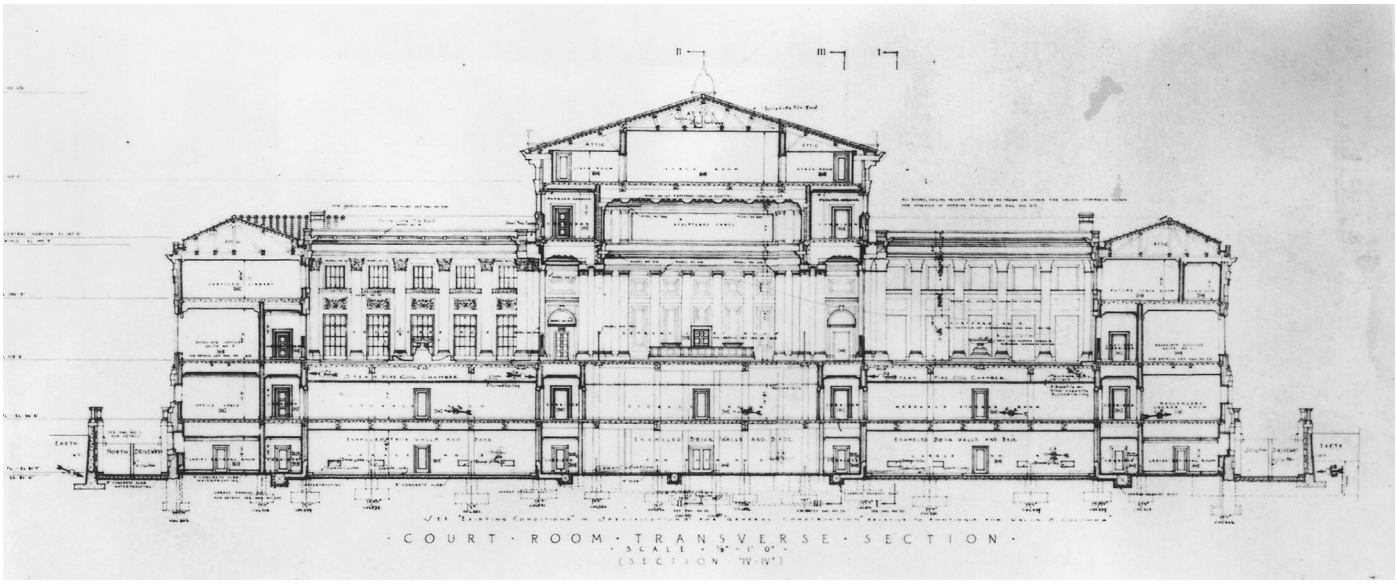
The Architecture of Judicial Power: Appellate Review & Stare Decisis



Building blueprint of the Supreme Court of the United States (transverse view), circa 1931. *Reproduced from the collection of the Supreme Court of the United States Office of the Curator.*

by the Honorable D. Arthur Kelsey*

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Perhaps no other nation has been more concerned about the segmentation of governmental power than America. We have fractured it in innumerable ways. Asserting that all power derives from the consent of the governed, the federal and state constitutions act as distribution grids —apportioning authority between the federal government and the fifty states, and then even more so among the separate states and their various localities. At both the federal and state levels, an additional tripartite division of authority separates legislative, executive, and judicial power.

The organizing principle of this architecture is not efficiency or consistency, but a profound distrust of concentrated power. The constitutional draftsmen openly advocated distrust as the principal rationale for the diffusion of governmental power accomplished by their blueprints. Obvious methods of consolidating decisionmaking authority were ditched for the comfort of knowing that surge protectors were wired throughout the highly engineered system to safeguard against dangerous concentrations of unchecked power.[1]

The separation-of-powers and federalism doctrines illustrate their handiwork better than any other examples. As James Madison explained: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the *very definition of tyranny*."[2] Even in a democratic republic, Thomas Jefferson agreed, concentrating these powers would be "precisely the definition of despotic government."[3] Similar concerns underscored their insistence on creating a republic, not a pure democracy, to harness the power sharing implicit in federalism. Prescient in their fears, the constitutional architects believed the prin-

cipal benefit of power diffusion (protection against tyranny) far outweighed its costs (inefficiency, redundancies, factionalism, and internal power struggles, to name but a few).[4]

One systemic cost of segmenting governmental power is the added burden of determining which among competing subsets of power has the rightful authority to exercise it. So, before any serious legal question can be answered, another *a priori* question must first be asked: Who decides? That is, we cannot say *what* the answer is until we know *who* gets to make the call. This who-decides question necessarily stems from the comprehensive devolution of power inherent in the American system of government. It is the question that precedes every other. And it is the one question that, if overlooked, will put in doubt all answers to all other questions.

The American instinct for subdividing power worked its way into the design of the judiciary. James Wilson, one of the principal drafters of Article III and an inaugural member of the U.S. Supreme Court, pointed out that the "essential elements of judicial architecture" include the "broad distribution of jurisdiction among inferior tribunals at the base of the judicial pyramid and one supreme tribunal [to] superintend and govern all the others."[5] This pyramiding was accompanied by two companion sets of rules: the appellate standard of review and the doctrine of *stare decisis*. Both involve workmanlike principles that provide order and stability to the judicial process. Because of this, they are sometimes treated as mere housekeeping rules—more concerned with the tidiness of the decisionmaking than the decision itself. But underlying both, I believe, is a deeper premise: the need to create a principled diffusion of decisionmaking power and thereby to limit the risk of creating dangerous nodes of power within the third branch of government. Just as separation of powers and federalism purposefully segment governmental power, so too do the principles of appellate review and *stare decisis*.

