrained court may decide in favor of the other party and will not be deemed to have overruled precedent, even if the rule in the precedent case by its terms dictates a similar decision in the

constrained case (a decision for the party analogous to the winner in the precedent case).[25]

This version of precedential constraint, which allows the constrained court to make factual distinctions between the constrained case and the precedent case even if they are not factual distinctions picked out by the precedent rule, is a version of precedent that does constrain, unlike the version that allows the constrained court to seize upon *any* factual difference. Moreover, this version does preserve the distinction between overruling and distinguishing precedent. Thus, so long as the constrained court (whether it likes it or not) follows the precedent court in situations where all factual distinctions between the cases indicate that the constrained case is a stronger case for the result in the precedent case than was the precedent case itself and departs from the precedent court only when the factual distinctions point the other way, the constrained court is following/distinguishing the precedent decision, but not overruling it.

Nonetheless, this version of precedential constraint is not a version of the rule model. Rather, just as was one version of restraint by the precedent court's reasons, it is one of the forms of the result model of precedent that I shall fully analyze in Section IV below. The reason I characterize it as a form of the result model is that the rule model requires following the rule as found in the precedent case. Any departure from that rule amounts to overruling it, just as a limiting amendment to a statute is equivalent to repealing the supplanted portion. In the version of precedential constraint just described, however, the constraint comes not from the precedent court's rule but from the facts of the precedent case. Under the rule model of precedent, by contrast, the constraint comes not from the facts of the precedent case but from the precedent court's rule.[26]

25. *See, e.g.*, R. CROSS, *supra* note 20, at 76-78; K. LLEWELLYN, *supra* note 12, at 52, 66-67; J. SALMOND, *supra* note 19, at 178; Hardisty, *supra* note 19, at 57-60; Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 298-301 (1989).

26. It follows from this that where the precedent court's rule does not cover the constrained case, the constrained court can decide the case as it believes is morally correct. Even if the constrained court's case is a stronger case on its facts for the same result as in the precedent case, the court is not constrained to reach the same decision. On the pure version of the result model of precedent, however, which I discuss in Section IV, *see infra* text accompanying notes 42-56, the court is so constrained in that manner, though not by the rule.

4. *Narrowing the Rule Based Upon Its Inconsistency With Other Rules, or Based Upon Clear Inadvertent Mistake*

Unlike the previous three versions of precedential constraint, which were deemed to be inconsistent with the rule model of precedent because they allowed the constrained court to narrow the precedent court's rule, the version here described is consistent with that model. On this version, the constrained court must generally follow an applicable precedent rule, except that it can narrow the scope of the rule to eliminate inconsistencies between it and other rules that it does not believe were intended to be overruled by the precedent court. The constrained court can also narrow the precedent rule to exempt the following three situations: (1) those that were not adverted to by the precedent court; (2) those where application of the rule is (in the constrained court's view) undesirable; and (3) those in which the constrained court is confident that the precedent court would not wish to have its rule applied. This version is consistent with the rule model of precedent because the instances in which the constrained court can modify the precedent court's rule parallel the instances in which a court can depart from the literal command of a statute.[27] Because the rule model of precedent treats following the canonical rule of the precedent case as being similar to following a statutory rule, this version is within the model.

5. *Narrowing the Rule to Make an Ideal Rule*

Throughout this section I have been assuming that the constrained court disagrees with the precedent court's result and, thus, disagrees with its rule (because the rule presumably supports the result). The question has been to what extent on the rule model of precedent can the constrained court narrow the rule to avoid reaching another result that it believes is wrong and yet deny that it is overruling the rule. The answer is "not at all," except when overruling is unavoidable to eliminate inconsistencies with other rules (that have not been overruled) or to remedy clear, inadvertent mistakes.

When the constrained court *agrees* with the precedent court's result, but disagrees with its rule, may the constrained court alter the rule without being deemed to be escaping precedential constraint? The answer on

27. *See, e.g.*, Cernauskas v. Fletcher, 211 Ark. 678, 201 S.W.2d 999 (1947). *But see* United States v. Locke, 471 U.S. 84, 96 (1985) (following the literal meaning of a statute despite obvious contrary legislative intent).

the natural model is, of course, "yes," but the answer is not so clear on the rule model.

It is clear that even where the constrained court approves of the precedent court's result, tampering with the precedent court's rule amounts to abandoning the rule model of precedent in favor of the natural model. Of course, it is possible to have one model—the rule model—apply to precedent results believed wrong by the constrained court and another model—the natural model—apply to precedent results believed correct by the constrained court.[28] But the rule model of precedent as a distinct model tolerates only very limited tampering with rules, whether the rules originated in cases with correct or incorrect decisions. Beyond this limited tampering, a court must follow the precedent rules or, depending upon the strength of precedential constraint that we attribute to our practice of following precedent, overrule them.

6. *Broadening the Rule*

If the precedent court declares that in all cases with facts A, B, and C the decision shall be X, then narrowing the rule takes the form of amending it to hold that, for example, in all cases of A, B, C, and not D the decision shall be X. Broadening the rule, by contrast, would be amending it to hold that in all cases of A and B, the decision shall be X. Broadening the rule, unlike narrowing the rule, does not ordinarily overrule it, for the rule "A, B, C, then X" does not speak to situations involving A, B, and not C at all. It is quite consistent with acceding to precedential constraint under rule precedent for the constrained court to decide "A, B, then X" where the precedent rule is "A, B, C, then X."

Of course, because our inquiry is concerned with constraint by incorrect precedents, and a rule that is too narrow may be correct as far as it goes, cases dealing with broadening such rules are really outside of our inquiry. Put differently, a court that confronts a rule "A, B, C, then X" in a case of A and B is not constrained by the rule even if it believes the rule is too narrow and that the correct rule should be "A, B, then X." *This is because the rule "A, B, C, then X" does not cover the case of A, B.*[29]

28. It might seem more plausible to have the natural model apply to precedent results believed wrong by the constrained court and the rule model apply to precedent results believed correct by the constrained court. However, this would in fact be highly unstable: an erroneous rule attached to a correct result would produce incorrect results in the future, which would then make the rule no longer binding.

29. *See* J. RAZ, THE AUTHORITY OF LAW 185 (1979).

Occasionally, however, broadening the rule *will* mean overruling it. If the precedent court held "if and only if A, B, and C, then X," the constrained court's holding "A and B, then X" would be tantamount to a partial overruling. Thus, unless the situation justified overruling, broadening the rule would be inconsistent with precedential constraint under the rule model of precedent.

It is no objection to rules that contain an "if and only if" and, thus, preclude broadening that they purport to resolve issues that need not be resolved to decide the case at hand. *All* rules resolve issues not before the court. In principle there is no difference between narrowing a broad rule and broadening a narrow rule that by its terms precludes broadening. Both amount to amending and, hence, overruling a portion of the rule.

I should add a word about the distinction between holding and dictum, the existence of which all lawyers are trained to acknowledge, but the determination of which proves in practice to be quite controversial. The distinction cannot apply to the natural model of precedent, nor can it apply to the result model of precedent that I shall discuss in Section IV. It cannot apply to those models for the simple reason that on both of them, what the court *says*, as opposed to what it *does*, is irrelevant to the constrained court.

The distinction, however, does apply to the rule model. Under the rule model, the "holding" of the precedent court is nothing other than its rule. "Dicta," in turn, are those portions of the precedent court's opinion that are not part of its rule. The distinction between holding and dicta will be as controversial as the content of the precedent court's rule, no more and no less. The distinction is not synonymous with the division between issues necessarily decided by the precedent court in reaching its result and other issues on which it opined. *Every rule, by virtue of being a rule, decides issues that are broader than the particular facts of the cases in which they are announced.* Indeed, any model of precedent stronger than the natural model, which is arguably not a model of precedent at all, will legitimate the precedent court's deciding a range of cases beyond the precedent case itself. Rules are always to some extent general, while cases always involve particulars.

C. ADVANTAGES OF THE RULE MODEL OF PRECEDENT

The rule model of precedent has several advantages over the natural model. If one considers equality to be a value supporting precedential

constraint—a value that I, for one, discount heavily[30]—then the rule model has the advantage of providing access to all the facts of the precedent case relevant to equality. All one needs to know about the precedent case is its rule, which establishes the relevant criteria of equal treatment.[31]

The most important advantage of the rule model, however, is that lower courts (and people in general) derive much more guidance from constraining general rules than they do from constraining particular decisions, even when the particular decisions take the value of rules into account. In claiming this, I am making three assumptions. First, I am assuming a practice of precedent following—precedent here consisting of the rules laid down in precedent cases—that is at least moderately strong. In other words, the constrained court cannot overrule the precedent merely because it can think of a rule that is slightly superior to the precedent court's rule. The rule model collapses into the natural model if the precedent can be so easily overruled. The advantage that the rule model provides in terms of guidance does not require that precedential constraint be absolute, but it does require that it be greater than zero.

Second, I am assuming that rules provide greater predictability than do other factors to which people might resort in order to predict courts' decisions—factors such as the judges' politics, economic class, and so forth.

Third, I am assuming that an improvement in legal predictability can be a net gain in terms of whatever political morality we hold, even when it comes at the cost of setbacks under that same political morality in particular cases and to particular litigants. This assumption holds up, I believe, despite its paradoxical quality, at least for any political morality that seems at all plausible.[32]

Finally, there is one additional "advantage" of the rule model: the third model of precedential constraint, the result model, is undesirable

30. *See supra* text accompanying notes 8-12 (Section II, subsection D.1).

31. There is a value furthered by constraint by general rules that is often confused with "equality": the value of preventing invidious discriminations and other abuses of authority by officials. It is easier to monitor compliance with general rules that pick out only a few factors as relevant to a decision—especially if the existence or nonexistence of those factors is not particularly controversial—than it is to monitor compliance with the standard "do justice in each particular case." *See* Alexander, *supra* note 3, at 319-21; Schauer, *Formalism*, 97 YALE L.J. 509, 532-35 (1988). Or, put negatively, it is more difficult for officials to hide their abuses if they operate under mechanical rules rather than under nonmechanical standards.

32. *See also* Alexander, *supra* note 3, at 319-21; Wonnell, *supra* note 3. *See generally infra* notes 61-63 and accompanying text (discussing this paradox under the natural and rule models of percedent).

and perhaps incoherent. Therefore, it is not a tenable alternative to the rule model.

D. Problems with the Rule Model of Precedent

1. *Cases with No Discernible Rules*

One problem with the rule model of precedent is its requirement that cases contain discernible rules in order to operate as precedents. This is a problem because many cases clearly fail this condition.[33] For instance, some cases lack discernible rules because the court's opinion is particularly opaque, cryptic, or self-contradictory. Other cases lack discernible rules because the majority of the court is divided into factions, each of which offers a different rule, and no rule justifies the decision that commands a majority of the court.

