

AN ESSAY ON PRECEDENT, *STANDING BEAR*, PARTIAL-BIRTH ABORTION AND WORD GAMES—A RESPONSE TO STEVE GRASZ AND OTHER CONSERVATIVES

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Like Elmer Dundy,¹ the author of *United States ex rel. Standing Bear v. Crook*,² I have been privileged to serve as a federal judge in Nebraska.³ Unremarkably, or so I thought until recently, we try as best we can to adhere to the commonly accepted norm that lower court judges must follow and fairly apply analogous opinions of higher court judges. This doctrine, called “precedent” or “*stare decisis*,”⁴ requires the lower court judge to apply the higher court judge’s prior opinion in a similar case, even if the lower court judge passionately disagrees with the result or the reasoning. In academic circles, this notion is called “vertical” precedent.⁵

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1. Elmer Scipio Dundy served as a U.S. Territorial Judge from 1863 until 1868 and as a U.S. District Judge from 1868 until his death in 1896. Federal Judicial Center, *History of the Federal Judiciary* (2001) at <http://www.fjc.gov/history>.

2. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

3. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 700-01 (C.C.D. Neb. 1879) (No. 14,891). The court issued a writ of habeas corpus and concluded that an Indian is a “person” within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.

For a marvelous review of the case and its history, one should read Professor Lake’s article on the subject. James A. Lake, Sr., *Standing Bear! Who?*, 60 NEB. L. REV. 451 (1981).

4. For purposes of this essay, I take “precedent” and “*stare decisis*” to mean the same thing; that is, “a system in which cases bind.” Jed I. Bergman, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 982 n.68 (1996). The term “*stare decisis*” is derived from the Latin “*stare decisis et non quieta movere*” or “stand by the thing decided and do not disturb the calm.” *Id.* (quoting BLACK’S LAW DICTIONARY 1406 (6th ed. 1990) and James C. Rehnquist, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986)).

5. See, e.g., Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L. J. 255, 276 n.106 (1992) (defining “vertical” precedent this way: “The hierarchical structure of Article III dictates that inferior courts faithfully apply the precedents of superior courts, just as the hierarchical structure of Article II requires executive officials to follow presidential precedents.”). “Horizontal” precedent, on the other hand, is quite a different thing. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (noting “horizontal” precedent is the doctrine that commands a court to follow its own prior

In this essay,⁶ I explore vertical precedent from the viewpoint of a trial judge who must actually decide a difficult case like one involving partial-birth abortion.⁷ In so doing, I cast a critical eye on a law review article written by Steven Grasz which refers to the *Standing Bear* opinion as a metaphor for the proper use of precedent in the context of abortion litigation.⁸ I conclude that Mr. Grasz proposes a strain of judicial activism that he ought to decry.

I. AN OVERVIEW

Let us back up for just a moment. As in all things, perspective is helpful.

A. PRECEDENT AND INFERIOR FEDERAL JUDGES

One might spend an entire career trying to come up with a theory of precedent.⁹ In fact, one very smart judge thinks the task is impossible.¹⁰ Nonetheless, all federal judges know in their gut what the

decisions in similar cases; and suggesting that "horizontal precedent" is unconstitutional when adherence to the doctrine compels a result contrary to a proper understanding of the Constitution).

6. I write for myself and not for the court which I serve. Moreover, I do not express any opinion on cases yet to come.

7. The words "partial-birth abortion" describe various surgical techniques for completing an abortion. The imprecision of these words was a big problem, but not one that is necessary to address here.

8. Steven Grasz, *If Standing Bear Could Talk . . . Why There is No Constitutional Right to Kill a Partially-Born Human Being*, 33 CREIGHTON L. REV. 23 (1999). Mr. Grasz was one of the lawyers for the State of Nebraska in *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding a Nebraska statute that criminalized partial-birth abortion unconstitutional). I was the trial judge who ruled that Nebraska's partial-birth abortion ban was unconstitutional. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd* 530 U.S. 914 (2000) (finding the ban was unconstitutional because (1) for some women, it banned the safest procedure (D&X) and was therefore an undue burden; (2) for other women, it banned the most often-used procedure (D&E) and was therefore an undue burden; and (3) the ban was vague). *See also Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (granting preliminary injunction). During these proceedings, I complimented all the lawyers, including Mr. Grasz, for the quality of their advocacy and their professionalism. *See, e.g., Carhart*, 972 F. Supp. at 509 n.2. I continue to hold Mr. Grasz in the highest esteem, although I profoundly disagree with him.