I. Appellate Review—The Vertical Segmentation

Consider first the hierarchical standards of appellate review.[6] These standards, at the most basic level, divide courtroom contests into two discrete categories: law and fact. As a general rule, appellate judges get the last word on the former; lower-court factfinders (whether trial judges or juries) decide the latter. Which of the two is more important depends entirely on one's vantage point. To expand upon Justice Wilson's illustration, a two-dimensional side view of the judicial pyramid shows the highest court at the apex of law. But a three-dimensional view from directly above shows the factual base of the pyramid, the exclusive province of the lower courts, to be the larger and weightier aspect of the same structure.

The normal apologetics for the law-fact division of labor focus on the factfinder's direct observation of the witnesses and the corresponding distance between the appellate jurists and these same witnesses. Separating truth tellers from liars is much easier, it has always been thought, when the storytelling is accompanied by nonverbal (and sometimes involuntary) communication.[7] Another common reason for the standard of review is the differing structure and operation of trial and appellate courts, as well as the unique capacities of each.[8]

Yet these explanations, while certainly true as far as they go, do not go far enough. While a factfinder has a superior capacity to determine what actually happened (*e.g.*, the accused hit the victim with a rod), the factfinder possesses no *sui generis* capacity to determine what objective inferences should flow from that historic fact (*e.g.*, the accused acted with malice). We nevertheless place the determination of inferences primarily in the hands of the factfinder even though these inferences are often relatively sterile assessments of objective probabilities, not efforts at verifying historic facts.[9]

Behind the appellate standard of review lies a more basic rationale.[10] "The principle that the jury were the judges of fact and the judges the deciders of law was stated as an established principle as early as 1628 by Sir Edward Coke."[11] The best explanation underlying this principle came more than a century later from William Blackstone. He feared that professional jurists—or, in his words, "the magistracy, a select body of men, usually chosen by the prince, or by parties holding the highest offices in the state"—would have a natural "involuntary bias towards those of their own rank and dignity."[12] While this feared bias could manifest itself in outright favoritism, it could also involve the judicial imposition of elite values and culture on those outside the elite strata of society. "On the other hand," Blackstone cautioned, "if the power of judicature was placed in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts."[13]

The common law, Blackstone concluded, shrewdly divided judicial decisionmaking power between them. "It is therefore wisely ordered," he explained, "that the principles and axioms of law, which are general propositions flowing from reason, and not accommodated to times or to men, should be deposited in the breasts of the judges." Determinations of fact, however, should be left in the hands of "a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank," whom Blackstone described as "the best investigators of truth, and the surest guardians of public justice."[14]

The Blackstonian justification for the law-judge/fact-jury dichotomy became particularly relevant during the ratification debates over the U.S. Constitution. To many of the Framers' generation, the jury was "'the lower judicial bench' in a bicameral judiciary" and "'the democratic branch of the judiciary power—more necessary than representatives in the legislature.'"[15] To them, the jury was "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the peo-

ple's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[16] The "common people," John Adams wrote, "should have as complete a control . . . in every judgment of a court of judicature" as in the legislature.[17] Jefferson was even more emphatic: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[18] As the "democratical balance in the Judiciary power,"[19] the jury system secured to the citizenry "a share of Judicature which they have reserved for themselves."[20]

Because the jury served as a core aspect of popular sovereignty, both Federalists and Anti-Federalists alike greatly feared the possible usurpation of the jury's factfinding role by judges. These sentiments were so strong that five of the required nine states would not have ratified the U.S. Constitution without the understanding that their proposed amendments, which included the right to trial by jury and a prohibition against appellate factfinding, would be submitted to the states during the first Congress.[21] Their concerns, voiced during the state ratification debates, stemmed from Article III of the Constitution, which guaranteed trial by jury only in criminal trials and provided that "the supreme court shall *have appellate jurisdiction, both as to law and fact*, with such exceptions, and under such regulations as the Congress shall make."[22]

As Justice Story later explained, an appeal at that time was "a process of civil law origin, and remove[d] a cause entirely, subjecting the fact, as well as the law, to a review and a re-trial."[23] While appeals existed in Britain's chancery system, they were unknown in common law, which used a "writ of error" that "remove[d] nothing for re-examination, but the law."[24] Many of the founding generation, therefore, regarded the Constitution's grant to the Supreme Court of appellate power "both as to law and fact" and its failure to provide specifically for civil jury trials to be dangerous concentrations of power in an aristocracy of judges.[25] As Virginia delegate Richard Henry Lee passionately argued, "every tribunal, selected for the decision of facts, is a step toward establishing aristocracy—the most oppressive of all governments."[26]

These concerns gave rise to the Seventh Amendment to the U.S. Constitution, which guarantees the right of jury trial in civil matters and incorporates into the Constitution principles of appellate review.[27] The Seventh Amendment provides in part that "no fact tried by a jury shall be otherwise *reexamined* in any court of the United States, than according to the rules of the common law."[28] Because the common law permitted no appellate review of facts,[29] the Seventh Amendment effectively put to rest "apprehensions" of appellate court evidentiary trials by insisting upon appellate deference to trial court factfinding.[30] Only by doing so could the law achieve the Blackstonian balance between the elitist preferences of the judicial "magistracy" and the "wild and capricious" decisions of the "multitude."[31]

We continue to live in that balance today. By atomizing decisions into findings of fact and conclusions of law, the standard of review leaves neither the appellate court judge nor the lower court factfinder with completely unchecked decisionmaking power. An appellate judge, anxious to move the law in one direction or another (whether for good or ill, depending on one's point of view) may find it difficult to do so without an alliance with the factfinder. Without it, he may go only so far. Likewise, a factfinder who wishes to monopolize the decision by manipulating factual findings will soon discover some dispositive aspect of his decision recharacterized by his appellate overseer as a question of law—for which the appellate judge has the last word.[32] In the end, a decisionmaker (whether appellate judge or factfinder) wanting to break new ground is impeded from doing so because the final decision only partly belongs to each.