If the rule model of precedent is an otherwise attractive model of precedential constraint, then cases that lack discernible rules are undesirable. Courts should be encouraged to write opinions that clearly identify the rule that the court wishes to promulgate, and to do everything possible to garner majority support for that rule and not just a particular result.

Nonetheless, the failure of some cases to reveal their rules is not fatal to the model. Those particular cases will just have to be treated under one of the other two models of precedential constraint if they are to be treated as constraining at all. For reasons that will be clear once I have discussed the result model of precedent, the default model for the rule model applicable to cases without rules will have to be the natural model of precedent.

2. *The Precedent Court as Legislature*

The central problem with the rule model of precedent is the tremendous power that it gives the precedent court vis-à-vis the constrained courts. While the rule that the precedent court lays down may be quite narrow, it may also be quite sweeping. If it is sweeping, then no matter how misguided the rule is, and no matter how poorly the precedent court anticipated the rule's future applications, the constrained court must follow the rule unless and until the legislature steps in. To do otherwise

33. Many opinions contain no statement or clear implication of the rule adopted by the court. Many cases contain conflicting statements, either in the same opinion or in the multiple opinions of the judges who make up the majority. *See* Goodhart, *Determining the Ratio Decidendi*, *supra* note 21, at 165-68.

would be the antithesis of precedential constraint, because to limit the rule in any way is to overrule it. Thus, so long as the constrained court is constrained at all by the precedent—and our focus is primarily on precedential constraint, not overruling—it may be constrained quite strongly under the model.

A related objection to the rule model that Michael Moore raises is that rule precedent quite explicitly grants authority to courts to legislate and not just to decide particular disputes.[34] Moore argues that this is a mistake because, for institutional and other reasons, the judiciary should not be given the power and right to legislate. On the natural model, which Moore favors, the influence that courts' decisions would have over other courts' decisions would be limited to equality and reliance concerns. In addition, courts could decide cases "as if" particular rules existed in order to further the "rule of law" values. No court could however, legislate for subsequent courts. Rather, legislation under the natural model is reserved for the legislature, with its superior resources and its electoral accountability. (Even under the third model that we shall take up, the result model, courts cannot legislate for future courts, even though the constraint of their decisions is greater than under the natural model.)

It is these criticisms of the rule model of precedent, particularly its strong version of what precedential constraint entails, that has led commentators like Moore to reject it and to advocate other models. I have already examined the natural model and its advantages and problems. I shall now turn to the third model, which I have already previewed, the result model. It has perhaps the most heavyweight supporters. It also, however, has the most serious problems.

IV. THE THIRD MODEL: THE RESULT MODEL OF PRECEDENT

Many readers will feel that I have as yet failed to describe the model of precedential constraint with which they are most familiar. Like Goldilocks and the bowls of porridge and beds, they will complain that the natural model of precedent is too weak to capture their sense of how precedents operate and that the rule model of precedent is too strong. I have not described a model that is "just right."

34. *See* Moore, *supra* note 5, at 186-87; *see also* M. DETMOLD, THE UNITY OF LAW AND MORALITY 191 (1984) (discussing the authority of courts to lay down binding rules).

The third model of precedential constraint appears to meet this complaint. It seems stronger than the natural model in that an incorrect decision has more power to constrain subsequent courts than just reliance or equality values would explain. Yet it also seems weaker than the rule model in that the precedent court's stated rule is not itself binding.

Moreover, it is by far the favorite model of modern commentators. It is endorsed in one form or another by such otherwise jurisprudentially diverse types as Edward Levi,[35] Steve Burton,[36] Brian Simpson,[37] Joseph Raz,[38] and perhaps Ronald Dworkin.[39] Also, although he is not totally clear on this point, Fred Schauer also appears to favor the result model.[40] Finally, even Michael Moore, whom I have described as a proponent of the natural model, can be read as endorsing the result model instead.[41]

There are two versions of the result model. I shall deal with the more powerful (more constraining) pure version first. I shall then deal with the impure or hybrid version.

A. THE PURE RESULT MODEL OF PRECEDENT DESCRIBED

What are the major structural features of the pure result model of precedent, and how specifically does it differ from the other two models? To answer that question I will give three different formulations of precedential constraint that appear to describe three different models. I will then demonstrate that these three different formulations are functionally equivalent formulations of a single model of precedential constraint.

1. *First Formulation: Incorrect Precedents Control A Fortiori Cases*

The simplest formulation of the pure result model is as follows: To follow precedent, a constrained court must decide its case for the party analogous to the winner in the precedent case if the constrained case is as strong or stronger a case for that result than the precedent case was for

35. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-27 (1963).

36. S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 27-40, 59-64 (1985).

37. Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, in 1 OXFORD ESSAYS IN JURISPRUDENCE 148, 164-75 (A. Guest ed. 1961) [hereinafter Simpson, *Precedent*]; Simpson, *The Common Law and Legal Theory*, in 2 OXFORD ESSAYS IN JURISPRUDENCE 77, 87-88 (A. Simpson ed. 1977) [hereinafter Simpson, *Common Law*].

38. J. RAZ, *supra* note 29, at 183-89.

39. R. DWORKIN, LAW'S EMPIRE 240-50 (1986) [hereinafter R. DWORKIN, EMPIRE]; R. DWORKIN, TAKING RIGHTS SERIOUSLY 110-15 (1977) [hereinafter R. DWORKIN, RIGHTS].

40. Schauer, *supra* note 2, at 579-82, 593-95.

41. Moore, *supra* note 5, at 201. I leave to a footnote at the conclusion of Section IV, when I have fully explicated the result model, my reasons for placing these scholars and others in the camp of the result model of precedent. *See infra* note 57.

its result. The constrained court must do so even if under the natural model it would have decided its case differently and regardless of any rule stated in the precedent case.[42] Conversely, however, the constrained court may depart from the precedent court's result if the constrained case is a weaker case for that result than was the precedent case, even when the stated rule of the precedent case covers the constrained case and demands a similar result. Put differently, under the pure result model the constrained court must depart from what the natural model requires if and only if its case is an a fortiori case for the same (incorrect) result as in the precedent case.

This formulation of the pure result model of precedent can be presented schematically as follows: Assume that the relevant facts of the precedent case are A, B, C, and D and the precedent court holds for P, declaring as its rule that in all cases of A and B, the decision must be for P. In the constrained case the facts are A, B, C, and E (rather than D) plus N, the natural weight (equality and reliance) of the precedent case. If the absence of D and the presence of E and N make the constrained case a weaker case for P than the precedent case, the constrained court may ignore the rule of the precedent case ("if A and B, decide for P") and decide against P. On the other hand, if the presence of E is a stronger reason for deciding for P than was the presence of D, then even if the constrained court believes that, giving precedent its natural weight, P ought not prevail, the pure result model of precedent constrains it to decide in favor of P.

The a fortiori case formulation of the pure result model of precedent is a way of giving meaning to the injunction "treat like cases alike." That injunction is either empty, because all cases are alike in some respects and not in others, or it translates into "reach the same result as in the precedent case in any case that is as or more morally compelling for the result reached in the precedent case than was the precedent case itself, even if that result is not on balance compelling in either case." In other words, a case is "like" the precedent case if the facts point at least equally as strongly toward a decision analogous to the decision in the precedent case.

42. The stated rule is completely irrelevant under the pure result model of precedent. It does not bind the constrained court within the ambit of cases that it purports to control. Moreover, the outer boundaries of the stated rule do not mark the outer boundaries of the constraining force of the precedent case. Thus, on this model, any a fortiori cases are controlled by the precedent case even if they fall outside of its stated rule.

2. *Second Formulation: General Principles Constructed from Legal Materials that Include Incorrect Precedents Bind Constrained Courts*

Readers familiar with the legal philosophy of Ronald Dworkin will recognize the second formulation of the pure result model as Dworkin's recipe for discovering the law applicable to a given dispute. Briefly, Dworkin argues that to reach a correct decision according to "the law," a court should first collect the basic legal material such as statutes, constitutional provisions, and court decisions not yet overturned. The court should then ask which set of political/moral principles offers the best—the politically/morally most attractive—justification for most of the legal materials. (Some legal materials can be treated as mistakes and ignored in constructing the justifying principles, but such mistakes cannot be too numerous; all eligible sets of principles must meet a threshold of "fit" with the primary legal materials.[43])

One problem with this methodology is that Dworkin is ambiguous on the question of whether the "precedents" from which the justifying principles are to be constructed are just the decisions of courts in particular factual settings or whether they also include the rules those courts have promulgated. It is possible to read Dworkin as accepting the rule model of precedent and as principally describing what courts should do in cases that are not covered by the rules. Some evidence for this reading is provided by Dworkin's distinction between a precedent's gravitational force and its enactment force, with precedents that are "mistakes" under the constrained principles having only the latter force.[44] Enactment force looks like it refers to the explicit rule of the case. On this reading, Dworkin is dealing with the constraint decisions in cases impose in situations that their rules do not explicitly cover.

There is another way of reading Dworkin, however, on which the force of any precedent is dependent upon the principles that support it, whether that force operates to narrow the explicit rule of the precedent or to extend the scope of the precedent beyond the ambit of the explicit rule. On this reading, the distinction between a precedent's gravitational force and its enactment force collapses. This reading is more consistent with Dworkin's insistence that courts do not legislate but merely decide cases on the basis of either preexisting rules or principles, because if

43. Dworkin's approach to adjudication is set forth in the books cited *supra* note 39. *See also* Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHIL. 419, 420-21 (1987) (surveying Dworkin's theory of legal doctrine).

44. *See* R. DWORKIN, RIGHTS, *supra* note 39, at 110-15.

courts could "enact" rules for future cases, those rules would either be based on policy considerations, which Dworkin rejects for courts, or on principles that would be paramount to and render superfluous any judicial enactments based upon them.

I am going to take the liberty of reading Dworkin in a way that allows a constrained court to narrow the rules enacted by precedent courts. Because many of my criticisms of the pure result model also cover the alternative reading of Dworkin—the rule model coupled with precedent-generated gravitational force for cases ungoverned by rules—it is not crucial that I have correctly interpreted his doctrine of precedent.

Dworkin's theory of adjudication, in which a precedent case is a datum that the constrained court must "justify" by constructing as attractive a political/moral theory as it can, draws much of its appeal with legal scholars from its theoretical account of, and justification for, a popular form of doctrinal analysis. The popularity of this methodology can be seen in the law reviews, which are full of articles that examine a line of cases, the opinions in which are unsatisfactory, and that construct a moral theory that reconciles all or almost all of the cases. The theory need not be, and frequently is not, expressed in any of the opinions and may even be opposed to the theories that are expressed in the cases. Moreover, the theory need not be, and frequently is not, one that the author regards as morally ideal.

