

## THOUGHTS ON THE CHURN LAW

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### INTRODUCTION

A grand alliance is forming, and new trenches are being dug on the old and hallowed battleground of the Constitution. Waving the stars and stripes of “constitutional design,”<sup>1</sup> and richly equipping themselves with the weaponry of reason, scholars like Richard Fallon, Sanford Levinson, and Jack Balkin have taken the field to determine “what provisions for judicial review (if any) ought to exist in constitutions for all societies whose people and legislatures are seriously committed to respecting rights,”<sup>2</sup> and to avoiding “constitutional crises” by “careful planning.”<sup>3</sup> Fallon, a self-proclaimed “system-designer,” applauds himself for having “plowed rich ground.”<sup>4</sup> Levinson and Balkin claim to be revealing a “secret”<sup>5</sup> that, if they are to be believed, has not only gone untold and unnoticed since the nation’s Founding, but could have avoided the near apocalypse of our Civil War.<sup>6</sup>

Frederick Schauer’s ambition—to breed a race of lawyers and judges equal to the ignominy of slavishly adhering to precedent—is no less breathtaking. Asserting that “following precedents even when they seem wrong to the decision maker is . . . a large part of law,”<sup>7</sup> he proposes to conduct empirical experiments to determine: (1) “whether those who self-select for

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<sup>1</sup> Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1734 (2008) (link); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009) (link).

<sup>2</sup> Fallon, *supra* note 1, at 1734.

<sup>3</sup> Levinson & Balkin, *supra* note 1, at 753.

<sup>4</sup> Fallon, *supra* note 1, at 1733, 1734.

<sup>5</sup> Levinson & Balkin, *supra* note 1, at 714.

<sup>6</sup> Levinson and Balkin first classify President Buchanan’s belief that “the Constitution did not allow him to deal with the most urgent problem facing the nation,” *id.* at 731, as a crisis resulting from excessive fidelity to the Constitution, *id.* at 729, and then maintain that such crises are “the ones most likely to be avoided by careful planning,” *id.* at 753. Levinson’s and Balkin’s suggestion that better planning could have avoided the Civil War ignores the fact that Congress, in enacting the Missouri Compromise, endeavored to do just that. Whether, as Justice Scalia maintains, their plan would have succeeded had the Supreme Court not stuck its nose into the matter by declaring the act unconstitutional is a question whose answer the passage of time has foreclosed. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., dissenting) (link).

<sup>7</sup> Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454, 459 (2008).

legal training (or are selected for legal training)” are superior, before receiving that training, “at subjugating their preferences for the right answer to a norm of precedent”; (2) “whether those who are trained in the constraints of precedent (recent graduates of law school, for example) are better at following uncomfortable (to them) precedents than those who have yet to receive such training”; and (3) “whether those who self-select for judging, or who are selected to be judges, are better at following precedent than practicing lawyers of similar experience.”<sup>8</sup> Whether these scholars’ wholesale embrace of intelligent design is the means to perfect constitutional systems commensurate with the universal call for freedom, or whether it desecrates the Founders’ legacy of a constitutional frame attributable neither to “human genius” nor to “reason and reflection,” but only to “time and experience,”<sup>9</sup> remains to be decided; and it can only be hoped that the tenor of the debate will prove less rancorous than the all-out war currently raging between the proponents of intelligent design and those of evolution in the field of biology.

### I. PRECEDENT V. ANALOGY

What is precedent? Assailing the “erroneous conflation of constraint by precedent with reasoning by analogy,”<sup>10</sup> Schauer maintains that the “obligation to follow earlier decisions just because of their existence and not because of their perceived correctness” is, at best, “a counter-intuitive form of reasoning.”<sup>11</sup> Precedent provides a reason—and apparently a compelling one—to abstain from reasoning. Schauer is insistent that precedent should not be understood as merely an “application of reasoning by analogy.”<sup>12</sup> Conceding that in the first instance arguments from precedent and by analogy both require a “determination of relevant similarity,”<sup>13</sup> he is adamant that precedent and analogy are different in kind. With precedent, “the question of relevant similarity admits only one plausible answer,” which may well foreclose the judge from making the decision she deems correct.<sup>14</sup> Analogy, on the other hand, allows for a “choice” amongst competing similarities.<sup>15</sup> “Once we see” that precedent forecloses “choice . . . , we can understand the most dramatic difference between analogy and precedent.”<sup>16</sup> The “play” of reason is “allowed for” in “the joints”<sup>17</sup> of analogy, whereas

<sup>8</sup> *Id.*

<sup>9</sup> THE FEDERALIST NO. 85, at 275 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1966) (link).

<sup>10</sup> Schauer, *supra* note 7, at 454.

<sup>11</sup> *Id.* at 455.

<sup>12</sup> *Id.* at 454.

<sup>13</sup> *Id.* at 455.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 457.

<sup>16</sup> *Id.* at 458.