9. *See, e.g., Frederick Schauer, Precedent*, 39 STAN. L. REV. 571, 572 (1987) (suggesting that "precedent" describes a process of thinking that transcends legal reasoning).

10. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 433 (1988) (stating "I begin without a theory of *stare decisis* and end that way."). Judge Easterbrook sits on the United States Court of Appeals for the Seventh Circuit. Richard A. Posner, another brilliant Seventh Circuit judge, has written extensively about the relative costs and benefits of precedent. *See Thomas R. Lee, Stare Decisis In Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 646 n.11, 648 n.17, 650 n.24, 654 n.35 (2000) (collecting and describing Judge Posner's many works on the subject). Both Judges Easterbrook and Posner are among the intellectual elite of the inferior federal courts. Both

doctrine requires, even if they have no clue what *theory* underlies it.¹¹

Precedent for a judge of a subordinate federal court “is theoretically absolute.”¹² While a member of the Supreme Court is free to examine “a series of prudential and pragmatic considerations designed to test”¹³ the utility of applying a prior decision to a pending case, “it is generally conceded that ‘the duty of a subordinate court’ is “to follow the laws as announced by superior courts.”¹⁴ More bluntly, for the inferior court judge, “prudential and pragmatic” considerations are out the window when there is precedent to be found.

Sometimes called the “result” model, this axiom requires that a court decide “in favor of a litigant because his case is most analogous to a decision rendered by a superior court.”¹⁵ That is, when a lower court judge decides whether a decision should be followed as precedent, there are few (perhaps none) moral or philosophical principles involved. Rather, it is (or ought to be) a question of similarity.¹⁶

men were also divided over the partial-birth abortion issue. See *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999), *cert. granted and judgment vacated* by 530 U.S. 914 (2000). Judge Easterbrook wrote the opinion upholding efforts to ban the practice, *id.* at 861, and Judge Posner wrote a stinging dissent. *Id.* at 861, 876.

11. However, when it comes to “vertical” precedent, the scholars frequently beg off. See, e.g., Lawson, 17 HARV. J.L. & PUB. POL’Y at 24 & n.4 (“The question whether inferior federal courts are permitted, or obligated, to follow the precedents of superior courts raises more complicated issues, and I want to put it aside for the moment.”); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL’Y 45, 47 (1994). (“And when lower court judges, whether state or federal, follow Supreme Court opinions they think erroneous (the question of vertical precedent), have they, in elevating the opinions of Supreme Court Justices (or, if they are District Judges, of Court of Appeals Judges) above ‘the Constitution’ thereby violated both their oath of office and the Supremacy Clause of the Constitution?” It is not my goal here to answer any of these questions, for the ones that are not frivolous are among the most enduring and most intractable in constitutional law.)

12. Bergman, 96 COLUM. L. REV., at 983 & n.78 (quoting 1A JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 0.401, at I-2 (2d ed. 1995)).

13. *Id.* at 983 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992)).

14. *Id.* at 983 n.78 (quoting 1A JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 0.401, at I-2 (2d ed. 1995)).

15. Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL’Y 35, 36 n.7 (1994) (summarizing three models of precedent proposed by Larry A. Alexander in *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 1-48 (1989)).

16. This does not mean the task is easy. But, frankly, it is not rocket science either. As one former judge has said, it is “ultimately a matter of judgment and good faith.” Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 811 (2000). We could spend a lot of time talking about whether federal judges are in theory only bound by the specific holding of a superior court opinion or whether the judge is also bound by the reasoning behind that opinion. In the hurried world where lower court judges labor, there is little time for that. The doctrine is far more efficient: honestly follow the instructions of the superior court no matter how those instructions might be coded.