Appellate judges sometimes assert decisionmaking power over facts and inferences, essentially substituting their impression of the factual record for the contrary interpretation adopted by the trial judge or jury.[33] When this happens, the safety limits engineered into the judicial power grid break down—concentrating power in a single, unchecked decisionmaker. In any particular case, that concentration of power may produce a good decision or a bad one. Since the beginning of our nation, however, the American instinct is to fear the worst.

To many of the Framers' generation, the jury was "the lower judicial bench' in a bicameral judiciary" and "the democratic branch of the judiciary power . . .

The anomaly can also occur in reverse when a factfinder manipulates the decision of what historic facts to declare true (*e.g.*, whether the accused did or didn't hit the victim with a rod) in a deliberate effort to nullify the legal consequences that flow from that declaration (*e.g.*, if he did, he will go to prison).[34] This bastardization of roles, called "jury nullification" when practiced by lay jurors (no similarly emotive phrase has been coined to describe it when practiced by professional jurists), vests the factfinder with decisionmaking power over both the facts and the law.[35] Here again, the nullification may produce a result we think right. We certainly have historic examples of such, the most famous being the acquittal by a colonial jury in 1735 of Peter Zenger of seditious libel even though he confessed to printing a journal containing articles critical of British authorities.[36] But still, the uniquely American fear of concentrated power

counsels against permitting factfinders from deciding on their own which laws they will follow and which they will ignore. It is entirely understandable, therefore, that most judicial responses to jury nullification have been laced with overt condemnation of the practice as little more than *ad hoc* lawlessness.[37]

II. *Stare Decisis*—The Horizontal Segmentation

Similar observations can be made of *stare decisis*. In contrast to the appellate standard of review, which operates vertically one case at a time, *stare decisis* applies analogous power segmentation principles horizontally over the course of many cases.[38] Though some view the modern use of *stare decisis* as "little more than a joke,"[39] I believe it has atrophied from selective disuse by being decoupled from its most basic rationale: the diffusion of decisionmaking power over time, across a long line of jurists—each deferring when he can, where he should, whenever he must, to those ahead of him in the jurisprudential queue.

At a bare minimum, *stare decisis* means a court of last resort should not change its mind on a settled legal principle simply because it produces a result the court dislikes.[40] Though a dose of cynicism might explain some of the reasons for deferring to our judicial predecessors (recall Justice Cardozo's observation that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case," and thus, judges must sometimes "stand by the errors of our brethren the week before, whether we relish them or not"),[41] the more enduring apologetic rests on resisting the arrogation of power by those judges who by happenstance preside over the most recent case.[42]

It is often said that *stare decisis* places a high value on juristic tradition. And so it does. That traditionalism, however, means considerably more than postulating that the jurists of prior generations were smarter and wiser than those who now sit in judgment. The tradition protected by *stare decisis* has a higher goal: spreading judicial power over time along a linear series of decisionmakers. As G.K. Chesterton put it, "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking around."[43]

Sharing judicial power with our predecessors also recognizes, as Justice Holmes observed, that a "well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."[44] At every appellate court decision conference, *stare decisis* reserves an empty seat for those "many minds." Their vote represents the views of a silent multitude of jurists. Calibrating their vote with the appropriate weight has a democratizing influence on the modern judiciary.

I do not mean to denigrate the concerns usually advanced in support of *stare decisis*, like the need for reliability in the issuance of legal pronouncements and the potential damage to the judiciary's institutional reputation if it constantly changes its collective mind about important things. Nor do I disagree that *stare decisis* is the "means" by which courts "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."[45] But I believe the more persuasive reason for the doctrine is founded on a more base calculation about human nature and, thus, judicial power.

If the restraints of juristic tradition could be freely thrown off, judicial decisionmakers would have unparalleled license to reconstruct the law to fit their particular, ever-changing views.[46] This is a bad thing, not merely because its protean qualities would disquiet the settled expectations of society, but because it could be (and quite likely would be) a subterfuge for politicizing the judicial process.[47] The American *élan vital*, since the earliest stages of the republic, has placed its trust in incremental change far more than in dramatic upheavals. To be sure, even as many of the colonies sent their sons into battle for independence from Great Britain, they expressly incorporated English law into the *corpus juris* of the new nation.[48] At least in this one respect, the American Revolution was far less revolutionary than we may now suppose.