It is plain that this type of doctrinal analysis is Dworkinian in nature and explains why Dworkin's jurisprudential views resonate as strongly as they do with lawyers and legal academics. This form of doctrinal analysis is, therefore, another way of describing the methodology of the pure result model of precedent. Thus, my criticism of Dworkin's formulation of the model is equally applicable to it.

3. *Third Formulation: The Precedent Court's Reasons, Not Its Rules, Control*

Another way to describe the pure result model of precedent is in terms of constraint by the precedent court's reasons for its decision rather than its rule. There are various denotations of the precedent court's "reasons." First, the precedent court's "reasons" might refer to some sort of algorithm endorsed by the precedent court that generates subsidiary rules and that itself can be canonically stated and applied as a rule. "Reasons" thus refer to a meta-rule to which the precedent court adheres. This meaning of constraint by the precedent court's "reasons"

is a particular form of the rule model, one distinguished from other forms by its means of identifying the "rule" of the precedent case.

Second, the precedent court's "reasons" might refer to a set of principles that it believes supports its decision (and rule) in the precedent case but that cannot be stated algorithmically. The precedent court obviously believes its principles are consistent with correct political/moral theory; thus, it believes that there is no conflict between its more basic and less basic principles. The constrained court, therefore, believing the precedent court to have misapplied or misgauged the principles of correct political morality, and thus the precedent case to have been wrongly decided, would have no reason not to decide its case as *it* deemed correct, because the principles of correct political morality that *it* would invoke to support the correctness of its decision would be principles it could also attribute to the precedent court at the highest level of generality. The "reasons" of the precedent court, like the "reasons" of the constrained court, would be correct reasons (as necessarily interpreted from the point of view of the constrained court).

Put differently, because both the precedent court and the constrained court are trying to decide as truly correct reasons dictate, there is no inconsistency between the precedent court's "reasons," which were just erroneously applied, and the constrained court's reasons. There is no logical stopping place between the incorrect precedent decision (and rule) and the level of generality at which the constrained court and precedent court agree. On this interpretation of "reasons" we get the natural model of precedent, where the constrained court just does what is right from its point of view.

Third, the precedent court's "reasons" might refer, not to meta-rules, and not to correct principles that are applied incorrectly, but to that set of reasons—principles and their weights—that best justifies the (unjustifiable) decision of the precedent court. "Reasons" on this interpretation are, thus, not capable of rule-like application, nor are they as unconstraining of the constrained court (because nondissonant) as the correct reasons of the natural model of precedent. They constrain, though not like rules.

4. *The Equivalence of the Three Formulations*

I now want to show that the three formulations of the pure result model of precedent are in fact equivalent. It is obvious that the second and third formulations are equivalent, because the third formulation—the "reasons" of the precedent court—either translates as the natural

model or rule model of precedent, in which case it is not the formulation of a new model, or else it translates as those principles that best justify the precedent decision, the latter simply being the second formulation of the pure result model.

It is more difficult to see the equivalence of the first formulation—the a fortiori case formulation—and the second and third formulations. I shall argue that while the a fortiori case formulation can be construed as different from the Dworkinian (second and third) formulations, it runs into deep problems that the alternative, Dworkinian, construal avoids. It will be easier to show how the a fortiori case version relates to the "best justification" version if we examine the problems with the entire pure result model.

B. Problems with the Pure Result Model of Precedent

1. *Incorrect Weighings and A Fortiori Cases*

The first problem with the pure result model is how to determine whether the constrained case is an a fortiori case for the result in the precedent case. By the hypothesis we are using to compare the models, the constrained court believes that by taking into account correct political/moral principles, including the correct natural weight of the precedent decision, the constrained case should be decided differently from the precedent case (which should have been decided differently itself). The issue is how a case that on its merits ought to be decided one way can be an a fortiori case for the opposite decision?

The most tempting answer is as follows: Assume the precedent case was composed of facts A, B, and C on the plaintiff's side and facts X, Y, and Z on the defendant's side. A, B, and C, correctly weighed, outweigh X, Y, and Z. Therefore, the precedent case should have been decided for the plaintiff. It was, however, mistakenly decided for the defendant. In the constrained case there are again facts A, B, and C for the plaintiff. For the defendant, however, there are facts W, Y, and Z, plus fact N, the natural weight of the precedent decision (reliance and perhaps equality). If fact W is a stronger reason for defendant than fact X, then facts A, B, and C might still outweigh facts W, Y, Z, and N, but by less than they outweighed X, Y, and Z alone. Because the balance tips in favor of plaintiff by less in the constrained case than in the precedent case, the constrained case is an a fortiori case for the defendant.

The major difficulty with this methodology for determining if a constrained case is an a fortiori case is that it requires a single metric on

which the facts of two cases can be compared and weighed. In other words, the methodology must assume a single master principle that assigns weights in a common currency to various facts. Actual moral reasoning, however, is much more complex than this metaphor depicts. Facts that help the plaintiff or the defendant might represent distinct principles or policies that a decision for a particular party will further. A decision in the constrained case that parallels the decision in the precedent case may further some principles or policies to a greater extent than in the precedent case and others to a lesser extent. Under such circumstances, therefore, what is an a fortiori case?

The choice that is presented here is stark. If we assume that there *is* a master principle, a common metric for weighing values, such as utility, equal welfare, etc., then the pure result model on the first (a fortiori) formulation tells the constrained court something like this: If there is a precedent case where the balance was in favor of the plaintiff by, say, ten utiles, but the precedent court decided for the defendant, then in *all* cases where the balance of utility comes out in favor of plaintiff by ten or fewer utiles, decide for the defendant, *no matter how unrelated the cases might seem at first blush.* If there is but one metric, then a torts case can be a precedent for contract or agency cases that bear no resemblance to it at all. Thus, the determination of whether a case is a fortiori given another case is nothing more than comparing, on that single metric, the balance in the two cases in favor of the plaintiff or defendant.[45]

A further difficulty with the a fortiori constraint given a single metric of value is that there will undoubtedly be cases that are correctly decided according to this metric as well as cases that are incorrectly decided. *If this is so, then every constrained case will be constrained in opposite and irreconcilable directions.* If there is a case where the balance

45. One cannot escape this far-reaching consequence of the single metric view by arguing that there may be positive value (according to our metric) in keeping classes of cases distinct, even if they are otherwise commensurable on that metric. That may be true, but the a fortiori formulation of the pure result model of precedent already contemplates, and indeed demands, that the constrained court knowingly decide in a way that sacrifices value as long as the sacrifice is no greater than in the precedent case. If we wanted to maximize value according to our metric, why require that the constrained court sacrifice value at all?

This response to the value of distinguishing cases applies as well to the value of rules that distinguish classes of cases. In moving from the rule model of precedent to the result model, we have dispensed with constraint by rules and the utility of that constraint. The a fortiori formulation of the result model cannot reintroduce a concern with the utility of rules, even rules defining classes of cases, because it directs courts to sacrifice utility up to the level of sacrifice in the precedent case. To state this point differently, we must distinguish between the disutility of a particular decision and the disutility of following a particular method, here, the method of the pure result model of precedent. That method cannot take into account its own disutility without collapsing as a method.

of utilities favoring plaintiff is one utile, and the plaintiff won, that case will be an a fortiori case for the constrained case we have been imagining, where the balance of utilities favors plaintiff by ten. But so was the precedent case, where plaintiff was similarly favored but where the defendant won.

This point can be illustrated by reference to those numerous "criminal" cases where the Supreme Court held that one suspected of a crime *may not* be induced to make self-incriminating statements through threat of a civil sanction, such as loss of employment, attached to remaining silent,[46] and those also numerous "administrative" cases where the Supreme Court held that one *may* be compelled through threat of sanction, including criminal sanction, to file reports and statements even if self-incriminating.[47] The "criminal" cases make the "administrative" cases a fortiori cases in favor of the defendants. The "administrative" cases make the "criminal" cases a fortiori cases in favor of the state. The rule model of precedent could keep the cases from clashing through the device of simply limiting the rules governing the two sets of cases. The pure result model of precedent, however, does not respect rules announced in cases; it only acknowledges results.

Moreover, an incorrect decision on the pure result model of precedent throws everything out of kilter. If the precedent court incorrectly decided that facts A, B, and C outweigh facts X, Y, and Z, then consider the case of facts D, E, and F versus facts U, V, and W. If the latter outweigh the former, the court may still be constrained to hold otherwise if facts D, E, and F outweigh facts A, B, and C, and facts X, Y, and Z outweigh facts U, V, and W.

If we have a common metric for weighing facts and comparing cases across the entire corpus juris, then an incorrect result under the result model is like a piece of a jigsaw puzzle that is misshaped. If the other pieces must be conformed to it, they will not fit with each other. No matter how one makes adjustments, the puzzle cannot be pieced together coherently.

Alternatively, if there are multiple principles that cannot be reduced to a common metric, how do we determine whether an incorrectly decided case controls a factually distinct case in the sense that the latter is an a fortiori case given the former? If only a single principle is involved in both cases, or if one principle is lexically prior to the others, we are

46. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967).
47. *See, e.g.*, California v. Byers, 402 U.S. 424, 427-34 (1971).

back to the preceding explanation: any case that damages that principle less than the precedent case did is an a fortiori case, regardless of the subject matter. But if the principles at stake are multiple and are not lexically ordered or reducible to a common master principle, determining whether the constrained case is an a fortiori case is impossible. (The only exception would be if the constrained case is an a fortiori case under every principle.) The one thing we do know is that the constrained court does not decide its case correctly merely because it applies this complex set of principles correctly.

2. *The "Best Justification" Version and the Problem of Incorrect Principles*

It is here that Dworkin's approach, the second and third formulations of the pure result model, solves the puzzle of the a fortiori case. We have been struggling with the a fortiori case because we have been operating with that principle or set of principles that we think is correct. We have been trying to measure the strength of an incorrect decision under a correct set of principles, which strength must be greater than its natural strength to fit the model we are exploring. But because an incorrect precedent can be given a weight on correct principles greater than the weight it in fact has on those principles, we are getting nowhere.

The problem can be illustrated from a slightly different perspective. The pure result model requires that incorrect decisions be extended to (as well as limited to) their logical limits. But their extension will run up against the extensions of other decisions, both correct ones and incorrect ones. Moreover, the conflict of precedents will not be an occasional result. Each decision can be viewed as implying a complete moral calculus, one that entails answers to all future cases. Thus, any two decisions, if not based on correct application of the same political/moral theory, are in actual conflict. Put differently, the notions of what is a morally a fortiori case and what is a morally distinguishable case are theory dependent. Two decisions embodying two different theories will produce irreconcilable conflicts, even if the decisions appear to apply only in quite separate domains. Once we dispense with rules and the opinions in which they are contained and look only to results, the law really does become not only a seamless web but an unmappable one as well.