While a scholar would be frustrated with such a narrow job description,¹⁷ the judge knows that it provides a limiting, and therefore more democratically acceptable, role definition. Put another way, this cramped view of precedent supposes, as does Article III itself,¹⁸ that it is preferable to have only nine unelected law givers (Supreme Court Justices), and a bunch of dutiful minions (all the rest of the judiciary), than it is to have a thousand.

When he was a judge, Robert Bork made a related, yet important, point. The judge's choice to apply a decision of a higher court as precedent requires probity and no more. Bork wrote that "[t]he only questions open for us are whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide."¹⁹ Note, and remember, these words: "fairly defined" and "honestly applied." Translation: "good faith."²⁰

This means, of course, that precedent becomes especially significant when, despite our misgivings about the outcome, a given result is honestly dictated by the precedent. We do not follow precedent because we like the result or think it just. "Authority, and therefore the

17. Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993) ("[T]he Supreme Court, and much scholarly and ordinary understanding, views the 'inferior court' as the simple (and perhaps simple-minded) enforcer of the Supreme Court's dictates, however wise or unwise they may appear to the hapless judge below.").

18. The first sentence of the first section of Article III states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

19. *Dronenburg v. Zech*, 741 F.2d 1388, 1396 n.5 (1984) (determining the Navy's policy of mandatory discharge for homosexual conduct does not violate constitutional rights to privacy or equal protection).

20. The reader will find this essay meaningless if he or she believes that the language of the law or words in general have no fixed meaning; that is, like poetry, prose is only important for the spaces between the words. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 79 (2001) (describing the "radical indeterminacy of legal language" idea; "Thus, just as statutes and constitutional provisions cannot really constrain judges, neither can past opinions") (footnote omitted). That view is both too silly and too depressing to spend time thinking about. Also depressing, and yet more plausible, is the suggestion that judges use precedent selectively to implement their personal preferences. Nelson, 87 VA. L. REV. at 81-82 (noting that some "commentators assert that *stare decisis* 'has always been a doctrine of convenience'; instead of conscientiously trying to follow predetermined rules of precedent, judges invoke *stare decisis* only when they favor inertia for other reasons") (footnote omitted). Although most of the time I have tried to resist, I confess that I have committed the "selectivity" sin myself. Fourteen years on the bench tells me, however, that most of the time most lower court judges act in good faith when applying precedent, if only because the multi-judge appeal process makes cheating risky for both district and circuit judges. And, if you think there is a prevailing ideological orthodoxy among circuit judges (who sit in panels and must come to consensus about precedent), please quit sniffing the book bindings.

authority of precedent, matters when and only when the precedent (as perceived by the current decisionmaker) is mistaken—only when past wrong decisions can provide reasons for decision despite their wrongness, and therefore precisely and only because of their pastness.”²¹

In sum, when looking for precedent, lower court judges are supposed to play it straight, particularly when they do not like the result.²² “Read ‘em and weep” could be our motto.

B. THE PARTIAL-BIRTH ABORTION LITIGATION

By now, the litigation over the efforts of many states to ban partial-birth abortions is well-known.²³ With only very few exceptions, every federal court to consider the question found the statutes barring these surgical procedures unconstitutional.²⁴ Virtually all of these cases (including those that upheld the bans) applied the Supreme Court’s earlier decisions in *Roe v. Wade*²⁵ and *Planned Parenthood v. Casey*²⁶ as pertaining to the dispute and as binding upon the lower federal courts. The dispute was not about whether *Roe* and *Casey* applied, but rather how to apply them.

C. MR. GRASZ’S LAW REVIEW ARTICLE

Before we get to the meat of it, we need a context for Mr. Grasz’s law review article. In December of 1999, when the article was published, a petition for certiorari had been filed by the State of Nebraska asking the Court to take the Nebraska partial-birth abortion case. As

21. Schauer, 17 HARV. J.L. & PUB. POL’Y at 48.

22. Of course, there is a point where a judge must say, “Hell, no!” Under what circumstances that exclamation may justifiably arise is a topic for another day.