Here again, we see these concerns surfacing during the ratification debates over the U.S. Constitution. The Anti-Federalist advocate using the pseudonym "Brutus" contended that the proposed Constitution's implicit grant of power to the Supreme Court to construe the "spirit" of the Constitution legitimated the exercise of unbridled authority.[49] In Federalist No. 78, Alexander Hamilton countered that the judiciary, though independent of the legislative and executive branches, would be self-policing through its adherence to "strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Such inherent self-restraint and respect for precedent, he contended, would make the judiciary "beyond comparison the weakest of the three departments of power" and thus "least dangerous" to the liberties of the people.[50] Hamilton borrowed his view of *stare decisis* from Montesquieu's *Spirit of the Laws*, which described the judicial tribunal as the weakest instrument of government because, among other reasons, its judgments would be "fixed . . . and to such a degree as to be ever conformable to the letter of the law."[51] "Were they to be the private opinion of the judge," Montesquieu cautioned, "people would then live in society, without exactly knowing the nature of their obligations."[52]

The exchange between Brutus and Hamilton implies an agreement in principle that wholly unchecked judicial power would corrode the foundations of representative democracy. It was not to be feared here, Hamilton argued, because of the inherent weakness of a judicial institution that faithfully subscribes to *stare decisis*. The legitimacy of judicial power and its independence from the elective branches of government, therefore, rests on this Hamiltonian assumption—one that

must stand the test of time if either is to remain secure.

In short, the early architects of our legal system, particularly those participating in the drafting of the federal and state constitutions, feared an aggregation of governmental power that would vest the few with the ability to produce revolutionary societal change for the many. The judiciary did not escape their notice. Owing to its composition and character, the judiciary is the least democratic branch of our tripartite government. By insisting upon a deep respect for *stare decisis*, the blueprints for the judiciary sought to siphon off decisionmaking power from those who, at any given moment, occupy the bench and then to redistribute that power along a multigenerational line of jurists.

III. Why It Matters

For some, the thought of an appellate judge not substituting his or her judgment for the factfinder may be an important, but still unconvincing, historical principle. Though unspoken, the nagging question remains: Why not?—particularly if the factfinder got it wrong. As for *stare decisis*, a fairly cursory survey of caselaw from the last decade or two would tempt one toward cynicism and put in question whether the stability-of-the-law and respect-for-the-institution rationales are still up to the task. Maybe they never were. If so, why defer at all to the democracy of the dead? Perhaps the living should unapologetically subject traditional legal doctrine to *de novo* contemporary reexamination.

If we could put these questions to the architects of our judiciary, I think we would hear this reply: "Take counsel of your fears—not only the fear that you may be wrong and that the certitude of your views has less to do with their objective merits than the unprincipled mood of your contemporaries, but, more importantly, the fear that aggregating in the present the plenary power to rewrite the past *tends* toward judicial oligarchy. So even if the fear of self-error has no currency with you, fear what could be done if such unchecked decisionmaking power were left in seemingly less capable hands. For you too will come and go just as we have. The power you concentrate in your office will be bequeathed to another."

Every appellate judge must decide whether these fears are real or illusory. Few openly acknowledge or disparage them, but all betray their true views in the decisions they make. As for me, I believe the fears of our forefathers give a sense of proportion and perspective. More than that, they serve as a warning: Do no less than your oath requires, but no more than it permits.

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Endnotes:

* The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach" and otherwise participate in extra-judicial efforts to improve the legal system). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

I very much appreciate the assistance of my law clerk, William Harty, Esq., in the research for and preparation of this essay. I am also indebted to several of my colleagues who offered constructive critiques during the drafting and editing process.

1 Under the Hamilton Plan, submitted to the Constitutional Convention on June 18, 1787, Alexander Hamilton proposed that the "supreme Executive authority" be elected for life. He acknowledged that the position would resemble an "elective Monarch," but believed the concentration of power in the executive far preferable to the political disorder that would accompany constant electoral politics over the position. THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON, A DELEGATE FROM THE STATE OF VIRGINIA, Monday June 18, 1787 (Gaillard Hund and James Brown Scott eds., Oxford University Press 1920) (1787) [hereinafter MADISON'S NOTES]. Hamilton made the same argument in support of lifetime senatorial appointments. *Id.* Consistent with these principles, Hamilton also advocated that state powers be greatly reduced so as not to interfere with the assertion of governmental authority by the national government. *Id.* No national constitution "leaving the States in possession of their Sovereignty," Hamilton declared, would accomplish the goals of the Convention. *Id.*; *see also* MADISON'S NOTES June 19, 1787. Though Hamilton would later advocate the constitutional text adopted by the Convention, the structure of the proposed national government bore little resemblance to Hamilton's preferred plan.

2 THE FEDERALIST No. 47 (Madison) (emphasis added); *see also* THE FEDERALIST No. 48 (James Madison) (discussing the dangers of concentration of power in the legislative and executive departments).

3 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 196 (1787); *see also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 60, at 68 (1859) [hereinafter STORY, EXPOSITION] ("Whenever [the executive, legislative and judicial powers] are all vested in one person or body of men, the government is in fact a despotism, by whatever name it may be called, whether a monarchy, or an aristocracy, or a democracy.").

4 We infrequently consider the importance of this concept, but it has never been lost on despots. During the Nuremberg trials, Van Der Essen, a member of the Official Belgian Commission for War Crimes, testified that upon invading Belgium the Nazis immediately went about the task of dismantling the legal framework separating governmental powers:

> [M. EDGAR FAURE (Deputy Chief Prosecutor for the French Republic)]: Can you give information on the attempt at nazification of Belgium by the Germans, and especially the attempt to undermine the normal and constitutional organization of the public authorities.
>
> VAN DER ESSEN: Certainly. First, I think it is interesting to point out that the Germans violated one of the fundamental principles of the Belgian Constitution and institutions, which consisted of the separation of powers, that is to say, separation of judicial powers, of executive powers, and legislative powers . . . .