<sup>17</sup> *Missouri, Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904) (link).

precedent constrains us mechanically and unthinkingly “to turn square corners.”<sup>18</sup>

So far so good. But in attributing what he calls “the Aristotelian mandate to treat like cases alike” (to do what has been done before even if we now think the past action was “mistaken or “misguided”),<sup>19</sup> Schauer conflates a practice of studied ignorance with what Chief Justice Roberts has repeatedly referred to and relied on as “the basic principle of justice.”<sup>20</sup> It is one thing for Schauer to take issue with the often-repeated claim of scientists that precedent and analogy are simply different applications of the same cognitive function,<sup>21</sup> quite another to refute a Chief Justice—empowered “to say what the law is”<sup>22</sup>—who also espouses this view. Surely even his greatest critics cannot in good faith accuse the Chief Justice of conflating justice with the necessity of deciding cases by rote reliance on previous cases even where he believes those cases to have been wrongly decided. Quite to the contrary. The critics live in fear that he will vote to overturn *Roe v. Wade*,<sup>23</sup> as he has already voted to overrule *Michigan v. Jackson*,<sup>24</sup> en route to overruling *Miranda v. Arizona*.<sup>25</sup> In determining to overrule *Jackson*’s precedent “forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding,”<sup>26</sup> Roberts and his like-minded brethren explained that the Court “created . . . *Jackson* by analogy to a similar prophylactic rule established [in *Edwards v. Arizona*]<sup>27</sup> to protect the Fifth Amendment based *Miranda* right to have counsel present at any custodial interrogation.”<sup>28</sup> Reconceiving the *Jackson* precedent as a mere analogy that was incorrectly drawn, they had no difficulty overruling it. In doing so the Court further suggested, sotto voce, that the precedent of *Edwards* itself was created by

<sup>18</sup> *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (link).

<sup>19</sup> Schauer, *supra* note 7, at 458. So far as I know, Aristotle never said any such thing. The closest he comes is to assert that “the just is proportional,” and that “the unjust is what violates the proportion.” ARISTOTLE, *NICOMACHEAN ETHICS*, in *THE BASIC WORKS OF ARISTOTLE* 1007 (Richard McKeon ed., 1941). What he means by proportion, moreover, is the similarity of analogy, not the sameness of precedent: “As the term A, then, is to B, so will C be to D . . . .” *Id.* The unjust, he goes on to explain, occurs when “one term becomes too great, the other too small, as indeed happens in practice; for the man who acts unjustly has too much, and the man who is unjustly treated too little, of what is good.” *Id.*

<sup>20</sup> *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (“[T]he basic principle of justice [is] that like cases should be decided alike.”) (link).

<sup>21</sup> Schauer, *supra* note 7, at 454.

<sup>22</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (link).

<sup>23</sup> 410 U.S. 113 (1973) (link).

<sup>24</sup> 475 U.S. 625 (1986) (link).

<sup>25</sup> 384 U.S. 436 (1966) (link).

<sup>26</sup> *Montejo v. Louisiana*, 129 S. Ct. 2079, 2082 (2009) (link).

<sup>27</sup> 451 U.S. 477, 484 (1981) (holding that once “an accused has invoked his right to have counsel present during custodial interrogation, . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,” unless he initiates the contact) (link).

<sup>28</sup> *Montejo*, 129 S. Ct. at 2085 (emphasis added).

analogy to *Miranda*.<sup>29</sup> This brief synopsis evinces two practical realities at irreconcilable odds with Schauer's theoretical construct: first, that Chief Justice Roberts's "basic principle" of likeness is one of analogy; and second, that the bright-line distinction Schauer would draw between analogy and precedent is ephemeral. That what Schauer understands as precedent can just as credibly be understood as analogy is confirmed by the *Montejo* Court's concluding remark: "This case is an exemplar of Justice Jackson's oft quoted warning that this Court 'is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.'"<sup>30</sup> If this "reasoning by analogy"<sup>31</sup> holds; and crediting the implication behind the Court's assertion that "today we remove *Michigan v. Jackson's* fourth story of prophylaxis,"<sup>32</sup> the foundation on which it once firmly rested as unshakable precedent—*Miranda* as analogy to the Fifth Amendment<sup>33</sup>—will be next to go.

Schauer's determination to contradict the Chief Justice and separate the wheat of analogy from the chaff of precedent is perhaps attributable to an overemphasis on the law's backward-facing aspect, which he describes as preoccupied with "previous decisions and practices solely for the sake of consistency . . ." <sup>34</sup> If this slavish adherence to "prior decisions addressing the same issue regardless of . . . how the issue ought to be decided," were as "ubiquitous" as Schauer claims,<sup>35</sup> then precedent, in the sense of *stare decisis* or of the *dead hand*, should be the rule and not the exception; and the expected result would not be the ever-swelling volume of appellate decisions analogizing this to that, but rather a slim compendium, perhaps not much larger than the copy of the Constitution Justice Hugo Black famously kept in his breast pocket, or the twin tablets Moses retrieved from Sinai.

In fact, the law is every bit as much forward looking as it is backward leaning. The work of analogy accounts for this thrust. If, as Aristotle says, time is forever "different and different,"<sup>36</sup> precedent accounts for the part of it that *has been*, whereas analogy accounts for the part that is *not yet*. The confusion between precedent and analogy is symptomatic of this deeper problem, the "intricate dilemma"<sup>37</sup> of time itself forever coming to be or

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 2092 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., concurring)).

<sup>31</sup> Schauer, *supra* note 7, at 454.

<sup>32</sup> *Montejo*, 129 S. Ct. at 2092.

<sup>33</sup> *Id.* at 2090.

<sup>34</sup> Schauer, *supra* note 7, at 455.

<sup>35</sup> *Id.*

<sup>36</sup> ARISTOTLE, PHYSICS, in THE BASIC WORKS OF ARISTOTLE, *supra* note 19, at 289.