23. See, e.g., Note, *The Supreme Court 1999 Term*, 114 HARV. L. REV. 219 (2000).

24. Of the twelve inferior federal courts to consider partial-birth abortion bans on the merits, all but two found them unconstitutional. Note, 114 HARV. L. REV. at 219 & nn.7 & 8 (collecting cases).

25. 410 U.S. 113, 164-65 (1973) (finding a woman has a right to choose to have an abortion before viability and to obtain it without undue interference from the state; after viability, the state has the power to restrict abortion if the law contains exceptions for pregnancies which endanger the woman’s life or health). My personal and long-held belief is that *Roe* was wrongly decided. This is not because the policy established by the opinion was wrong. In my judgment, the policy was correct. Rather, *Roe* was wrong because there was no underlying constitutional provision which supported the policy and, absent such a foundation, the political branches of government should have been left to deal with the issue. If this essay is correct, these views are entirely irrelevant when an inferior federal judge applies *Roe*.

26. 505 U.S. 833, 845-46, 877, 879 (1992) (rejecting the trimester framework but affirming the essential holding of *Roe*; declaring that the states have legitimate interests in regulating abortion throughout pregnancy to protect maternal health and fetal life; announcing that a state law regulating pre-viability abortion is unconstitutional only when it imposes an “undue burden” on a woman seeking an abortion; stating that unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden).

he had been in the earlier stages of the litigation, Mr. Grasz was one of the lawyers.²⁷

Nebraska Deputy Attorney General Grasz, of course, hoped that the Supreme Court would take the case, as it later did, and vindicate his position, which it refused to do.²⁸ Unlike a subordinate court, the Supreme Court is free to change its mind and disregard or overrule its prior decisions, even if these prior decisions might otherwise be sufficiently analogous to be called “precedent.”²⁹ This is the notion of “horizontal” precedent.

Therefore, and to be clear, Mr. Grasz cannot fairly be faulted for asking the Supreme Court to do what it manifestly had the constitutional right to do.³⁰ My substantive, and not personal, dispute with Mr. Grasz and other conservatives is over the suggestion that the lower courts should have ignored Supreme Court precedent when deciding the partial-birth abortion cases. And, now, I turn to the substance of his law review article.³¹

Mr. Grasz began his article with a compelling rhetorical device. He compared “partially-born children” to Native Americans in 1879.³² He invoked the *Standing Bear* opinion as a metaphor.³³ While he acknowledged that the “[l]ower federal courts are obliged to follow clear legal precedent regardless of whether it may seem unwise or even

27. Brief of Petitioner at 1, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830).

28. *Stenberg*, 530 U.S. at 920-44 (applying *Roe* and *Casey* to Nebraska’s partial-birth abortion law and finding it unconstitutional on two independent grounds; the law was unconstitutional because it lacked an exception for the preservation of the health of the mother who needed a D&X procedure; the law was unconstitutional because it imposed an undue burden on the right of a woman to choose to have a D&E procedure).

29. See, e.g., *Casey*, 505 U.S. at 854 (noting “[I]t is common wisdom that the rule of *stare decisis* is not an ‘inexorable command’ . . .”) (citations omitted).

30. It is worth noting that every time a judge of an inferior court follows precedent, he or she knowingly takes the risk that the superior court may, without explicitly overruling the prior decision, simply ignore, disregard or qualify the precedent as an expedient (but not necessarily principled) way of dealing with the issue. Sometimes superior court judges acknowledge what they are doing. Many times they do not. See, e.g., *Stenberg*, 530 U.S. at 956-980 (Kennedy, J., dissenting).