6 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, 534-35 (Testimony of Van der Essen 4 Feb. 1946). What the Nazis understood, so too did our Founding Fathers.

5 James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1456 (2000) (internal quotation marks omitted).

6 Appellate "review" is the "[e]xamination of a lower court's decision by a higher court, which can affirm, reverse, or modify the decision." BLACK'S LAW DICTIONARY 1320 (6th ed. 1999); *see also Turner v. Jackson*, 14 Va. App. 423, 431 n.5, 417 S.E.2d 881, 887 n.5 (1992) (noting the "[s]tandard of review" is the "degree of deference" given by the appellate court to the lower court's decision).

7 *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 471 (1979) (Stewart, J., concurring in part and dissenting in part) ("The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer."); *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (noting that the trial court "has the feel of the case which no appellate printed transcript can impart"); *United States v. Huebner*, 356 F.3d 807, 812 (7th Cir. 2004) (explaining that the factfinder "has the best 'opportunity to observe the verbal and nonverbal behavior of the witnesses'" by "'focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements,' as well as confused or nervous

speech patterns *in contrast with merely looking at the cold pages of an appellate record*" (quoting *United States v. Tolson*, 988 F.2d 1494, 1497 (7th Cir. 1993)) (emphasis in original)).

8 *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-32 (1991) (contrasting capabilities of trial and appellate courts); *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. As the Court has stated in a different context, the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road."'" (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977))); Evan Caminker, *Symposium: Restructuring Federal Courts: Federal Courts: Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1526 (2000); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 845-50 (1994).

9 Appellate courts are enjoined to "take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). On appeal, "the evidence and all reasonable inferences flowing therefrom must be viewed in the light most favorable to the prevailing party in the trial court." *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). One of the nation's oldest appellate court systems, Virginia historically treated appeals in a manner similar to the way a trial court treats demurrers, with the appellant occupying the same role as the demurring party. *See Abernathy v. Emporia Mfg. Co.*, 122 Va. 406, 411, 95 S.E. 418, 419 (1918) (Where "the evidence and not the facts" are certified, "the case stands in [the appellate court] as on a demurrer to the evidence by the plaintiff in error."); *Adamson's Adm'r v. Norfolk & P. Traction Co.*, 111 Va. 556, 566, 69 S.E. 1055, 1059 (1911) (noting that the testimony of the defendant's witness, "is to be considered as absolutely true in favor of the defendant since the plaintiff stands here as upon a demurrer to the evidence . . ."); *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 161, 45 S.E. 875, 876 (1903) ("[I]t must be borne in mind that the case stands here as on a demurrer to evidence, and it is beyond the province of this court to follow counsel for the plaintiff in error in his discussion of the countervailing evidence upon which he relies to sustain his theory of the case.").

10 Alexander Hamilton, discussing the constitutional plan for the judiciary, divided his discussion into three principal topics, the third of which was "[t]he partition of the judiciary authority between different courts, and their relations to each other." THE FEDERALIST No. 78 (Alexander Hamilton). This topic consumed the majority of Hamilton's further writings on the judiciary in THE FEDERALIST No. 80 (discussing the rationale for the constitution's jurisdictional grants to the Supreme Court), No. 81 (discussing the "distinct and independent organization of the Supreme Court" from the legislature, and "the propriety of the power of constituting inferior courts"), No. 82 (expounding on the division of judicial power between federal and state courts), and No. 83 (devoted to discussing the issue of jury trials in civil matters).

11 *Jones v. United States*, 526 U.S. 227, 247 n.8 (1999) (citing 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 155b (1628) ("*ad questionem facti non respondent judices; ad questionem juris non respondent juratores*")). "We sit as an appellate court for a review of such evidence and issues, not as a trial court." *Temple v. Moses*, 175 Va. 320, 338, 8 S.E.2d 262, 269 (1940). In criminal cases, for example, when faced with a challenge to the sufficiency of the evidence of guilt, an appellate court will "'presume the judgment of the trial court to be correct' and reverse only if the trial court's decision is 'plainly wrong or without evidence to support it.'" *Kelly v. Commonwealth*, 41 Va. App. 250, 257, 584 S.E.2d 444, 447 (2003) (*en banc*) (citations omitted); *see also McGee v. Commonwealth*, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*). When a jury decides the case, the appellate court will "review the jury's decision to see if reasonable jurors could have made the choices that the jury did make. We let the decision stand unless we conclude no rational juror could have reached that decision." *Pease v. Commonwealth*, 39 Va. App. 342, 355, 573 S.E.2d 272, 278 (2002) (*en banc*), *aff'd*, 266 Va. 397, 588 S.E.2d 149 (2003). The same standard applies when a trial judge sits as the factfinder because the "judgment of a trial court sitting without a jury is entitled to the same weight as a jury verdict . . . ." *Cairns v. Commonwealth*, 40 Va. App. 271, 293, 579 S.E.2d 340, 351 (2003) (citing *Reynolds v. Commonwealth*, 30 Va. App. 153, 163, 515 S.E.2d 808, 813 (1999)); *see also Shackleford v. Commonwealth*, 262 Va. 196, 209, 547 S.E.2d 899, 906-07 (2001). Put another way, a reviewing court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)). It instead asks whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Kelly*, 41 Va. App. at 257, 584 S.E.2d at 447 (quoting *Jackson*, 443 U.S. at 319). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 257-58, 584 S.E.2d at 447; *see also Myers v. Commonwealth*, 43 Va. App. 113, 118, 596 S.E.2d 536, 538 (2004); *Seaton v. Commonwealth*, 42 Va. App. 739, 747-48, 595 S.E.2d 9, 13 (2004); *Williams v. Commonwealth*, 42 Va. App. 723, 734, 594 S.E.2d 305, 311 (2004); *Boyd v. County of Henrico*, 42 Va. App. 495, 525, 592 S.E.2d 768, 783 (2004) (*en banc*); *Holmes v. Commonwealth*, 41 Va. App. 690, 691-92, 589 S.E.2d 11, 11 (2003); *Crowder v. Commonwealth*, 41 Va. App. 658, 662-63, 588 S.E.2d 384, 386-87 (2003); *Hoambrecker v. City of Lynchburg*, 13 Va. App. 511, 514, 412 S.E.2d 729, 731 (1992); *Campbell v. Commonwealth*, 13 Va. App. 33, 42, 409 S.E.2d 21, 27 (1991).