<sup>37</sup> EDMUND HUSSERL, THE PHENOMENOLOGY OF INTERNAL TIME CONSCIOUSNESS 21 (Martin Heidegger ed., James S. Churchill trans., 1964). See SAINT AUGUSTINE, CONFESSIONS Book XI, Ch. XXII, in 18 GREAT BOOKS OF THE WESTERN WORLD: AUGUSTINE 95 (Edward Bouverie Pusey trans., 1952) ("My soul is on fire to know this most intricate enigma.").

gone. Time's enigma, reports Husserl, nearly drove Augustine insane.<sup>38</sup> Heidegger complains that it "has had every possible kind of effect ever since Aristotle."<sup>39</sup> Time, he adds, "remains" today as "deceptive" as it was then. According to Husserl, it "is motionless and yet it flows."<sup>40</sup>

The consequences of time are as polarizing and ultimately as unsatisfactory for the law as they are for philosophy. The perceived injustice of an ever elusive *present* is evidenced afresh in a doctrine of Article III standing that permits a long-barren woman to sue for the right to an abortion she once wanted, but no longer needs, because the circumstances are "capable of repetition, yet evading review."<sup>41</sup> In dissenting because the "record in no way indicates the *presence*" of "a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit,"<sup>42</sup> then-Associate Justice William Rehnquist only reinforced what Holmes discerned long ago: there is inherent difficulty in "transferring" a right "when the situation of fact from which it sprung" is long gone.<sup>43</sup> Whereas Rehnquist cannot see how an as yet unidentified women who may, one day, become pregnant can step into the shoes of someone who once was—but is no longer—pregnant, Holmes maintains that it is just this kind of *stepping into the shoes of* that is one of the law's "significant metaphor[s],"<sup>44</sup> and that it is ubiquitous.

In what follows, I endeavor first to probe more particularly into how time functions in the law, and to suggest that time's forward movement, however apparently reasonable, leads to unreasonable results that can only be countered by the seemingly unreasonable stoppage of time. I go on to suggest that this reversal of the roles of reason and non-reason is endemic to both the common law and constitutional law as we know and practice it in America. Consequently, I argue further that Schauer's analysis of forward-looking analogy as the friend of reason and backward-leaning precedent as reason's foe is symptomatic not of a difference between them, but rather of an underlying identity signaling that the two should be synthesized. In this view, precedent is itself the voice of reason declaring in no uncertain terms: Thou shalt not reason. I conclude by briefly returning to my introductory remarks, and arguing that the extant confusion over the rule of reason and the rule of law is fueling the dangerous and irresponsible transmigration of

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<sup>38</sup> HUSSERL, *supra* note 37, at 21.

<sup>39</sup> MARTIN HEIDEGGER, SCHELLING'S TREATISE ON THE ESSENCE OF HUMAN FREEDOM 76 (Joan Stambaugh trans., 1985) (1936).

<sup>40</sup> HUSSERL, *supra* note 37, at 89.

<sup>41</sup> *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *So. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)) (internal quotation marks omitted).

<sup>42</sup> *See id.* at 171 (Rehnquist, J., dissenting) (emphasis added).

<sup>43</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 409 (1881).

<sup>44</sup> *Id.* at 354.

the debate over intelligent design and evolution from biology to constitutional law.<sup>45</sup>

## II. THE LAWS OF TIME

The *fee*, Holmes explains, first establishes a “fictitious identification” that transports the living presence of a *persona* forward into the future as *heriditas*;<sup>46</sup> the fee goes on, he insists, to “run[] through everything.”<sup>47</sup> The *estate* itself, that to which succession adheres, has nothing to do with land: “As every lawyer knows, the estate does not mean the land. It means the *status* or *persona* in regard to that land formerly sustained by another.”<sup>48</sup> In the estate *the other that was* and *the other that will be* are the same. The law effects the “joinder” of past and future “times” into one being.<sup>49</sup> How else, Holmes inquires, can a law of prescription arrange for ten-year trespasses by different people to conjoin and establish one *estate*, one *persona*?<sup>50</sup> The mere fact that one person’s wrong follows after another’s cannot account for the joinder.<sup>51</sup> As Holmes is quick to point out, “if four strangers to each other used the way for five years each, no right would be acquired by the last.”<sup>52</sup> Rather, “[t]he joinder of times is given to those who succeed to the place of another;”<sup>53</sup> only where the predecessor and the successor are already one by virtue of having “the same *fee*, or *heriditas*,” will the passage occur.<sup>54</sup>

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<sup>45</sup> I investigate this subject more fully in an article entitled *Constitutional Design or Evolution* to appear shortly.

<sup>46</sup> HOLMES, *supra* note 43, at 342, 351. The heir is “*eudem persona cum antecessore*, the same *persona* as his ancestor.” *Id.* at 349.

<sup>47</sup> *Id.* at 353. As Holmes more fully explains:

[T]he most striking instance . . . is the acquisition of prescriptive rights. . . . A man uses a way for ten years and dies. Then his heir uses it ten years. Has any right been acquired” from these successive trespasses? “If common sense alone is consulted, the answer must be no. . . . But here comes in the fiction . . . . From the point of view of the law it is not two persons who have used they way for ten years each, but one who has used it for twenty. The heir has the advantage of sustaining his ancestor’s *persona*, and the right is acquired.