31. Mr. Grasz has not been the only author of a *Creighton Law Review* article to vigorously attack my opinion. See Richard Collin Mangrum, *Stenberg v. Carhart: Poor Interpretivist Analysis, Unreliable Expert Testimony, and The Immorality of the Court’s Invalidation of Partial-Birth Abortion Legislation*, 34 CREIGHTON L. REV. 549, 556-61, 578-95 (2001) (assailing the factual finding that under certain circumstances the D&X would be the safest procedure for patients treated by Dr. Carhart). For present purposes, there is no reason to debate Professor Mangrum about this difficult issue. Indeed, whether I was right or wrong on the safety question is entirely irrelevant to the point of this essay. Nevertheless, the majority of the Supreme Court thought my decision on this question was “highly plausible” and “record-based.” *Stenberg*, 530 U.S. at 936.

32. Grasz, 33 CREIGHTON L. REV. at 29.

33. *Id.*

morally repugnant to do so," Mr. Grasz quickly retracted the point.³⁴ That is, "a court need not extend questionable jurisprudence into new areas or apply it in areas outside of where there is clear precedent."³⁵

He proceeded to chastise a lower court decision³⁶ (mine) for brushing aside and denying the claim that "partially-born human beings" were persons under the Fourteenth Amendment. He wrote:

In a preliminary injunction memorandum, one federal court brushed this issue aside by noting that "there is no precedent" for treating partially-born human beings as persons. Amazingly, this is, in essence, the same argument made by the federal authorities in support of denying civil rights protection to Standing Bear and thirty-five other Native Americans in April of 1879—exactly 119 years previous—in the same court. In *Standing Bear*, Federal District Judge Elmer S. Dundy expressly addressed and rejected this argument:

I must hold, then, that Indians, and consequently the relators, are "persons," such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore the court must be without jurisdiction in the premises. This is a non sequitur. I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before been so great.³⁷

Asserting that "[a]bortion jurisprudence is, to a significant extent, a word game[.]"³⁸ Mr. Grasz argued that "the rules and legal tests set forth in *Casey* and *Roe* have application only to 'the unborn,' and do not govern state protection of a partially-born child."³⁹ He concluded by stating: "Courts need not, and should not, apply the *Roe-Casey* legal framework when reviewing States' efforts to protect partially-born human beings. There is no constitutional right to kill a partially-born human being."⁴⁰

II. APPRAISAL

I will not spend time quibbling with Mr. Grasz except to say that: (1) he is wrong to suggest that in 1879 there was no precedent for the

34. *Id.* at 27.

35. *Id.* at 27-28.

36. *Id.* at 29 (citing and quoting *Carhart*, 972 F. Supp. at 529).

37. *Id.* (quoting *Standing Bear*, 25 F. Cas. at 697) (footnotes omitted).

38. *Id.* at 30.

39. *Id.* at 33.

40. *Id.* at 38.

Standing Bear decision;⁴¹ and (2) he is also inaccurate when he asserts that his “partially born” argument was “brushed aside” 119 years later in the same Nebraska federal court that gave *Standing Bear* relief.⁴² In contrast, I want to take issue with Mr. Grasz, and his fellow conservatives,⁴³ over what I view to be a more fundamental and quite radical suggestion.

Mr. Grasz asserts that “[a]bortion jurisprudence is, to a significant extent, a word game” and judges “need not extend [this] questionable jurisprudence.”⁴⁴ But when an inferior court judge decides

41. The *Standing Bear* decision was in fact supported by precedent. See, e.g., *Ex Parte Dos Santos*, 7 F. Cas. 949 (C.C.D. Va. 1835) (No. 4,016) (ordering the release of an alleged murderer from Portugal even though he was not a citizen of the United States because he could not lawfully be detained in this country). As the Supreme Court later observed, by the time *Standing Bear* was decided, it had long been the law in America that “any person, whether a citizen or not, unlawfully restrained of his liberty, [was] entitled to that [habeas corpus] writ.” *Elk v. Wilkins*, 112 U.S. 94, 108 (1884) (discussing *Standing Bear* and citing, among other cases, *Ex Parte Dos Santos*).