In Virginia, the standard of review comes from Code § 8.01-680—the basis for all appellate court review of factfinding in civil and criminal cases. The rational decisionmaker formulation remains the same for our sufficiency review of criminal cases, *see, e.g., Crowder*, 41 Va. App. at 663, 588 S.E.2d at 387, as it does for the Virginia Supreme Court's sufficiency review of civil cases, *see, e.g., Andrews v. Ring*, 266 Va. 311, 322, 585 S.E.2d 780, 786 (2003) (quoting *Pallas v. Zabaropoulos*, 219 Va. 751, 755, 250 S.E.2d 357, 359-60 (1979)) (noting that a fact issue "presents a jury question unless reasonable minds cannot differ"); *Norfolk & W. R. Co. v. Spencer*, 104 Va. 657, 664, 52 S.E. 310, 313 (1905) (holding that "it is impossible to say that reasonable men might not differ in their judgment upon the question . . . and therefore this court would not be warranted in disturbing the verdict of the jury"); and for the trial court's review of a motion to set aside a jury verdict, *see, e.g., Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 571, 587 S.E.2d 711, 715 (2003) (noting the power to set aside a verdict under Code § 8.01-680 can be exercised only if no "reasonable" jurors could "differ in their conclusions of fact to be drawn from the evidence") (citations omitted).

12 3 WILLIAM BLACKSTONE, COMMENTARIES *379-80.

13 *Id.*

14 *Id.*

15 AKHIL REED AMAR & LES ADAMS, THE BILL OF RIGHTS PRIMER 137-39 (2002) (quoting JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814), and *Essays by a Farmer (IV), reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981)); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 11, 81-118 (1998) [hereafter AMAR, THE BILL OF RIGHTS].

16 *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 2538-39 (2004).

17 *Id.* (quoting John Adams, Diary Entry (Feb. 12, 1771), *reprinted in* 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850)).

18 *Id.* (quoting Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958)).

19 AMAR, BILL OF RIGHTS 95 (quoting Essays by Hampden, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 15, at 198, 200)).

20 *Id.* at 94 (quoting Wythe Hold, *"The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 325 (1987)).

21 ALPHEUS THOMAS MASON, FREE GOVERNMENT IN THE MAKING: READINGS IN AMERICAN POLITICAL THOUGHT 309 (3d ed. 1965). Article VII required nine of the thirteen states to ratify the constitution. Six of the ratifying states called for amendments and five of those "put forth two or more jury-related proposals." AMAR & ADAMS, *supra* note 15 at 130.

22 U.S. CONST. art. III, § 2 (emphasis added).

23 STORY, EXPOSITION § 379, at 272.

24 *Id.*; *see also Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830) (Story, J.) (The Seventh Amendment is a "prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."); *United States v. Wonson*, 28 F. Cas. 745, 748 (CC Mass. 1812) (Story, J.) ("[I]n proceedings according to the course of the common law, writs of error are the modes, by which these courts exercise their jurisdiction,—and the facts once settled by a jury are, while the judgment remains in force, forever conclusive upon the parties."); 3 WILLIAM BLACKSTONE, COMMENTARIES *405 ("The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it."); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 213-14 (7th ed. 1956). *See generally Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 452 (1996) (Scalia, J., dissenting); 5 ROSCOE POUND, JURISPRUDENCE § 148 (1959).

25 Though Alexander Hamilton considered the Judiciary to be "beyond comparison the weakest of the three departments of power," many of the founding generation were not convinced. THE FEDERALIST No. 78 (Alexander Hamilton) (citing 1 MONTESQUIEU, SPIRIT OF THE LAWS 186 (1752) (stating "of the three powers above mentioned, the

judiciary is next to nothing")). Anti-Federalists, writing under the pseudonyms Centinal, Federal Farmer, and Brutus, wrote extensively of their concern that the Constitution concentrated too much power in the judiciary and abrogated the right of jury trial. *See, e.g.*, Centinel (I) October 5, 1787; The Federal Farmer, October 9, 1787; Brutus (XI) January 31, 1788; Brutus (XII) February 7 and 14, 1788; Brutus (XV) March 20, 1788, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 236, 265-67, 294-98, 299-300, 304-09 (Ralph Ketcham ed., 1986). Similarly, during the Virginia ratifying convention George Mason and Patrick Henry argued that the Constitution vested too much power in the judiciary, eroded the right of jury trial, and undermined the state judiciary. *See* 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 525, 540-41, 544-46 (2d ed. 1836) [hereafter ELLIOT'S DEBATES]. In North Carolina, James Bloodworth and Hon. Samuel Spencer made the same arguments. 4 ELLIOT'S DEBATES 151, 154. The concern was sufficiently significant to warrant special treatment by Hamilton in The Federalist. *See* THE FEDERALIST Nos. 78, 81 & 83 (Alexander Hamilton). Indeed, Hamilton devoted all of The Federalist 83 to the jury trial issue, characterizing it as "[t]he objection to the plan of the convention, which has met with most success in [the State of New York], and perhaps in several of the other States . . . ."