*Id.*

<sup>48</sup> *Id.* at 376.

<sup>49</sup> *Id.* at 363. *See id.* at 363–366.

<sup>50</sup> *See id.* at 354.

<sup>51</sup> *See id.* at 365.

<sup>52</sup> *Id.* at 353.

<sup>53</sup> *Id.* at 363.

<sup>54</sup> *Id.* at 351. Chaucer, the medieval poet, may have been the first to grasp the fee’s *transcendental* aspect when he said, about the Sergeant of the Law, “Al was fee symple to hym in effect.” GEOFFREY CHAUCER, *THE TALES OF CANTERBURY* 11 (Robert A. Pratt ed., Houghton Mifflin 1966) (1400) (General Prologue, line 319). Nietzsche, reflecting on the genius of America’s greatest transcendentalist, picks up the trace when he says that Emerson “is absolutely unaware of how old he already is and how young he will yet become; he could say of himself in Lope de Vega’s words: ‘yo me sucedo a mi mismo’ [I am

Holmes's "analogies of the inheritance"<sup>55</sup> go further still. He insists that "without understanding the theory of inheritance, it is impossible to understand the theory of transfer *inter vivos*."<sup>56</sup> Here, the first difficulty "is to convince the s[k]eptic that there is anything to explain," because "[o]f course," the skeptic says, "a person has the right to sell the property he owns."<sup>57</sup> But that was not always so self-evidently true.<sup>58</sup> The now transparent connection between "the notion that a right is valuable" and "the notion that it may be turned into money by selling it" had to be established.<sup>59</sup> As Holmes explains, "[b]efore you can sell a right, you must be able to make a sale thinkable in legal terms," and he cautions that "[i]t is a great mistake to assume that it is a mere matter of common sense that the buyer steps into the shoes of the seller."<sup>60</sup> This *stepping into the shoes of* had to be devised, and what allows for the sale of land is "the obvious analogy between purchaser and heir."<sup>61</sup>

That this legal process of fast-forwarding into the future will—indeed must—go on *ad infinitum* if left to its own devices is confirmed by the fact that the *persona, qua estate, qua hereditas* perpetuates itself in the much celebrated and much reviled contingent future interest, which is legally binding notwithstanding the fact that no identifiable being exists or may ever exist. The contingent future interest depends on the emergence of a virtual person—if, ten thousand years from now (or whenever) the qualifying person comes into being, he or she immediately steps into the conveyor's shoes as heir just as if no time had elapsed and nothing had happened in the interim.

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my own heir]." FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 50 (Duncan Large trans., 1998) (1895) (link).

<sup>55</sup> HOLMES, *supra* note 43, at 365.

<sup>56</sup> *Id.* at 353.

<sup>57</sup> *Id.* at 354.

<sup>58</sup> *Id.* at 354. Nor is it always true today. For all his sovereignty, the monarch is foreclosed from selling his realm. The royal lands are inalienable. They cannot be transferred in the ordinary course. Neither can the crown itself. Although it is always exposed to being picked up off the field of battle by a conqueror, a crown cannot be bought and sold in the open market. Monarchs "do not have the same right as other citizens either to dispose freely of their entire property or to know that it will pass on to their children in proportion to the equal degree of love that they feel for them." G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 306, at 345 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991). The monarch's "wealth" is "*inalienable*," entailed, and "burdened with primogeniture" in ways that would be unthinkable and intolerable for his subjects. *Id.* In accordance with his view that property is "the *existence [Dasein]* of personality," Hegel understands the modern constitution as the conversion "without struggle or opposition" of the monarch's property into "public property." *Id.* § 51, at 81, § 298, at 291.

<sup>59</sup> HOLMES, *supra* note 43, at 354.

<sup>60</sup> *Id.* at 353–54.

<sup>61</sup> *Id.* at 355. In fact, to Holmes, "every relation of juridical succession presupposes either an inheritance or a relation to which, so far as it extends, the analogies of the inheritance may be applied." *Id.* at 365.

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

The infinite contingent future interest is an extreme example of the familiar Latin cognate for the law's propensity to project forward, *nunc pro tunc*, and the law has had to employ strong counter-measures to arrest it. Why does "the law abhor[]" a perpetuity<sup>62</sup> if not because perpetuity bespeaks a future time we are not equipped to comprehend at present, or ever? A time machine thus hurtling us into the unknown willy-nilly must be disabled, and so a wooden rule against perpetuities is devised<sup>63</sup> that effectively stops even the most ingenious estate lawyer dead in his tracks: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>64</sup>

The wooden rule against perpetuities is no aberration, however; rather, it reflects an endemic tendency that is universally perceived to be unacceptably dangerous if left unchecked. What else but an abiding fear that the law will get too far ahead in time explains the perceived need for the bluntly fashioned statute of limitations? Absent the imposition of a non-negotiable drop dead date, the law's future jurisdiction over a person's past is nothing short of infinite. However time may seem to pass me by, and however much I may change and grow older, I remain the same *juridically present person* whom the law may rightly summon to appear and call to account.<sup>65</sup> The fact that a person may, generally, elect to exempt himself from this otherwise everlasting jurisdiction by raising a statute of limitations serves only to confirm the defense's artificiality—for to be successful, a statute of limitations defense must be affirmatively made, at the earliest possible moment, or else it is waived in its entirety.<sup>66</sup> The fact that some limitations pe-

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<sup>62</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*174.