42. This argument was fully considered and rejected. First, the “partially born” argument was rejected because *Roe* and *Casey* were thought to provide the rules of decision:

The defendants do argue that *Roe* and *Casey* do not apply to Nebraska’s law because “the Supreme Court has never recognized a constitutional right to kill a *partially born human being*.” (Defs.’ Br. Opp’n Pl.’s Mot. Prelim. Mot. [sic] at 3 (emphasis added).) We reject this argument because there is no precedent for it.

Roe and *Casey* categorized fetuses as viable or not viable. No case with which we are familiar uses the “partially born human being” category as a construct for constitutional analysis. It is our job to fairly apply the precedents of the Supreme Court whether we agree with them or not. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984) (Bork, J.). Accordingly, we decline the defendants’ invitation to ignore *Roe* and *Casey*.

Carhart, 972 F. Supp. at 529.

Then, the “partially born” argument was rejected because the evidence did not support it:

There is also no evidence to support this contention. For example, the evidence does not show that placement of the fetus partially in the uterus and partially in the vaginal cavity is the medical equivalent of birth. See *STEDMAN’S MEDICAL DICTIONARY* at 175 (defining “birth” as “the complete expulsion or extraction from its mother of a fetus”). Nor does the evidence show that such placement makes a nonviable fetus viable. *Id.* at 1551 (defining “viable” as “denoting a fetus sufficiently developed to live outside of the uterus”).

Id. at 529 n.35.

43. See, e.g., James Bopp, Jr. & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 *ISSUES L. & MED.* 3, 25 (1998) (“Abortion jurisprudence does not govern killing infants who are not unborn.”).

44. Grasz, 33 *CREIGHTON L. REV.* at 30. Do I hear a blast from the past? See Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979, 983 (1987) (noting that a decision of the Supreme Court “does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore”). On the other hand, perhaps this is the “brave new world” envisioned by conservatives. See James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 *HARV. J.L. & PUB. POL’Y* 189, 200-01 (2000) (questioning the propriety of vertical and horizontal precedent when dealing with the Constitution and federal statutes, a Senior United States Circuit Judge writes: “[i]f we are to keep faith with the Constitution, however, we may have to do more than embrace originalism As I see it, there is a more benign

whether a decision of the Supreme Court should be treated as precedent, *that judge* is not engaged in “a word game.” This is most particularly true when the decision is “questionable” (frequently meaning that we disagree with it). Our job, as best we can, is to understand (not agree with) the prior decision of our superiors, and, if it be fairly analogous, apply it. This task is manifestly not a contest which permits us to question the wisdom of the decision.

Let me be clear. Conservative-thinking lawyers, like everyone else, are perfectly justified in trying to persuade the members of the Supreme Court to change their minds and to reject or narrow prior decisions of the Court. If these lawyers find appeals to emotion are useful, so be it.⁴⁵ But inferior court judges are not free to engage in that sport. If our oath of office means anything, it means that we must honestly try to follow the precedents of our superiors. That task is not the equivalent of scrabble with a vengeance.

An example (which is not entirely hypothetical⁴⁶) from the other side of the spectrum is in order. Let us say Virginia enacted a law that permitted a court to impose a forty-year prison sentence for possession with intent to distribute less than nine ounces of marijuana. Let us further say that a petition for writ of habeas corpus was filed with the federal district court arguing that such an idiotic sentence violated the Eighth Amendment. Remember, *Standing Bear* sought a writ of habeas corpus too.

Now, assume that the Supreme Court had earlier ruled that the Eighth Amendment permitted Texas to send a three-time felon to prison for the rest of his life even though his first felony involved a \$29 forged check, his second felony involved the fraudulent use of a credit card to the tune of \$80, and his last offense involved obtaining \$121 by false pretenses. In the Texas case, the Court made it plain that for felonies other than the death penalty, the length of a sentence was purely a matter of legislative prerogative.

explanation than judicial activism for most of the departures from constitutional bedrock that have occurred over the years. I refer to our application of the precedent-bound methodology of the common law to the application of written law. . . . If these thoughts have any merit, the task of changing our common law-based legal culture will prove a formidable one.”).