Dworkin solves these problems of the a fortiori case by jettisoning the correct political/moral principles and replacing them with principles that are not necessarily correct but that do best explain the existing

precedents. Dworkin's formulation of the method of the pure result model of precedent has the constrained court applying, not the principles of correct political morality and their correct weights, but the principles and weights of a political morality that is constructed from results reached by precedent courts. As we saw in the previous section, trying to allow an incorrect weighing to constrain other weighings in a moral universe governed by correct principles and their correct weights leads to indeterminacy or incoherence. Dworkin's alternative is to reformulate the governing principles and weights, adjusting them to the results with which they must cohere.

The first problem that confronts Dworkin is underdetermination.[48] Dworkin is asking us to imagine a possible moral world that is like ours except that certain results that are wrong in our world are correct in this possible world. If the precedent court has, for instance, held that facts A, B, and C outweigh facts X, Y, and Z, and the constrained court believes that correct application of correct political/moral principles leads to the opposite conclusion, its task, per Dworkin, is to imagine the possible world and its associated political/moral principles in which A, B, and C really do outweigh X, Y, and Z. The principles of *that* world then dictate the results the constrained court should reach.

The problem, however, is that there is an indefinite number of possible worlds and possible sets of principles that can "justify" the results in the precedent cases, assuming that we can really imagine these possible worlds and possible incorrect sets of principles. Once we are freed from the constraint of correct political/moral principles, our construction of alternative sets is unguided and unconstrained. Any given set of data, no matter how large, always underdetermines the theory constructed to explain it; likewise, any set of case results, no matter how large, will underdetermine the political/moral principles that would justify that set.

Dworkin, perhaps in recognition of this point, adds an additional constraint in the construction of the constrained court's principles to the constraint that those principles justify the results in the precedent cases (the constraint of "fit"). This additional constraint is that the set of principles constructed be the "best" or "most acceptable" set from among those sets that fit the results.

While this additional constraint on the construction of justificatory principles and their weights removes the bogey of indeterminacy, it does

48. The following discussion is a shortened version of that found in Alexander, *supra* note 43, at 426-34.

so at the cost of plunging Dworkin's enterprise into incoherence. For what is the meaning of "best" or "most acceptable" here? Their meaning must be dependent upon some normative theory, but what is it? It cannot be the political/moral theory to be constructed from the precedents, for then each theory would judge itself "best" or "most acceptable," and we would not have constrained our choice from among the indefinite number of such theories that can be constructed from the same data.

On the other hand, if the meaning of "best" or "most acceptable" is derived from correct political/moral theory (from the constrained court's point of view), the question for the constrained court becomes: "Which incorrect political/moral theory is 'best' from the point of view of correct political/moral theory?" But no political/moral theory can answer such a question because the question is so bizarre. A political/moral theory will perhaps determine for us a scale on which to rank and compare evils. But evils just remain evils, decisions that should not have been taken according to correct political/moral theory. Evil results are not translatable into more or less pernicious political/moral principles, *which are then to be substituted for correct political/moral principles and extended into new decisions.*[49] I deny that we could ever devise a set of principles that was the "best incorrect set" that would ever prescribe a result different from the result the correct set would prescribe taking incorrect results into account—that is, the result we would reach under the natural model of precedent. No political/moral theory will ever dictate its own abandonment in favor of another political/moral theory that is erroneous (from the former's perspective).[50]

Dworkin believes that the value of Integrity supports his approach to precedent in that the parties in the precedent case and in the constrained case will all be treated according to the same set of political/moral principles, though not the correct set. Integrity, for Dworkin, is a particular conception of the value of equality, one that requires that everyone be treated by government in accordance with the same set of principles, even if that set of principles is constructed from past and contemporary instances of governmental treatment of which none were

49. I doubt it is possible for a court sensitively to weigh and apply principles that it believes are mistaken. The reader might consider how sensitively to weigh and apply Nazi principles or the principles that best "justify" apartheid.

50. That is not to say, however, that a political/moral theory will not prescribe the adoption of rules that operate opaquely with respect to the theory and that will in some cases produce results different from those warranted by direct application of the theory. In other words, a political/moral theory may best be furthered by indirect means. *See* Alexander, *supra* note 3; Wonnell, *supra* note 3.

intentional invocations of that set of principles. Given instances of governmental treatment that cannot be justified by correct political/moral principles, equality as Integrity requires that we construct the "best" incorrect set of political/moral principles that cover and, hence, "justify" those instances. Because we will then have treated everyone in accordance with the same set of principles, we will have treated them "equally."

A correct account of equality, however, cannot be detached from a correct account of political morality in general. It makes no sense to further one correct principle of political morality in adjudication and disregard the others with which it is linked. Moreover, even if equality (of something) is the supreme value from which all others are derived, and furthering that conception of equality *is* acting in accordance with correct political/moral principles, it cannot have the kind of intertemporal implications that Dworkin requires. For if that conception of equality is the only value a court need consider, and if the precedent case was *wrongly* decided, then it must be because the decision offended that correct conception of equality. If the precedent is to operate on the constrained court in the way Dworkin envisions, it will do so because the correct conception of equality dictates extension of an incorrect conception of equality. But that conclusion is nonsense.

Dworkin's version of the pure result model also generates peculiarities with respect to the overruling of precedents. Under the natural model of precedent, there is really nothing for a constrained court to overrule: there is only the ineluctable historical record of what the precedent court did and its equally ineluctable present effects in the world. The rule model dictates that overruling is the express repudiation of a precedent rule or the promulgation of a rule inconsistent with the precedent rule in whole or in part. Under Dworkin's theory, however, a decision that is inconsistent with the political/moral principles generated by all of the preceding cases overrules the principles but not the cases. It becomes a datum for the construction of a new set of principles. Thus, precedents cannot themselves be overruled for the same reason that there is no overruling of precedents under the natural model, namely, the ineluctability of the historical facts. (Indeed, as I argue elsewhere, a Dworkinian court logically should look at repealed statutes and constitutional provisions as well as presently operative ones in constructing the set of political/moral principles to use in adjudication.[51]) But although

51. *See* Alexander, *supra* note 43, at 422. Briefly, the argument is this: If courts could overrule precedents and then ignore them, and if courts could ignore repealed statutes or constitutional provisions, Integrity would operate only intratemporally, not intertemporally. But the vice of

precedents cannot be overruled, the legal rights of people arising from particular transactions are being changed retroactively by the subsequent changes in the set of political/moral principles that is to govern those transactions.[52]

To sum up this discussion, Dworkin does not want the constrained court to be constrained by either the precedent court's rule (as under the rule model of precedent) or by correct political/moral principles (as under the natural model of precedent). Rather, he wants the constrained court to consult correct political/moral principles in order to determine which set of incorrect political/moral principles among those that would "justify" the incorrect precedents is the "best" set, and then to jettison correct political/moral principles in favor of applying this best incorrect set in future cases. Dworkin's enterprise has neither the virtues of moral correctness nor the rule-of-law virtues of rule-following. If it is coherent at all, which I deny, it is so normatively unattractive that it cannot be a tenable option for a model of precedential constraint.

(I should point out parenthetically that perhaps the most powerful aspect of Dworkin's theory of adjudication is how well it seems to resonate with—and indeed seems to be a more sophisticated rendition of—a very common version of precedential constraint, which I call the "inducing a covering rule" formulation of the pure result model of precedent. In brief, on this formulation, the precedent cases are viewed as a collection of particulars, and the constrained court must decide its case under a general rule, the consistent application of which would explain the pattern of precedent decisions. In other words, a general rule is induced from the collection of precedent cases and then applied in the constrained case.

Because an indefinite number of such general rules can be induced from any set of precedent cases, no matter how large the set, this version faces the following dilemma. If the constrained court wishes to decide as it deems correct—pursue the method of the natural model—it need only formulate the rule it has induced as the correct rule, but with exceptions for any cases identical to those precedent cases that came out the wrong

unprincipled action that Dworkin represents through his hypothetical checkerboard statutes is one that can only occur over time, not instantaneously. Although all the parts of the checkerboard statute may exist at the same time, they apply to people—and thus produce their checkerboard effect—only over time. Thus, a concern with Integrity must necessarily be a concern with intertemporal treatment. Precedents, statutes, and constitutional provisions that had past effects on people cannot be ignored in the present even if formally overruled or repealed.

52. *See* Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 398-402 (1984).

way according to the correct rule. Because no future case will be identical to past cases, the exceptions will not constrain. To build in constraint on this version—and here is the other horn of the dilemma—the rule induced must be one that "justifies" the precedent decisions. However, because some of the precedent decisions were not really justified from the constrained court's point of view, the constrained court must ask itself the counterfactual: "If the precedent decisions were justifiable, what covering rule would justify them?" Because this is essentially the same incoherent question Dworkin's theory has the constrained court ask, I do not treat the "inducing a covering rule from particular cases" version as a distinct formulation of the pure result model of precedent.[53])

3. *The Problem of Access to the Facts of the Precedent Case*

A further problem with the pure result model is that it requires the constrained court to have access to those facts of the precedent case that bear on the constrained court's assessment of whether its case is or is not an a fortiori case given the precedent. The precedent court might be quite obliging and recite volumes of facts in its opinion regardless of *its* view of their relevance. On the other hand, the precedent court may believe that its case and future cases should be governed by a very broad rule, which in turn may lead it to recite only those facts pertinent to the rule and only at the level of generality at which the rule operates. For example, it may reveal only that defendant is a promisor and plaintiff a promisee if it believes that the appropriate rule is that all promises should be legally enforced.

The problem raised by a spare recitation of facts characterized at a high level of generality is that it seriously impedes the constrained court's determination of whether the constrained case is an a fortiori case or is instead distinguishable on its facts from the precedent case. If all the constrained court knows about the precedent case is that the plaintiff was a promisee, the defendant was a promisor, and the plaintiff won, then if it believes its plaintiff-promisor should not win (in the absence of the precedent case), it will be unable to determine whether its case is factually

53. Both inducing a covering rule to "justify" unjustifiable precedent decisions and narrowing stated rules so that they do not cover the constrained case but still "justify" the unjustifiable precedents, *see supra* text accompanying note 28, run afoul of the same problem of "justifying" the unjustifiable. No rule that purports to justify a precedent that the constrained court believes was wrongly decided will be a justifiable rule. Thus, no such induced or narrowed rule will be any more justifiable than a rule that covers only the precedent cases and hence does not constrain at all! For an example of a recent discussion of precedent that assumes the contrary, see Kress, *supra* note 25, at 298-301.

different from the precedent case in a way that supports the defendant (that is, that it is not an a fortiori case for the plaintiff).