26 Letter from Richard Henry Lee to Virginia Governor Edmund Randolph, Oct. 16, 1787, *reprinted in* 1 ELLIOT'S DEBATES 503 (loosely quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *379 ("Every new tribunal, erected for the decision of facts, without the intervention of a jury, is a step towards establishing an aristocracy, the most oppressive of absolute governments.")).

27 That the general populace regarded the right of civil jury trial to be, at a minimum, a valuable safeguard of liberty was conceded by Hamilton: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." THE FEDERALIST No. 83 (Alexander Hamilton).

28 U.S. CONST. amend. VII (emphasis added); *see also Parsons*, 28 U.S. (3 Pet.) at 447-48 (The Seventh Amendment is a "prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."). Modern courts remain faithful to this understanding of the Reexamination Clause. *See Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 437 n.11 (2001) (noting the "'Reexamination Clause . . . controls the allocation of authority to review verdicts'" (quoting in parenthetical from *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996))).

29 *See supra* note 24.

30 *Wonson*, 28 F. Cas. at 750 (Story, J.); *Parsons*, 28 U.S. (3 Pet.) at 447-48 (Story, J.).

31 *See supra* notes 12-14 and accompanying text.

32 *See, e.g., FDIC v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26, 27 (1st Cir. 1984) ("'[T]he fact that a court labels [its legal] determinations 'Findings of Fact' does not make them so if they are in reality conclusions of law.'" (quoting *In re Bubble up Delaware, Inc.*, 684 F.2d 1259, 1262 (9th Cir. 1982))); *In re Missionary Baptist Found.*, 712 F.2d 206, 209 (5th Cir. 1983) ("When a finding of fact is premised on an improper legal standard, or a proper one improperly applied, that finding loses the insulation of the clearly erroneous rule."); *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976) ("However, the fact that a trial court labels determinations as 'findings' does not make them so if they are in reality conclusions of law. In that case, they are subject to unrestricted review.").

33 *See, e.g., Hudson*, 265 Va. at 514, 578 S.E.2d at 786 ("In the case before us, the analysis of the Court of Appeals viewed the evidence in the light most favorable to Hudson rather than to the Commonwealth as required. Additionally, the Court of Appeals emphasized Hudson's evidence rather than the totality of the evidence as required. Finally, the Court of Appeals' analysis did not give proper deference to the province of the jury to consider the testimony and the credibility of the witnesses to determine reasonable inferences from such evidence, and reject as unreasonable the hypotheses offered by Hudson."); *Commonwealth v. Jenkins*, 255 Va. 516, 522, 499 S.E.2d 263, 266 (1998) (finding that the intermediate appellate court failed to consider all the evidence, but instead relied only on the evidence it considered "most trustworthy"); *Sch. Bd. v. Beasley*, 238 Va. 44, 51, 380 S.E.2d 884, 888-89 (1989) (reversing court of appeals because it "redetermined" the facts on appeal and thus violated the rule that a reviewing court is "not permitted to reweigh the evidence or to substitute its factual judgment" for the factfinder).

34 *See, e.g., Jones*, 526 U.S. at 245 (Under the Anglo-American system, "competition developed between judge and jury over the real significance of their respective roles. The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences.").

35 Sympathies for this form of concentrated power, however, have not always been discouraged. The first Chief Justice of the Supreme Court, John Jay, in a rare jury trial under the Supreme Court's original jurisdiction, charged the jury with the following instruction:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: *For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.*

Georgia v. Brailsford, 3 U.S. 1, 4 (1794) (emphasis added); *see also United States v. Battiste*, 24 F. Cas. 1042, 1043 (CC Mass. 1835) (Story, J., sitting as Circuit Justice) (the jury's general verdict is "necessarily compounded of [both] law and fact"). *But see Sparf v. United States*, 156 U.S. 51, 64-107 (1895) (concluding that the trial court did not err by refusing to instruct jurors on issues that may have given rise to nullification). Similarly, with regard to inconsistent verdicts, Justice Holmes noted that such verdicts were "'no more than [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'" *Dunn v. United States*, 284 U.S. 390, 393 (1932) (citation omitted). Yet the Court nonetheless has held that such verdicts may stand despite their inconsistency. *See id.* at 394. Opinions upholding inconsistent jury verdicts have "been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *United States v. Powell*, 469 U.S. 57, 65-66 (1984) (citing *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.), and Bickel, *Judge and Jury — Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 652 (1950)).

36 *See generally* JAMES ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963); *Jones*, 526 U.S. at 246-48, 252 n.8.