45. Why should lawyers desist from *Standing Bear*-like arguments when members of the Supreme Court and law professors find them useful? See, e.g., *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting) (likening the majority opinion to *Korematsu* and *Dred Scott*); Mangrum, 34 CREIGHTON L. REV. at 609 (same). While it may provide a neat conversation starter at Federalist Society dinners, for me, that type of rhetorical flourish has become tiresome.

46. See *Hutto v. Davis*, 454 U.S. 370 (1982) (applying *Rummel v. Estelle*, 445 U.S. 263 (1980)).

Let us further stipulate that the Virginia federal district judge (like many of his brethren on the Fourth Circuit) honestly and passionately believes that the Supreme Court got it wrong. Indeed, those lower court judges believe the Supreme Court dissenters stated the proper test. That is, under the Eighth Amendment a sentence is not purely a matter of legislative prerogative, and a court should review the proportionality of the sentence by looking at such things as the presence or absence of violence.

Now, you be the judge! Better yet, let a judge be the judge who believes the Court's "Eighth Amendment jurisprudence" is mostly an intellectually dishonest "word game," and that lower federal courts need not extend the "questionable" precedents that flow therefrom.

Clearly we can distinguish the Virginia case from the Texas case. For example, the Texas case involved a "three-time loser" and, if relative culpability means anything under the Eighth Amendment, that difference is enough to disregard the Texas opinion. After all, this is all about "word games" anyway. The Texas case was, at the very least, "questionable." My goodness, Justices Powell, Brennan, Marshall and Stevens certainly thought so. Okay, tell Virginia to cut the guy loose.⁴⁷

If you grant the writ, you are likely to get a reversal, and a per curiam reversal at that. As an introduction, the opinion would state that by granting the writ after the Texas decision, you "sanctioned an intrusion into the basic line-drawing process that is 'properly within the province of legislatures, not courts.'"⁴⁸ "More importantly," you would be sternly informed that your decision "ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress."⁴⁹

The opinion might even acknowledge that, yes, "arguments may be made one way or the other whether the present case is distinguishable" from the Texas case.⁵⁰ But, in the end, you would be instructed not to toy with the opinions of your seniors. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [a su-

47. If we want to make the hypothetical even better, we could make the defendant a young, poorly educated, abused, pregnant, African-American mother of two with no prior criminal history. See *United States v. McMurray*, 833 F. Supp. 1454, 1457, 1485 (D. Neb. 1993) (Kopf, J.) (imposing a mandatory life sentence under the Sentencing Guidelines on a young, poorly educated, abused, pregnant, African-American mother of two with no prior criminal history due to her non-violent participation in a crack cocaine conspiracy), *aff'd*, 34 F.3d 1405 (8th Cir. 1994), *cert. denied*, 513 U.S. 1179 (1995). (That case very nearly caused me to say, "Hell, no!" See *supra* note 22.).

48. *Hutto*, 454 U.S. at 374 (quoting *Rummel*, 445 U.S. at 275-76).

49. *Id.* at 374-75.

50. *Id.* at 375.

perior court] must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”⁵¹

This cautionary tale from Virginia is what actually confronts federal judges every day in a wide variety of circumstances. Feeling constrained by precedent, and not motivated by ideological cant, most of the time we try our fragile best to do what Judge Bork suggested. That is, we strive to fairly define and then honestly apply the precedents. When we fail, our superiors quickly force us back into line. If the first sentence of the first section of Article III means anything, that is how it should be.

III. CONCLUSION

I return to the beginning. How could a lower court judge in a partial-birth abortion case honestly and fairly disregard *Roe* and *Casey* and create a new category of constitutional analysis for the “partially born”?⁵² Playing word games with the precedents does not provide an appropriate answer. Nor does invoking the visage of *Standing Bear* or *Dred Scott*. This is true for abortion litigation and every other facet of the federal courts’ work. For those who desire a principled and restrained national judiciary, fidelity to precedent is serious business. It is no less than a matter of good faith.

51. *Id.*

52. It is not too harsh to say that the phrase “partially born” “is a non sequitur.” *Standing Bear*, 25 F. Cas. at 697.