If this lack of access to the facts of the precedent case causes the constrained court to follow the precedent decision and to decide, contrary to its natural model judgment, for the party analog to who won in the precedent case, the pure result model of precedent all but collapses into the rule model. At least it does so if the precedent court is clever and reveals only that the facts picked out by its rule obtain. In other words, the advantage that the pure result model purports to have over the rule model—the absence of judicial legislation—is quite fragile and easily defeated by a clever court.

Joseph Raz, in response to this problem, argues that the constrained court should be free to assume that any fact not mentioned by the precedent court was not present in the precedent case.[54] Thus, if (1) the precedent court reveals facts A, B, and C and announces as its rule, "A, B, then X"; and (2) the constrained case has facts A, B, C, and D, D being a fact that supports non-X; then (3) the constrained court may assume that D did not exist in the precedent case and, under the pure result model of precedent, decide for non-X (assuming it favors non-X on the natural model).

Raz's solution to the problem of access to facts saves the pure result model from collapsing into the rule model. It does so, however, at the price of collapsing it into the natural model. This is so because if *anything* in the constrained case points to an opposite decision—and there always will be in the cases we are considering, the cases where the precedent decision is viewed as incorrect by the constrained court—then, unless that fact also clearly exists in the precedent case, the precedent case will not constrain beyond its natural model strength. Suppose that the precedent case involved snail remains in a bottle of ginger beer,[55] as revealed in the precedent opinion, and the constrained case involves particularly ugly snail remains in a bottle of high priced ginger beer. If the precedent court decided for the defendant, and the constrained court wishes to decide for the plaintiff, on Raz's argument the constrained court need only assume that the facts "ugly" and "high priced" did not exist in the precedent case because the precedent opinion did not mention them. Moreover, the constrained court does not need to find the ugliness of the snail remains or the price of the ginger beer relevant under the rule

54. J. RAZ, *supra* note 29, at 187.

55. *Cf.* Donoghue v. Stevenson, [1932] App. Cas. 562 (deciding for plaintiff with same facts of snail remains in a bottle of ginger beer).

it would favor.[56] Rather, it need only find that these facts point more strongly toward a decision for plaintiff.

Thus, the pure result model is, because of lack of direct access to the facts of the precedent case, threatened with collapse into either the rule model or the natural model. Neither of these models, however, are hampered by the problem of the precedent court's characterization of the facts of the precedent case. The rule model clearly is not; the natural model merely asks the constrained court to do the best it can with whatever facts it has. On the natural model, limitations on the constrained court's knowledge about the facts of the precedent case are no more significant than other limitations on its information about the world, limitations that are the hallmark of the human condition generally.

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The pure result model in all its formulations, to the extent it avoids collapse into and differentiates itself from the natural model and the rule model, faces either indeterminacy or incoherence. This is not surprising because the normative enterprise it describes, having neither the virtue of moral correctness nor the virtues of rule-following, lacks any normative appeal whatsoever.

C. THE IMPURE RESULT MODEL OF PRECEDENT: A RULE/RESULT HYBRID AND ONE-WAY RATCHET

The impure result model is a hybrid of the rule model and the pure result model. It is another model of constraint by erroneous precedent. On this model, the rule announced in the precedent case acts as a limit on the precedent court's constraint; the constrained court need not extend the result of the precedent case to a fortiori cases that are not covered by the rule of the precedent case (as it must on the pure result model). On the other hand, the precedent rule can be narrowed in the constrained case if the latter is not an a fortiori case for the same result as in the precedent case; within the ambit of the precedent rule, only the precedent result, not the rule itself, constrains.

The impure result model avoids the pure result model's problem of extending incorrect results so that they are perpetually in conflict with other incorrect and correct results, a conflict avoidable only by the construction of a complete but incorrect political/moral theory. If the

56. Otherwise, a rule that selected the criteria that it should select but then dictated the opposite result from what it should would be more constraining than a less perverse rule.

notion is coherent that a case can be an a fortiori case for result X even though both it and its precedent case should really have result Y, then the impure result model may be capable of application. (The governing assumptions for both result models are that the precedent rule can be treated as erroneous but the precedent result must be treated as correct, though only within the limits of the rule on the impure model. The question for the constrained court on both models is, given these assumptions, are the constrained and precedent cases distinguishable?) Nonetheless, the impure result model is extremely curious, even bizarre. The main question is why should rules count as marking the outer limits of constraint of an incorrect precedent but not count as rules within those limits.

Not only does the impure result model face the problem of all hybrids—lack of a principled rationale—but it shares with the pure model several unattractive features. First, unlike the natural model of precedent, it requires the constrained court to decide some cases contrary to the way it believes those cases ought to be decided. Second, unlike the rule model, it does not offer the predictability and stability that decisions based on rules provide. Thus, it has the virtues of neither of the non-result models and the vices of both. Moreover, like its purer cousin, it also faces the "access to the facts of the precedent case" problem. All in all, it is an ugly model, conceptually and normatively. If it accurately describes our practice of precedential constraint, then changing that practice is surely in order.

D. THE CURIOUS ATTRACTION OF THE RESULT MODEL OF PRECEDENT

I hope that my attack on the result model of precedent in both its pure and impure versions will be universally assessed as, not only devastating, but fatal. But if I am correct about the seriousness of the result model's problems, what can account for its attraction among the commentators?[57] I have three hypotheses to offer that may explain this phenomenon.

57. The following are my reasons for placing various commentators either firmly or tentatively in the result model of precedent camp.

Edward Levi: Levi is an advocate of the view that rules in cases do not bind, but instead precedent cases are continually susceptible to reinterpretation under covering rules induced from them. This is clearly one formulation of the pure result model of precedent. *See* E. LEVI, *supra* note 35, at 1-27.

Steve Burton: Burton, in his discussion of analogical reasoning, like Levi, adopts the view that "the rule" of the precedent case is not fixed by the court in that case but is continually subject to

First, in cases where the precedent court reaches the correct result but promulgates an unfortunate rule, both the result model and the natural model prescribe the same course of action for the constrained court:

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reformulation in future cases. His position is, in all respects relevant to our topic, the same as Levi's. *See* S. BURTON, *supra* note 36, at 27-40, 59-64.

Brian Simpson: Simpson explicitly rejects the rule model of precedent and says that language in the precedent case that purports to be canonical need not be treated as such. Because he believes precedents constrain beyond the minimal force they have on the natural model, he can be read as endorsing the result model. *See* Simpson, *Common Law*, *supra* note 37, at 87-88; Simpson, *Precedent*, *supra* note 37, at 164-75.

Joseph Raz: Raz believes that the rule stated in the precedent case can be narrowed by the constrained court and that such narrowing differs from overruling. Narrowing and (partial) overruling are synonymous on the rule model of precedent, so it appears that Raz rejects that model. In cases where the precedent case was correctly decided, the natural model of precedent and the result model of precedent give the constrained court the same latitude to reformulate and improve the rule of the precedent case. In the cases pertinent to our inquiry—cases the constrained court believes were decided incorrectly by the precedent court—both the natural model and the result model allow the constrained court to modify the precedent rule. However, the result model imposes the a fortiori constraint while the natural model does not. Raz says that the modified rule must "justify" the precedent decision aud must "improve" the precedent rule. J. RAZ, *supra* note 29, at 185-86. That could be read as a natural model injunction, in which case it translates into the correct rule plus an exception for all cases (of which there will be none in the future) absolutely identical to the precedent case. However, that is a very strained reading of Raz because Raz later says that the modified rule must have the same essential rationale as the precedent rule. *Id.* at 189. This only fits the natural model at the highest level of generality, where the essential rationale of all rules is to do what is right and good. (Raz can also be read as endorsing a version of the rule model if the real rule, the one that cannot be modified by the constrained court, is the "essential rationale" stated in canonical, rule-like form. Again, this is a very strained reading.) The most straightforward reading of what Raz says about modifying precedent is the Dworkinian one: one "justifies" an incorrect precedent by constructing a set of principles with which it and other principles cohere. This is, therefore, one formulation of the result model of precedent. Nonetheless, I place Raz in this camp rather tentatively since he is in all other arcas very critical of Dworkin's approach to adjudication.

Fred Schauer: I hesitate to place Fred Schauer with the proponents of the result model of precedent because most of his focus is on the precedent court's formulation of rules and on the virtues of constraint by rules. Indeed, this latter focus would seem to indicate that Sehauer would endorse the rule model of precedent. Yet Schauer argues that precedents can be distinguished without being overruled, which is not possible under the rule model. *See* Schauer, *supra* note 2, at 579-82, 593-95.

Michael Moore: In Section II, *see supra* text accompanying notes 5-7, Michael Moore was characterized as a proponent of the natural model of precedent. Yet Moore can also at times sound like Dworkin. For example, he states, citing Dworkin: "We know how to justify . . . truths of the common law. We take . . . all . . . legal decisions in our jurisdiction . . . and construct the most coherent theory that we can think of that has those decisions as its deductive implications." Moore, *supra* note 5, at 201 (citations omitted).

Treating incorrect precedents as if they were correctly decided is the hallmark of the result model of precedent, not the natural model, where incorrect decisions are taken into account but not "justified." Unless Moore is dealing only with correctly decided precedents, where the natural and result models have the same implications, the quoted passage is a recipe for the result model.

Others: There are a large number of legal theorists who reject the rule model of precedent in that they do not view the constrained court as bound to apply the precedent rule as stated, but who also view precedential constraint as stronger than it would be on the natural model. For example, Felix Cohen argues for precedential constraint that is stronger than *logical* consistency (which is no

ignore the precedent court's rule and do what is right. Because the precedent court reached the correct result, there is nothing in the precedent case to stand in the way of the constrained court's doing justice in its case once the precedent court's rule is jettisoned. *If commentators focus only on precedents that reached correct results, they will not see any difference between the result model and the natural model.* Seeing no difference, they will be deceived about the efficacy of the result model because of the coherence of the natural model.[58]

Second, commentators may be attracted to the view that courts do not "legislate," and they may fail to notice that on any model of precedent stronger than the natural model—which may be tantamount to saying on any model of precedent rightly so called—the precedent court perforce legislates (makes law) for future courts. As the result model may appear to sanction a weaker form of judicial legislation than the rule model, it may, therefore, appear attractive to commentators. But appearances are deceiving. In reality, the result model's form of judicial legislation is, in its own way, just as strong as the rule model's. Moreover, it has none of the redeeming virtues of the latter.

Third, many precedents contain no clear articulation of a canonical rule. Under the rule model, the constrained courts in such situations may follow a convention that identifies the rule of such precedents as the narrowest rule that can reasonably be intended by the precedent court in light of what it said in its opinion. (The narrowest rule that can reasonably be intended does not mean, of course, a rule that is actually justifiable. If it did, we would be outside the rule model of precedent, where rules constrain because they are the precedent court's rules and not because they are justifiable. Moreover, justifiable rules cannot be inferred from those precedents that are incorrectly decided.)