<sup>63</sup> The rule against perpetuities "restricts the creation of contingent future interests." L. M. Simes, *Public Policy and the Dead Hand*, reprinted in CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 471 (1977). Although the rule itself arose around 1600, the problem it purports to address is far older: whether "[t]he earth belongs always to the living generation," *id.* at 472 (quoting Thomas Jefferson), or to the ancients, or to "Posterity," as the preamble of our Constitution forthrightly declaims, is a question whose structure resembles the structure of time itself, and so far as philosophy is concerned neither Augustine, nor Aristotle, nor Hegel, nor Husserl, nor Heidegger has been able to answer it.

<sup>64</sup> T. F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, reprinted in HAAR & LIEBMAN, *supra* note 63, at 452. The rule against perpetuities allows the dead hand, dead for twenty-one years, to literally control the devising of property.

<sup>65</sup> Kant endeavors to explain just what makes this right:

[W]hen what is in question is the law governing our intelligible existence . . . , reason acknowledges no distinctions concerning the time at which something occurred, the only thing it enquires into being whether a certain act is attributable to me as my deed. And if it is, it is one and the same sentiment which becomes invariably associated with it, no matter whether the deed is happening now or whether it happened in time long past.

IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 122 (G. Heath King & Ronald Weitzman eds., H.W. Cassirer trans., Marquette Univ. Press 1998).

<sup>66</sup> See, e.g., *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008) (link); *Fed. R. Civ. P. 8(c)(1)*, 12(b), 15(a) (link).

riods are (like the rule against perpetuities) inflexible<sup>67</sup> further evidences how intricately the “dilemma of time” is manifest in the law.

The exceptional case of murder—as to which no statute of limitations can be said to run—further captures the enigma. The law retrieves a body and identifies it, but cannot find the killer. The more difficult the case, the more everyone wants to know, “Who did it? How was it done? What was the plan of accomplishment and the plan of escape?” We want to know that which compels us to turn the pages of the murder mystery: the “seven golden Ws” of “What? Who? When? Where? In what way? What with? Why?”<sup>68</sup> Everyone likens himself to the murderer, however implausibly or impossibly. To disprove the likeness, society requires that the murder be solved, regardless of the passage of time.<sup>69</sup> Just as we read through the night, regardless of the hour, so the law continues to search, forever. From whence does this compulsion to know, to be apprised of the facts despite the constraint of empirical time and its passage, come? Perhaps when he says that the law’s capacity to *analogize* different persons as *alike* runs through everything, Holmes goes a long way in providing the answer. As the pregnant step into the shoes of the barren, the heir into the shoes of the predecessor, the fee holder into the shoes of the trespasser, so everyone steps into the shoes of the murderer. The murder must be solved, regardless of time, because only by ascertaining the details and comparing them to what we know of our own circumstances at that same time, date and place, can we begin to rule ourselves out as the murderer; when the crime is solved, we can know for sure.<sup>70</sup>

The conundrum of time is not a phenomenon of the common law alone. In arguing the case for constitutional supremacy in *The Federalist*, Hamilton begins by acknowledging that the deference to what comes earlier in time—an assumption on which his theory depends—is distinctly contrary

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<sup>67</sup> Where the purpose of the limitations period is not to protect the body of the *person* from futuristic intrusions, but “to achieve a broader system-related goal, such as facilitating the administration of claims,” it is deemed truly “jurisdictional.” *John R. Sand & Gravel Co.*, 128 S. Ct. at 153. As such, it concerns not the *person of the defendant* but the *subject matter of the claim* itself. *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (link).

<sup>68</sup> THEODOR REIK, *THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT* 8 (Farrar, Straus, & Cudahy 1959).

<sup>69</sup> Cf. Richard P. Conti, *The Psychology of False Confessions*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 25 (1999) (hypothesizing that some people during an interrogation may “cognitively label physiological response as guilt, and would conclude that they are feeling guilty, therefore they must have had some involvement in the crime” and that “[t]he result may be an internalized false confession”) (link).

<sup>70</sup> While Freud may or may not be correct that only a race of still blood-thirsty and unrepentant murderers could ever conceive and declare their First Commandment to be “thou shalt not kill,” uttered by a *me* intent on deflecting his culpability, the likeness Freud draws between the innocent and the guilty is instructive. See SIGMUND FREUD, *THE FUTURE OF AN ILLUSION*, reprinted in XXI THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 15 (James Strachey ed. & trans., 1961).

to the natural order of things.<sup>71</sup> Where “two statutes existing at one time[] clash[],” he observes, “the last in order of time shall be preferred to the first.”<sup>72</sup> This consequence—that amongst “interfering acts of an *equal* authority, that which was the last indication of its will should have the preference”—is not “derived from any positive law.”<sup>73</sup> It follows, rather, from “the nature and reason of the thing”: time itself flows forward. Only in the exceptional instance where the earlier act is of higher authority, as is the case with the Constitution, should the natural order be reversed and the path of the law arrested in favor of precedent’s dead hand, freezing everything in time and place. For all his unwavering commitment to this reversal, on which he says the theory of every written constitution must hinge, even John Marshall understood that in the natural course of things time is forever hurrying along and away from us, that “[t]he past cannot be recalled by the most absolute power,” and that the law—the might of precedent notwithstanding—is powerless to change this truism.<sup>74</sup>