37 Even the possibility of jury nullification has factored into Eighth Amendment jurisprudence forbidding the imposition of capital punishment for certain specified crimes. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 597 (1977) (reversing a capital sentence for rape, noting that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence" under Georgia's sentencing law); *McGautha v. California*, 402 U.S. 183, 199 (1971) ("In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."). The same concern also plays a role in the permissible scope of *voir dire* and the wording of jury instructions. *See, e.g., Adams v. Texas*, 448 U.S. 38, 44 (1980) ("A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment."); *Poyner v. Commonwealth*, 229 Va. 401, 414, 329 S.E.2d 815, 825 (1985) ("A juror opposed to the imposition of the death penalty is not impartial. This is so because he or she would be unwilling or unable to follow the law. Such a juror might attempt to undermine the proper functioning of the courts by engaging in jury nullification."); *Walls v. Commonwealth*, 38 Va. App. 273, 282, 563 S.E.2d 384, 388 (2002) ("Although jury nullification undoubtedly occurs in some situations," a litigant has no due process right to "encourage" it.).

38 *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 35 (1994) ("The prevailing duty of lower courts to obey higher court precedents under the precedent model strikes a particular balance of lawmaking power among the various tiers of courts, a balance that falls between complete centralization and radical diffusion of power. . . . The doctrine's centralizing force is justified by its service of various institutional values, including judicial economy, uniformity of interpretation, and decisional proficiency[.]").

39 *See* CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 1.6(b), at 32 (5th ed. 1999) ("Appellate courts are, supposedly, subject to the doctrine of *stare decisis*, which is defined as the policy of courts to stand by their precedents and not to disturb settled points of law. As American law has become more and more politicized, many appellate courts, most notably the Supreme Court of the United States, have begun virtually to ignore *stare decisis*, until today it is, in many courts, little more than a joke.").

40 "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). However, while *stare decisis* is not an "inexorable command," the "careful observer will discern that any detours from the straight path of *stare decisis*" occur only "for articulable reasons." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). When asked to abandon precedent, a court must distinguish between statutory and constitutional questions. A party "advocating the abandonment of an established precedent" bears a greater burden where "the Court is asked to overrule a point of statutory construction." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). This is because "unlike in the context of constitutional interpretation, the legislative power is implicated," and the legislature "remains free to alter what we have done." *Id*. at 172-73; *see also Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

41 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

42 *See, e.g.*, WILLIAM O. DOUGLAS, STARE DECISIS 8 (1949) ("*Stare decisis* serves to take the capricious element out of law and to give stability to a society.").

43 GILBERT KEITH CHESTERTON, ORTHODOXY 85 (1909).

44 Oliver Wendell Holmes, *Codification and Scientific Arrangement of the Law*, *reprinted in* OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 63 (1936). Though the reasoning of the prior precedent "be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration," cautioned Blackstone. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

45 *Vasquez*, 474 U.S. at 265.

46 A distinction must be made, however, where a court overrules a more recent case that, itself, violated *stare decisis* and thus represented a divergence from settled precedent. In such matters, the court does not flout *stare decisis* by overruling the anomalous case. Rather, it "restore[s]" the prior "fabric of law" that the anomalous case departed from. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995). Thus, in *Adarand Constructors, Inc.*, the Court overruled its recent opinion in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), stating that "*Metro Broadcasting* itself departed from our prior cases — and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it." *Id*. at 233-34. To give the aberrant case dispositive effect in the face of well-established contradictory precedent would be to "mock stare decisis." *United States v. Dixon*, 509 U.S. 688, 712 (1993).

47 I acknowledge that, to some, the merger of law and politics is both inevitable and harmless. I could not disagree more, however. *See generally* D. Arthur Kelsey, *Law & Politics: The Imperative of Judicial Self-Restraint*, 28 VBA NEWS JOURNAL No. 6, at 8 (Sept. 2002) (**www.vba.org/sept02.htm**). It is something to be resisted at every step. The moment we become tolerant of judges imposing their own personal or political philosophies through judicial edicts—a tolerance, by the way, that we conveniently embrace only when we think the judges got the answer right—we compromise our ability to make a principled objection to this exercise of power when we think the judges got the answer wrong. *Id*. If you think this point not that important, go back and reread the *Dred Scott* decision, in which the highest court in the land declared there to be a constitutional right to enslave our countrymen, and on that basis, struck down the Missouri Compromise. Then consider the dissent of Justice Curtis:

> Political reasons have not the requisite certainty to afford rules of [judicial] interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting). It was only a few years after Justice Curtis issued this dissent that our nation took a violent free-fall into civil war.

48 Virginia adopted not only English common law, but all "statutes or acts of parliament made in aid of the common law." 9 HENING'S STATUTES OF VIRGINIA ch. v, § vi, at 127 (May 6, 1776); *see also* JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *supra* note 3, at 137 ("[T]he rule, in our courts of judicature was, that the common law of England, and the general statutes previous to the 4th of James, were in force here . . . ."); VA. CODE § 1-10 ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."); VA. CODE § 1-11 ("The right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, insofar as the same are consistent with the Bill of Rights and Constitution of this Commonwealth and the Acts of Assembly."); *see also* DEL. CONST. art. 25 (1776); MD. CONST. Dec. of Rights, art. iii (Nov. 11, 1776); N.J. CONST. art xxii (1776); N.Y. CONST. art. xxxv (1776).

49 Essay by Brutus (XI) January 31, 1788, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 293-95 (Ralph Ketcham ed., 1986).

50 THE FEDERALIST No. 78 (Alexander Hamilton) (citing 1 MONTESQUIEU, SPIRIT OF THE LAWS 186 (1752) (observing that "of the three powers above mentioned, the judiciary is next to nothing")).

51 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 186 (G. Bell & Sons, Ltd., eds., 1914) (1752).

52 *Id*.