This method of finding the precedent court's rule might appear to some commentators to sanction the constrained court's narrowing the precedent court's rule and, thus, to be inconsistent with the rule model. Thinking that precedent must be stronger than the natural model would

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constraint at all), a concept he calls "ethical consistency." F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 33-37 (1933). "[A]ssuming that the decision in the earlier case was a desirable one, is it desirable to attach legal weight to any of the factual differences between the instant case and the earlier case?" *Id.* at 37. This, again, is similar to Dworkin's formulation of the result model of precedent.

Likewise, R.W.M. Dias argues for limiting precedent decisions to their facts as long as they are "reasonably" distinguishable from the constrained case. R. DIAS, JURISPRUDENCE 145-46 (5th ed. 1985).

58. This may explain Moore's apparent endorsement of the result model. *See supra* note 57.

have it, and construing the method in question as inconsistent with the rule model, the commentators might be drawn to the result model by default. But, of course, the method is *not* inconsistent with the rule model. To the contrary, it is a method for finding the rule of those precedent cases in which the opinions do not contain readily identifiable rules.

In the end, I do not know why the commentators have been attracted to the result model. I offer these three hypotheses merely as possibilities. Whatever the explanation for its attraction, the result model in both its pure and impure versions surely must be rejected. Because of its internal incoherence, it cannot be the model courts in fact employ. Even if it were not internally incoherent, however, it is so normatively unattractive that it could not be recommended as the model for courts to adopt.

V. THE NATURAL AND RULE MODELS OF PRECEDENT REVISITED

I have shown that the result model of precedent in both its pure and impure versions lacks both internal coherence and normative appeal. That leaves the natural and rule models as the only possible models for an attractive method of precedential constraint.

I now return to an earlier suggestion and argue that the natural model and the rule model might complement each other in the sense that the former might endorse the latter. Here is how the argument goes.

The natural model recognizes the value of bright line rules and the propriety of courts' deciding cases as if the ideal bright line rules had been judicially promulgated. What the natural model denies and the rule model affirms, however, is that the precedent court can bind the constrained court to the rule the precedent court believes is ideal as opposed to the rule the constrained court believes is ideal.[59]

The problem the natural model of precedent faces with its injunction to "get it right" is that such an injunction may create, through unpredictability and uncertainty, more disvalue (under correct political/moral principles) than the injunction "follow the precedent rules even if they are incorrect." That is so even though the natural model instructs

59. Of course, even on the natural model, the announcement of a rule in the precedent case may be constraining, not because the rule is binding per se, but because of reliance. Still, reliance may not outweigh other reasons for departing from the precedent court's rule in the constrained case and is even less likely to outweigh reasons for announcing a new prospective rule (though it could).

the constrained court, in its attempt to "get it right," to consider the unpredictability and instability its decisions will cause.

The point is the familiar one about how direct pursuit of political/moral values may achieve less in terms of those values than the indirect pursuit of those same values, that is, pursuit through norms, such as general rules, that are to be followed without reference to those values.[60] The point is highly paradoxical; yet I believe it accurately describes the normative universe we inhabit. For various reasons, primarily those concerned with the informational and motivational limitations human decisionmakers face, adherence to rules even when the rules dictate incorrect results—as they inevitably will in some cases—may achieve more value and thus be more "correct" than deciding each individual case "correctly."[61]

While the natural model of precedent recognizes the value of rules, it doesn't carry this insight far enough. The natural model admits that an ideal rule may produce results contrary to the results produced by (correct) direct application of the governing political/moral principles. In such cases, the constrained court should abide by the constraint of the ideal rule. What the natural model of precedent denies and the rule model affirms, however, is that the constrained court must also abide by nonideal rules announced in precedent decisions.

The relationship between an ideal rule and those applications of the rule that diverge from (correct) direct application of the governing political/moral principles is exactly parallel to the relationship between the (perhaps) ideal meta-rule—"follow the rules laid down in precedents"—and *its* nonideal applications (those instances where the precedent rules are nonideal). If the natural model of precedent envisions that constrained courts will decide cases according to ideal rules even where the decisions diverge from direct application of the governing political/moral principles, there is no reason for it to preclude the constrained courts from deciding cases according to an ideal meta-rule. If the ideal meta-

60. *See* Alexander, *supra* note 3; Wonnell, *supra* note 3.

61. This is a familiar theme in the literature on rules. *See* Alexander, *supra* note 3; Alexander, *supra* note 43, at 432-33; Schauer, *supra* note 31, at 538-44; Schauer, *supra* note 2, at 595-602; Wonnell, *supra* note 3; Schauer, *The Jurisprudence of Reasons* (Book Review), 85 MICH. L. REV. 847, 863-70 (1987) (reviewing R. DWORKIN, LAW'S EMPIRE). It has also been a favorite topic in the scholarship of members of the Critical Legal Studies movement, though they tend to regard rules less sympathetically than the other authors mentioned. *See, e.g.*, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976); Kennedy, *Legal Formality*, 1 J. LEGAL STUD. 351 (1973); *see also* Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (discussing problems with certainty and flexibility in rules versus standards).

rule is one that makes precedent rules binding even where the constrained court can do better in terms of the governing political/moral principles by departing from the precedent rule—and that paradoxical possibility is quite likely—then the natural model itself dictates the adoption of that ideal meta-rule by the constrained courts. In other words, once a proponent of the natural model, such as Moore, admits that courts may decide cases under optimal rules that will produce non-optimal results in some cases, he can have no principled objection to courts legislating for other courts if such a meta-rule is optimal. But this meta-rule constitutes the rule model of precedent.[62]

We can then see how this paradoxical relation between reasons and rules, between direct and indirect applications of the same political/moral principles, can lead to the natural model's endorsing the rival rule model. I believe that any set of political/moral principles that is a plausible candidate for the correct set will be best implemented indirectly. Moreover, I believe it very likely that the indirect strategy for implementing political/moral principles not only warrants binding rules that are legislatively-authored but also binding rules that are "legislated" by courts in the gaps left by legislation. Thus, I believe that the natural model of precedent, correctly applied, quite plausibly requires adoption of the rule model of precedent.

A natural model of precedent gives the precedent case no authority.[63] Rather, the precedent case generates some gravitational pull

62. Moore clearly concedes the legitimacy of courts deciding cases under rules. Moore, *supra* note 5, at 201-04. The core of his argument against the rule model is one of institutional inappropriateness:

> Courts deciding individual cases do not have the information before them (nor the means to get it) either to issue rules in the linguistically precise form of a statute or to give authoritative statements of policy objectives. They do not know precisely what the reach of a rule or goal should be when deciding cases. Attaching precedential weight to their statements of rules or reasons may thus put a burden on them that they are not equipped to meet.

Id. at 187. However, since all general rules are formulated with an eye toward their consequences, and therefore resemble statutes in that respect, Moore's "separation of powers" argument is too strong. It is, in fact, an argument against all common-law decisionmaking by courts, as distinct from decisionmaking under statutes and constitutional provisions. But, since Moore otherwise supports common-law decisionmaking and the employment of general rules in that process, his argument really boils down to one about the relative competence of the precedent and the constrained courts. There is reason to believe that we learn from experience, which is, at the extreme, an argument against any entrenchment of choices in rules. *See* Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 384-427; Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENTARY 69 (1989). However, the value of rules on the other side of the balance is quite considerable, a point that Moore himself recognizes and indeed must find compelling, given his support for general rules.

63. *See* J. RAZ, *supra* note 29, at 19-27.

toward an analogous decision because of the values of reliance and (controversially) equality. But the goods associated with the reliance value may be more realizable under a stronger model of precedent, one in which the precedent case has authority—that is, the rule model. Moreover, these reliance goods may outweigh the negative aspects of constraining courts to follow rules that they believe are wrong, even though the constrained courts are as wise as precedent courts and have the advantage of more experience, or so the argument runs.

This argument is probably correct if the rule model of precedent has a moderate but not absolute strength in the area of common-law decisionmaking that is our area of concern. Thus far, I have said nothing about the strength of precedential constraint under the rule model of precedent. On the natural model, the constraint of a precedent decision is equal to the strength of the reasons it generates in favor of a like decision. On the rule model, the strength of precedential constraint is the greater of either its strength on the natural model or the constraint of the meta-rule that defines the rule model. That meta-rule could be "always follow the precedent rule," in which case the constraint is absolute, or it could be "always follow the precedent rule, except under certain (specified) conditions," in which case the constraint is less than absolute. The limiting case, where the rule model disappears and is replaced by the natural model, is the meta-rule "always follow the precedent rule except when the reasons for *not* doing so outweigh the reasons *for* doing so."

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If precedential constraint is too weak—if the constrained court can overrule the precedent with little more reason than mere disagreement with it—the "ruleness" of the precedent is undermined and the model virtually collapses into the natural model. If precedential constraint is too strong and approaches absolute constraint, many bad rules (some of them *really* bad) will become entrenched over time. Only the legislature will be able to get rid of those precedents.[64] The optimal form of the rule model will most likely be one that gives the precedent rule absolute constraining power over lower courts and parties and, with respect to co-

64. Interestingly, legislation operates analogously to the natural model of precedent. That is, no legislative rule can be entrenched against future legislative repeal. *See* Eule, *supra* note 62, at 403-05. Nor can any judicial rule of nonconstitutional status be entrenched against repeal. Of course, promiscuous legislative repeals of legislative and judicial rules are limited to some extent by constitutional doctrines relating to ex post facto laws, takings of property, impairments of contracts, and vested rights. (Courts would be so limited even if they operated on the natural model and not under

equal courts, strong constraining power (beyond the constitutional constraints that exist) to limit overrulings that would apply retrospectively and weaker constraining power to limit prospective overrulings.[65]

There are a couple of final points that need to be addressed. First, I have criticized the result model of precedent in several places on grounds that might be construed as inconsistent with what I am claiming is true for the natural model, namely, that it leads to its own abandonment. For example, I pointed out in criticizing Dworkin that a correct political/moral theory would never endorse following an incorrect political/moral theory no matter how well the latter fit with past decisions.[66] I also pointed out that application of the result model could not take into account its own disvalue when it is not constrained by disvalue in particular cases.[67]

Here, however, I am not arguing that correct political morality, the natural model of precedent, be abandoned in favor of an incorrect political morality. The relation between the natural and rule models is one of direct versus indirect application of the same political morality. Nor is there any "indirect" version of the result model of precedent, for it is a model that eschews the pursuit of correct value altogether, whether directly or indirectly.