### A. *Identity and Difference*

In affirming that analogy “as a friend”<sup>75</sup> entails “choice,”<sup>76</sup> Schauer tacitly acknowledges that by the process of analogy, by likening one thing to another, the law moves forward in time—and he concurs with Hamilton that this is reasonable. When he goes on to say that precedent is about “constraining,” and is typified by a “lack of freedom,”<sup>77</sup> what he has in mind is the strict obligation to follow a prior decision, to “stand by what has been decided,”<sup>78</sup> *stare decisis*, right or wrong. As Kant once said with great opprobrium, “Argue as much as you will, and about what you will, only obey!”<sup>79</sup> This determination to look backward, to defer to what has been, to succeed to what reason may presently tell the judge to be wrong, however enlightened he may otherwise be, is what Schauer questions when he suggests that to follow precedent may be an act of non-reason. His argument, however, has nothing to do with time, and everything to do with logic. If *this* is to be recognized at all, it must be deemed to be the *same* as, identical

<sup>71</sup> THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 9, at 228–29 (link).

<sup>72</sup> *Id.* at 229–30.

<sup>73</sup> *Id.* at 230.

<sup>74</sup> Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (link).

<sup>75</sup> Schauer, *supra* note 7, at 456.

<sup>76</sup> *Id.* at 457.

<sup>77</sup> *Id.* Schauer’s election to pursue his argument with loaded words like *choice*, *freedom*, and *constraint*, while unfortunate, highlights the fact that precedent and analogy are not as easily corralled as he would like. These are the very words in which the divisive and unresolvable abortion debate is conducted. It is both ironic and instructive that the proponents of choice and freedom rely on the constraint of *Roe v. Wade* as precedent, while those who would constrain the mother seek the freedom and the choice to overrule it as wrongly decided.

<sup>78</sup> *Id.* at 455 n.2.

<sup>79</sup> IMMANUEL KANT, WHAT IS ENLIGHTENMENT?, in FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 92 (Lewis White Beck trans., 1959) (link).

to that. There is no play in the joint of sheer identity ( $A=A$ ). As a consequence, diversity of any shape or stripe is precluded *ab initio*, *a priori*. Schauer acknowledges that the analogical creation of *likenesses* and the precedential identification of *sameness* both begin with an initial act of comparison, “but from there the paths diverge.”<sup>80</sup> Using analogy, all sorts of things can be made alike. Analogues are similar; they are proportional and differ only by degree.<sup>81</sup> A system of precedent is, by contrast, digital.<sup>82</sup> Either two legal situations are the same, which is to say acknowledged as identical, or they are different, which is to say excluded from coverage by existing law. Analogy is consistent with freedom and choice, whereas precedent only obliges. In this vein, Schauer goes on to speculate that people with a “broader scope of imagination and creativity will . . . see analogical opportunities where others see only precedential constraint.”<sup>83</sup>

Schauer’s criticism of precedent as a “foe”<sup>84</sup> to reason is reminiscent of Hegel’s famous attack on the so-called philosophy of identity extant in his time. Just as Hegel likens thinking that demands that diverse things be deemed identical to the night in which all cows are black,<sup>85</sup> Schauer’s precedent-bound jurist is like the “Vermont justice of the peace” who dismissed a claim for a broken churn because “he had looked through the statutes and could find nothing about churns.”<sup>86</sup> This kind of black-and-white thinking gives credence to Schauer’s assertion that “introductory logic texts often describe arguments from precedent as logical fallacies.”<sup>87</sup> So Hegel assails the proposition  $A=A$  as a contradiction, a formulaic identity of terms that belies the actual difference between things; and Leibniz insists that “there are never in nature two things which are perfectly alike and between which it is not possible to find an inward difference.”<sup>88</sup> To prove the point, we find him “cheerfully challenging a gentleman to find two identical

<sup>80</sup> Schauer, *supra* note 7, at 455.

<sup>81</sup> When Robert Bork says that “[a]lmost all judgments in law, as in life, are ones of degree,” he readily acknowledges the quantitative primacy of analogy for adjudication. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 248 (1990). But because degree is inherently subjective, Bork believes all such decision making should be left to the people themselves, either directly, through “the common sense of the jury,” *id.* at 248, or indirectly through their legislators. *See id.* at 147. Judges, by contrast, have no business with anything but precedent. *Id.* at 146.

<sup>82</sup> On the face of an analog device, ten minutes before the hour of eleven can be plainly seen to be very much like five minutes before the hour of eleven. Similarly, both ten minutes before the hour and ten minutes after the hour look to be close to the hour. A digital clock allows for no such comparison by degree. The time that flashes is exact and exclusive.

<sup>83</sup> Schauer, *supra* note 7, at 459.

<sup>84</sup> *Id.* at 456.

<sup>85</sup> G.W.F. HEGEL, *Preface* to PHENOMENOLOGY OF SPIRIT 9 (A.V. Miller trans., Oxford Univ. Press 1977).

<sup>86</sup> OLIVER WENDELL HOLMES, JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS* 174 (Richard A. Posner ed., 1992).

<sup>87</sup> Schauer, *supra* note 7, at 458.