A second point that needs to be made is that the result model of precedent cannot be justified as an indirect method for implementing correct political/moral principles, one that is a plausible alternative to the rule model in this role. The result model, besides being internally incoherent, lacks the determinateness and predictability that are the *sine qua non* of indirect methods of implementing political/moral principles.[68]

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the stronger constraints of the rule model.) But the primary check on legislative upsets of reliance is undoubtedly inertia.

The question then is, why do we need courts to be constrained by a formal practice of following precedential rules when ultimately those rules can be repealed legislatively by a body not so constrained? In other words, if the natural model is appropriate for the legislature, why is it not also appropriate for courts, at least for those of co-equal status with the precedent court? The best answer may be that the courts are not as well-equipped in a variety of ways to legislate as are legislatures and that courts function best when they take one stab at promulgating a rule and then leave matters to the legislature. I believe that answer is probably correct.

65. Even prospective overrulings, like statutes that apply prospectively, have retrospective, reliance-upsetting effects. *See generally* Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) (discussing retroactivity and legal validity).

For an interesting discussion of the strength of precedential constraint, see Perry, *supra* note 3, at 963-90; Raz, *supra* note 3, at 1206-09.

66. *See supra* text accompanying notes 48-49.

67. *See supra* note 45.

68. *See* Alexander, *supra* note 43, at 434.

Because we have reasons for having a rule model of precedent, we have reasons for doing other than what the balance of reasons requires. We have reasons to have rules that preclude resort to reasons. This is surely paradoxical, but it is equally surely true. Even if the existence of rules adds to the balance of reasons in favor of doing what the rules require in all cases, there is still a gap between following the rules *qua* rules and acting on reasons, including the reasons for having rules. It is always possible that we have reasons to follow rules that produce results at odds with those reasons.

VI. CONCLUSION

In this Article I have discussed three models of precedential constraint. I have demonstrated that two of these, the natural and rule models, are tenable, and one, the result model, is not. Moreover, I have argued that if the value of rules is admitted even when they do not "get it right" in every application, there is no reason to deny the possibility that the rule model of precedent may be superior to the natural model on the latter's own terms.

Which of these models are we likely to discover when we examine the case law? Although some formulation of the result model is frequently asserted to capture how courts in fact view precedential constraint, the internal incoherence of the model leads me to believe that the courts cannot really be following it. Moreover, I think we will find the courts paying far more attention to the opinions in precedent cases than either the result model or the natural model would warrant and surely viewing themselves as more constrained than the latter model would suggest. While I suspect that the data would be messy, I imagine they would reveal that constrained courts of lower rank than the precedent courts follow a strong version of the rule model,[69] constrained courts of equal rank follow weaker versions of the rule model, and unconstrained courts—those of higher rank than the precedent court,[70] or those in

69. Lower courts surely follow some version of the rule model. They pay careful attention to the opinions of courts superior to them in the judicial hierarchy. Indeed, they frequently have nothing else from the higher courts but opinions, as when the higher court remands a case to the lower court for further proceedings not inconsistent with what the higher court has said. In these cases, there are only rules, not results, for the lower courts to follow. But even where there are "results" from higher court decisions and not just rules, imagine the chaos that would result if the lower courts felt free to disregard the higher courts' rules.

70. Because the constraint of precedent is not absolute for constrained courts of equal rank, the potential breadth of the precedent courts' rules is less of a problem than might be feared. Still, it is a problem, and the "solution" of weakening precedential constraint is really no solution at all, being, in essence, an anti-precedent tack. The real solution is for precedent courts to exercise restraint and

other jurisdictions—follow the natural model. (Much of the messiness in the data would be traceable to disagreements over what part of a precedent opinion contains the rule and how the rule is properly formulated; much would also be traceable to partial overrulings—amendments—by courts that are not absolutely constrained.) Finally, in cases not covered by precedent rules, all courts would follow the natural model, though in attempting to reach the correct decision and to promulgate the correct rule, they would take into account, as relatively fixed parts of the environment, not only the statutory and constitutional rules governing other areas of the law but also the judicial rules that do so.

Finally, the debate over models of precedential constraint tracks the more general debate over the nature of law. In *Law's Empire*, Dworkin gives the name "Pragmatist" to the natural law position that "the law" in adjudication is whatever is morally correct for courts to do, the name "Conventionalist" to the legal positivist position that "the law" is a set of formal rules or conventions, and the name "Integrity" to the middle-ground jurisprudential position that he proposes.[71] In criticizing Dworkin, I wrote the following:

> Now the Pragmatist will realize that in any community of more than a few people, it will be morally correct to establish conventions and institutions for deciding authoritatively what is morally correct. Those conventions and institutions, which are themselves decisions about what is morally correct, plus the more substantive decisions they produce regarding what is morally correct, make up the Conventionalist's "law." Thus, the Pragmatist's "law" (what it is best to do) leads inevitably to the Conventionalist's "law" (what we have already decided it is best to do in accordance with conventions and through institutional mechanisms that we have decided it is best to have). The Pragmatist, or as I would call her, the Sophisticated Natural Lawyer, may claim that the term "law" properly applies to her broad, practical question. The Conventionalist, or Legal Positivist, may claim that "law" properly applies only to her narrower question regarding the content of authoritative decisions. But this dispute is at bottom terminological, not substantive. The two positions can be viewed as complementary parts of one coherent moral enterprise.
>
> Although Pragmatism and Conventionalism are complementary parts of the same enterprise, there is a quite paradoxical relation between them. Although the Pragmatist, to do what is morally right,

to formulate rules rather narrowly. While the desirability of rules stems from the fact that every rule decides cases not before the court, one can still have much of the benefit of a regime of rules if the courts formulate the rules with caution and modesty.

71. *See* R. DWORKIN, EMPIRE, *supra* note 39, at 94.

> needs authoritative conventions—conventions that should be treated as binding—these conventions may produce answers that are not morally right. Morality requires us to make binding decisions, and those decisions can be morally wrong. I have explored this paradox elsewhere. What I wish to say here is that there is no middle ground within the paradoxical relation between Pragmatism and Conventionalism for Dworkin to occupy with Integrity. And Pragmatism/Conventionalism, unlike Integrity, is coherent and attractive. Its paradoxes are paradoxes born of features of reality, not unattractive, theory-discrediting blemishes.[72]

If one substitutes the natural model of precedent for Pragmatism, the rule model of precedent for Conventionalism, and the result model of precedent for Integrity, one has a restatement of the conclusions of this Article.[73]

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72. Alexander, *supra* note 43, at 432-34 (citations omitted); *see also* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988) (defining a moderately skeptical approach to law and judging).

73. A thoroughgoing natural law position denies practical authority to all humanly posited rules and thus to those institutions, such as courts and legislatures, that owe their existence to such rules. A thoroughgoing legal positivist position leads to Eichman. But because I see these positions as the two sides of a paradoxical relation, I deny that there is a "middle," "compatibilist" position for theorists like Dworkin to occupy. *See* Alexander, *supra* note 43, at 433-34; *see also* Alexander, *Personal Projects and Impersonal Rights* (1989) (publication forthcoming in Harvard Journal of Law & Public Policy) (discussing the positivism/natural law relationship).

The interpretivist/noninterpretivist debate in constitutional law is itself a version of the positivism/natural law debate. *See* Alexander, *The Constitution as Law*, 6 CONST. COMMENTARY 103 (1989). Noninterpretivism carried to its logical limits, like the strong natural law position with which it is affiliated, undermines the authority of the courts' noninterpretive decisions themselves. For, given noninterpretivism, why should any court be bound to interpret an earlier court's decision that it disagrees with if neither it nor the carlier court is bound by correct interpretation of legally authoritative sources? Indeed, given noninterpretivism, how do we even recognize courts, legislatures, or other legally authoritative institutions and their products?

Finally, the positivism/natural law debate is part of a more general problem of practical rationality, the problem of decisionmaking. Practical rationality requires that we make deeisions based on the balance of reasons as it appears to us at the time of the decision. But to make a decision means that we are not open thereafter to reconsideration based on the balance of reasons as it appears to us later. If we were so open, then we would not have "decided." Decisions, as the etymology of the word suggests, "cut off" this type of reconsideration. Yet, reconsideration might reveal that we misassessed the balance of reasons and thus that our decision was incorrect. In other words, reconsideration might lead to a more reasonable decision. If that is so, decisions, which rationality requires that we make, appear also to confiict with rationality. In other words, practical rationality is itself paradoxical. *See* M. BRATMAN, PERSONAL POLICIES (Center for Philosophy and Public Policy Working Paper No. RR-8, March, 1987); Raz, *Reasons for Actions, Decisions and Norms*, in PRACTICAL REASONING 128-42 (J. Raz ed. 1978). One example of this paradox is in the free speech area; we cannot know whether a bar to acquiring information is good or bad without knowing the information we are barred from acquiring.

In jurisprudence, the decisions we are concerned with are those that determine what people are obligated to do and that claim practical authority. Once such a determination is made, the claim of practical authority means that the legal rule that issues from the determination—the Constitution,

the statute, the judicial decisiou—supplauts the balance of reasons that underlies the determination. The paradox here is that we must determine, both in general and in particular cases, whether to abide by these legal rules without revisiting the balance of reasons behind the rules or their particular applicatiou. For if we so pierce the rules, we have already failed to give them the practical authority they claim and that rationality requires we give them. On the other hand, how can it be rational not to examiue how good or bad they are?

APPENDIX A: PRECEDENTIAL CONSTRAINT IN STATUTORY AND CONSTITUTIONAL INTERPRETATION

A. THE RATIONALE

Some commentators believe that the whole notion of being constrained by precedent is problematic when the subject is statutory and/or constitutional interpretation rather than common law decisionmaking.[74] After all, if the constrained court believes the precedent court has misinterpreted a statutory or constitutional provision, does it not defeat the purpose of lawmaking through statutes and constitutional provisions for the constrained court to follow the precedent rather than the correct meaning of the provision at issue?

The answer is that precedential constraint in statutory and constitutional cases *does* fit uneasily with a pure statutory/constitutional regime, but that our statutory/constitutional regime is an impure one, and for good reason. First, we have statutes and constitutions rather than a mere general injunction to decide cases as justice dictates. This is because the indeterminacy of "do justice" leads to less justice overall than the more determinate directions of statutory and constitutional rules, even when what the rules prescribe is not just in every case. Rules, even nonideal rules, lead to more justice than doing justice directly, case by case.

Second, we have the institution of judicial review in constitutional cases because having some institution whose interpretation of the Constitution is authoritative and final within the legal system furthers the value of determinateness in law. We have, at least since *Marbury v. Madison*,[75] accepted the risk of making an incorrect judicial interpretation final in exchange for the benefit of settling disputes over constitutional meaning. The same argument for rules instead of direct application of political/moral principles supports judicial finality in constitutional interpretation rather than institutional anarchy, even if in some cases this means that the judicial interpretation in effect displaces the authority of the Constitution, correctly interpreted.