<sup>88</sup> G.W. LEIBNIZ, *THE MONADOLOGY OF LEIBNIZ* \*9 (Herbert Wildon Carr ed., 1930).

leaves in a garden.”<sup>89</sup> The gentleman failed—just as the Vermont justice failed to find anything on all fours with churns in the statute books. Yet for every simpleton vainly seeking identity, there is a sophisticate profitably claiming likeness, a Brandeis expounding the “Law of Ponds” by likening it to other laws that are not identical, but analogous in one way or another.<sup>90</sup> Although the theory of identity on which precedent relies precludes any such thing as “churn law,” the corollary fact that nothing either in heaven or earth is reducible to an “either-or,”<sup>91</sup> that everything so diverse in nature can be related through reason, be seen to be alike in some fashion or other, allows for the possibility that there indeed *can be* such a thing as churn law—for better or for worse.

No less an authority than Aristotle cautioned about the danger of endemic likeness when he instructed: if reason is let alone to make analogies at its pleasure, “an infinity of specifically different things” will all be deemed alike.<sup>92</sup> The proliferation of such novelties as Pond Law, Tree Law, Art Law, even Horse Law proves this “infinite connectedness of grounds with what is grounded.”<sup>93</sup>

Schauer is of the opinion that the law can harness and control, in a principled fashion, reason’s profligate appetite for likenesses, its propensity to analogize amongst different things. Believe him if you will.<sup>94</sup> Yet implicit in the apt characterization of the law as a seamless web is the understanding that the likenesses with which it is woven, the grounds it ceaselessly demands and provides, are interchangeable. Explaining that a correct “perception of similarities and dissimilars” is the “one thing that cannot be taught” and also “a sign of genius,” Aristotle asserts that “the greatest thing by far is to be a master of metaphor.”<sup>95</sup> Small wonder that at the very beginning of his *Elements of the Philosophy of Right* Hegel takes particular care to distinguish his sober task from “work as ephemeral” as

<sup>89</sup> IAN HACKING, *THE EMERGENCE OF PROBABILITY* 199 (2d ed. 2006).

<sup>90</sup> See Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).

<sup>91</sup> G.W.F. HEGEL, *THE ENCYCLOPEDIA LOGIC (WITH THE ZUSÄTZE): PART I OF THE ENCYCLOPAEDIA OF PHILOSOPHICAL SCIENCES, WITH THE ZUSÄTZE* § 32, at 70 (T.F. Geraets et al., trans., 1991).

<sup>92</sup> ARISTOTLE, *METAPHYSICS*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 19, at 749.

<sup>93</sup> HEGEL, *supra* note 91, § 123, at 192. Holmes’s point that “hard cases make bad law,” N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (link), illustrates Hegel’s further point that “[e]verything in the world that has been corrupted, has been corrupted on good grounds.” HEGEL, *supra* note 91, § 121, at 191–92.

<sup>94</sup> Justice Scalia does not. In condemning the grounds on which Justice Kennedy rests his *Rapanos* opinion, Scalia retells his “favorite version” of an old classic: “[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant[,] he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies, ‘Ah, after that it is turtles all the way down.’” *Rapanos v. United States*, 547 U.S. 715, 754 n.14 (2006) (Scalia, J., dissenting) (link).

<sup>95</sup> ARISTOTLE, *Poetics*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 19, at 1479.

Penelope's "web" of likenesses, "which must be begun afresh every morning."<sup>96</sup>

### B. Reason and Necessity

More to our point is John Marshall's accolade of the written constitution as that with which everything must be strictly identified (A=A). Like the unyielding precedents to which Hamilton's common law jurists are strictly bound,<sup>97</sup> the document identifies the constitutional right and duty in every instance, *stare decisis*, no questions asked. As cherished as originality, creativity, and imagination may be for the analogical thinker aspiring to devise ingenious relations between diverse things, so they are despised when it comes to "fundamental law." Schelling, Marshall's early nineteenth-century contemporary in Germany, said it as well as anyone in asserting that a judge who decides by "looking into the heart of things" to see for himself what they are truly like, what they should and should not be likened unto, "presents the most unworthy and revolting spectacle that can exist for anyone imbued with feeling for the holiness of the law."<sup>98</sup> Marshall makes no apology for the fact that constitutional law is nothing but an elementary match game, a black-and-white matter of included identity or excluded difference. Just compare the challenged act to the constitutional text. If they match, then all is well and good; but if there is a difference, if the act proves "repugnant" to the Constitution, it is void. Any other result would be "absurd," would "subvert the very foundation of all written constitutions," and "reduce[]" it "to nothing."<sup>99</sup> Following in this train, Justice Antonin Scalia—in reference to reproductive freedom—readily concedes that women, like everyone else, have "liberty" in the absolute sense.<sup>100</sup> The only problem is that such "liberty *simpliciter*" cannot be identified anywhere in the Constitution.<sup>101</sup> Likewise, when Justice Clarence Thomas dissents from the *Lawrence* Court's likening of constitutional liberty to transcendence, it is because he cannot find "transcendence" mentioned anywhere in the constitution.<sup>102</sup> In these instances, the fact that there is no constitutional law of transcendence or absolute freedom does mean that (absent amendment) no such constitutional law can ever come to be. As analogous as they may appear, the "rights of man" are not synonymous with, identical to, or the same as constitutional rights.<sup>103</sup>

<sup>96</sup> HEGEL, *Preface* to ELEMENTS OF THE PHILOSOPHY OF RIGHT, *supra* note 58, at 10.

<sup>97</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 9 (link).