It is this argument for judicial finality—for making the courts' interpretations supreme over the correct interpretations as assessed by other actors—that also supports making the precedent court's interpretation of a statute or constitutional provision supreme over the constrained court's

74. *See, e.g.*, Brilmayer, *The Conflict Between Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 418 (1988).

75. 5 U.S. (1 Cranch) 137 (1803).

interpretation. Statutes and constitutions are means to justice. So, too, is judicial finality. And so, too, is precedential constraint. There is no reason why these three means to justice cannot coexist as complements.[76]

B. THE FORM

The model of precedential constraint in statutory and constitutional cases must perforce be the rule model, with a qualification that I shall discuss in a moment. What the precedent court is doing in each case is translating the language of the provision in question into language of its own. It is the latter that is "the rule" and that constrains later courts. In other words, a precedent in statutory and constitutional cases is a canonical translation of a canonical text.

If the precedent court interprets the statutory or constitutional provision as a mechanical rule, then it will merely convert the language of that rule into different language. That language will thereafter also have the characteristics of a mechanical rule.

On the other hand—and this is the qualification I mentioned—if the precedent court interprets the provision as a correct political/moral principle, case-by-case implementation of that principle will proceed as if under the natural model of precedent, because the natural model is characterized by the case-by-case implementation of correct political/moral principles. Of course, once a court decides to implement the correct principles of the governing text through subsidiary mechanical rules,[77] the rules could then bind constrained courts as they would under the rule model of precedent.

If the precedent court interprets the statutory or constitutional provision as an *incorrect* political/moral *principle*—that is, as neither a mechanical rule nor a correct principle—that court and subsequent courts will inevitably convert the provision into either a correct principle or into a mechanical rule. Incorrect principles cannot be applied as such because they lack real weight as well as determinate form.[78] Moreover, as normative prescriptions they have no virtues, being neither correct nor clear.[79]

76. *See* Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); Monaghan, *supra* note 2, at 744.

77. *See* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-34 (1975).

78. *See* Alexander, *supra* note 43, at 431-32 n.20.

79. *See* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 15-16 (1981).

C. THE STRENGTH

The strength of precedential constraint in statutory and constitutional cases will be determined by what factors the constrained court must find, other than finding the precedent interpretation incorrect, to justify overruling. The precedent interpretation's incorrectness is perforce a necessary but not a sufficient condition for overruling. If incorrectness were *not* a necessary condition for overruling—if the constrained court were able to overrule the precedent merely because it believed that the precedent caused mischief—the authority of statutory and constitutional texts themselves would be undermined. On the other hand, if incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases. Thus, to preserve both the authority of texts and precedential constraint, the constrained court must find a precedent under a statute or constitutional provision to be both incorrect and something else. That something else might be that the precedent causes mischief, is egregiously incorrect as an interpretation, is very recent and yet to be relied upon, or is very old and eroded and, hence, no longer relied upon. The strength of the precedential constraint will be determined by what that something else is.[80]

80. For some of the implications of a practice of precedent in constitutional cases that treats the precedential constraint as real but less than absolute, see Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235, 278-80 (1989).

APPENDIX B: THE RULE MODEL OF PRECEDENT AND LINES OF PRECEDENT

What should happen on the rule model of precedent when the precedent court's "rule" purports to be the correct interpretation of a still earlier precedent court's rule, but the constrained court believes that the precedent court misinterpreted the earlier court? Should the constrained court follow the precedent court's interpretation, or should it follow what it believes is the correct interpretation of the earlier court's rule?

Although my thoughts on this are somewhat tentative, I believe that the proper analysis of these situations goes like this: If the second court has the authority to overrule the precedent rule of the first court, which will generally be the case where the second court is equal in rank to the first court, then whether or not the second court intended to overrule the first court, and whether or not it should have overruled the first court, the third court should follow the second court. At least it should do so unless it is equal in rank to the second court and has reasons for overruling stronger than merely that the second court made an interpretive mistake. This analysis parallels the analysis given in Appendix A of the practice of following precedent in cases of statutory or constitutional interpretation, except that the egregiousness of the second court's mistake in interpreting the first court can never be a reason for the third court to overrule the second court.[81]

Again, I have nothing to offer on the question of how precedent rules are correctly identified and interpreted beyond the conditions that circumscribe the enterprise that I mentioned in Section III. The nub of that discussion is that precedent rules are best conceptualized as judicial statutes, with all that implies for their identification and interpretation. Nor do I have anything to offer here on the question of the strength of precedential constraint, except, as I have said before, that it should be less than absolute but more than the precedent's natural strength for courts of equal rank. What is clear is that the reasons for constraining a court to follow a precedent court's rule even when the constrained court

81. The reason for this possible distinction between the constraint of a precedent that misinterprets a statute and the constraint of a precedent that misinterprets a prior case is that mere misinterpretation of an institution of equal authority (like a predecessor court) is, unlike the substance of a particular interpretation or misinterpretation, not in itself an evil, especially where the misinterpreting body has authority to overrule. In the case of a precedent that misinterprets legislation or the Constitution, the precedent court lacks that equality of status with the interpreted institution. Therefore, even with a practice of precedent following in statutory and constitutional cases, the egregiousness of the precedent court's misinterpretation could be a reason for overruling that misinterpretation.

believes the rule is ill-advised apply with no less force in situations where the constrained court thinks the precedent court's rule is a misinterpretation of an earlier court's rule.

APPENDIX C: MELVIN EISENBERG ON THE COMMON LAW: A FURTHER COMPARISON OF THE NATURAL AND RULE MODELS OF PRECEDENT

In a recent book devoted to the common law and the processes of judicial decisionmaking associated with the common law, Melvin Eisenberg distinguishes different ways that a constrained court might establish the rule of the precedent case.[82] One approach, the minimalist approach, allows the constrained court to cut back the precedent court's announced rule to the bare minimum necessary for producing the result in the precedent case. The constrained court can then treat the resulting rule as the only constraint it faces. Another approach, the result-centered approach, disregards the precedent court's announced rule altogether and merely requires the constrained court to make its result consistent with the result in the precedent case. Eisenberg admits that neither approach provides much precedential constraint. I would add that this is especially the case if particulars such as the names of the parties and the dates of the transaction at issue are regarded either as parts of the necessary rule or as parts of the result. (If they are not so regarded, then, as I have pointed out, the precedent court can produce considerable constraint through a very general characterization of the facts.[83])

In any event, neither approach attributes to the precedent court's announced rule the force common law courts characteristically grant both verbally and behaviorally to announced rules in precedent cases. Under a third approach, however, what Eisenberg calls the announcement approach, the constraining aspect of a precedent case *is* the announced rule in that case. It is the announcement approach that is most characteristic of common-law judicial behavior.

It would appear that Eisenberg is endorsing what I have called the rule model of precedent, at least as the most accurate general description of common law methodology. But when Eisenberg turns his attention from establishing precedent rules to overturning them in whole or in part (transformation), his model of common law methodology deviates from the rule model.

The deviation does not consist in his recognition that courts do in fact overrule announced precedent rules or, what is in fact the same thing, narrow them through techniques such as the minimalist and

82. M. EISENBERG, *supra* note 5, at 52-55.

83. *See supra* text accompanying notes 54-56 (Section IV, subsection B.3).

result-centered approaches. After all, the rule model does not entail giving any particular weight, much less absolute weight, to precedential constraint. Thus, the rule model is consistent with a considerable amount of total and partial overrulings.

Where Eisenberg deviates from the rule model—and in fact adopts the natural model—is in his discussion of the proper bases for overruling.[84] For Eisenberg, the key to determining when total or partial overruling is proper lies in what he calls social congruence and systemic consistency.[85] Basically, social congruence refers to the compatibility between the precedent rule and what Eisenberg calls background social propositions, which function for Eisenberg essentially the same way as what I have been calling principles of political morality.[86] Systemic consistency refers to the compatibility among legal rules themselves, though that compatibility I would argue must ultimately be cashed out as well in terms of background principles.[87]

Eisenberg argues that total or partial overruling is justified when the announced precedent rule does not substantially satisfy the standards of social congruence and systemic consistency and when the reliance costs brought about by overruling—costs that are themselves made relevant by the same background principles that determine social congruence—are not great relative to the costs of following the precedent.[88] Put differently, background principles of political morality provide the bases both for the substantive critique of the precedent rules and also for the decision whether to overrule them wholly or partially.

It is here that the real though subtle difference between the rule and natural models emerges. The weight of precedential constraint in both models is a product of background political/moral principles. Under the natural model, overruling or modifying a precedent rule is governed directly by these principles. As I have pointed out,[89] these principles often will dictate that the constrained court continue to follow a non-ideal precedent rule in order to avoid reliance costs. Under the rule model, however, these background principles dictate adoption of a second-order rule or meta-rule regarding when and when not to overrule or modify first-order precedent rules. That second-order rule—the rule that determines the weight of precedential constraint—is itself to be applied

84. M. EISENBERG, *supra* note 5, at 62-76.
85. *Id.* at 64-76, 104-06.
86. *Id.* at 43-47.
87. *Id.* at 44-46.
88. *Id.* at 68-74, 110-15, 130-36.
89. *See supra* text accompanying notes 13-18.

by constrained courts absolutely (without resort to its progenitor principles) though it is a product of reasoning from the background principles of political morality. I have already shown that the argument for first-order rules—an argument that proponents of the natural model accept—can support second-order rules such as a rule prescribing when first-order rules may be overruled or modified.[90] Eisenberg would base overruling and modifying on direct application of background principles and thus is urging a natural model of precedent. He nowhere denies the possibility nor gainsays the desirability of second-order rules, including a rule determining precedential constraint. And the combination of first-order precedent rules and a second-order rule of constraint defines the rule model of precedent.

In short, the difference between the natural model of precedent and the rule model does not lie in the recognition of the importance of first-order rules, rules that might dictate some outcomes at odds with those produced by (correct) direct application of background political/moral principles. The proponents of the natural model such as Moore and Eisenberg recognize the value of first-order rules. Nor does the difference lie in the recognition of the role of political morality. Even the proponents of the rule model, like most legal positivists, acknowledge the connection at some level between legal rules and the political/moral principles from which their justifiability must ultimately be derived. Rather, the difference lies primarily in the area of second-order rules of stability and change, the level at which the practice of constraint by precedent is defined. For the proponent of the natural model, the principles of political morality operate at this level and apply directly to first-order rules. For the proponent of the rule model, those principles of political morality produce second-order as well as first-order rules. They thus apply to the latter only indirectly, that is, through the filter of those second-order rules.

90. *See supra* text accompanying notes 59-68.