<sup>98</sup> F.W.J. SCHELLING, SYSTEM OF TRANSCENDENTAL IDEALISM 196 (Peter Heath trans., 1978).

<sup>99</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>100</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).

<sup>101</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (link).

<sup>102</sup> See *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (link).

<sup>103</sup> ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 8 (1984).

## NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

Admittedly Scalia, Thomas, and Bork are associated with an extreme view of constitutional propriety. Still, no one is endorsing the notion that the practice of law be reduced to Hegel's "infinite connectedness of grounds." Lawyers and judges all are committed to the proliferation and enforcement of "those wise restraints that make men free." Schauer's suggestion that precedent (in the sense of *stare decisis*) is synonymous with constraint as the inevitable precipitate of identity ( $A=A$ ), and that analogy is synonymous with freedom as the consequence of difference ( $A$  is like  $B$ ), offers a helpful new way to frame and to understand the debate over just what constitutional allegiance entails. His further suggestion that the underlying tension is between reason and non-reason further advances the ball only if we understand non-reason not as something pejorative, but in a neutral way, as something other, simply different than reason. This is precisely, I suggest, what Montesquieu had in mind in insisting that the *spirit* of the laws has nothing to do with the laws themselves, but "consists in the various relations that laws can have with various things,"<sup>104</sup> and it is also what Hamilton means in asserting that "[t]he interest of the man must be connected with the constitutional rights of the place."<sup>105</sup> That Hamilton actually means what he says—that a right is inherently attributable to the place and not the person (as we have come to believe)—is consistent with his insistence that the courthouse, "being the immediate and visible guardian of life and property," is "the great cement of society," the "most attractive source of popular obedience and attachment," and a symbol of the people's "affection, esteem, and reverence towards the government."<sup>106</sup>

As improbably as Moses once disappeared into a mountain and reappeared with words chiseled onto rock successfully commanding people to adhere and to obey, Schauer's precedent, or *stare decisis*, demands and achieves absolute fealty, the dictates of reason notwithstanding. In the face of precedent reason declares *thou shalt not reason*. Although a committed dialectician, which is to say aspiring master of metaphor and unrepentant idolater of reason, may rue the fact that the law has not yet proved itself capable of advancing beyond rote deference to "the thing decided" and prescribed on the Tablets,<sup>107</sup> the Founders recognized that there is something other than reason in this world; thankfully, they provided for it when they set our constitutional sails. As the ancients were informed of that other something in their practice of burying the dead hand of the suicide victim as far away as possible from the rest of his body (lest it return and, like some springing future interest, suddenly come back to life to strike another mortal blow), so the wise men of America have always deemed it necessary to

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<sup>104</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* Book 1,C ch. 3, 93 (Anne M. Cohler et al., ed. & trans., Cambridge Univ. Press 1989).

<sup>105</sup> THE FEDERALIST NO. 51 (Alexander Hamilton), *supra* note 9, at 160 (link).

<sup>106</sup> THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 9, at 43 (link).

<sup>107</sup> See Jacques Derrida, *Force and Signification*, in DERRIDA, *WRITING AND DIFFERENCE* 306 n.53 (Alan Bass trans., 1978).

consecrate the dead hand of precedent. In so doing, they protect against the dead hand's no less dangerous analogue—the rule of reason—whose process of “like recognized by like” allows for even the most unlikely of things to be deemed alike.

### CONCLUSION

If I am right that a mighty armada is setting its sails to impose an empirical order on a constitution that relies on something else<sup>108</sup> to secure the “Blessings of Liberty”<sup>109</sup> in perpetuity, Schauer's complicity is particularly dangerous. If, as John Marshall insists, adaptation to “exigencies” that cannot be “foreseen,” and “which can be best provided for as they occur “is the only chance our Constitution has “to endure for ages to come,”<sup>110</sup> and to prevail as the fittest amongst all the competing species of government, Schauer's proposition that we design ways for selecting lawyers and judges who lack “creativity” and “imagination,”<sup>111</sup> and who are constitutionally predisposed to a “noncreative” and “narrower” way of seeing<sup>112</sup> is stunningly obtuse; and his reckless insistence on playing the high-stakes game of coercion versus freedom borders on the irresponsible. Whether wise restraints make men free and how, or whether “freedom” is “completely incompatible with system” and must “end up with the denial of freedom” are the fundamental questions that any theory of law must ponder.<sup>113</sup> The starting point for this reflection is not, as Schauer suggests, to enlist the mercenary assistance of “psychologists” who are “trained to perform” experiments about liberty and restraint,<sup>114</sup> but to recognize that freedom and necessity are not separate and distinct quanta, but are and will forever remain in dialectical relation to one another.

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<sup>108</sup> One cannot but admire Larry Tribe for standing like a brick wall against the onslaught. Alone amongst the old guard of constitutional scholars, he is insistent that we attend not to graven images but to “The Invisible Constitution.” LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

<sup>109</sup> U. S. CONST., pmb. (link).

<sup>110</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (link).

<sup>111</sup> Schauer, *supra* note 7, at 459.

<sup>112</sup> *Id.*

<sup>113</sup> F.W.J. SCHELLING, *PHILOSOPHICAL INVESTIGATIONS INTO THE ESSENCE OF HUMAN FREEDOM* 9 (Jeff Love & Johannes Schmidt trans., State Univ. of N.Y. Press 2006).

<sup>114</sup> Schauer, *supra* note 7, at 459.