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## STALWARTS OF STARE DECISIS: LESSONS FROM EARLY SUPREME COURT REPORTERS FOR THE DIGITAL AGE

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## INTRODUCTION

As a young nation, the United States maintained a common law legal system transplanted from England.<sup>1</sup> Common law legal systems are defined by *stare decisis*, meaning “to stand by things decided.”<sup>2</sup> In other words, judges are expected to apply prior rulings to like cases in like manner. This ensures “the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>3</sup> Traditionally, the doctrine of *stare decisis* was bound by the limits of human memory, as English judges delivered their opinions orally.<sup>4</sup> However, in the United States, this oral tradition changed as early as 1789 when decisions were first memorialized in writing and published for later reference.<sup>5</sup> These were not written opinions

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1. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1222 (2007) (“The situation in the American colonies was originally not all that different from that in England, whence their legal system largely came. Pre-revolutionary lawyers tended to rely on law books imported from England, including case reports.”); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 685 (2008) (“The U.S. legal system inherited *stare decisis* from its English common law ancestor.”). But early colonies “deviate[d] from English common law” to “address unique local conditions, protect property, [and] advance economic interests.” J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL’Y 351, 370 (2019); see also *id.* at 364 (“[O]ver time, each colony and later each state decided for itself the extent to which its legal system would adopt English common law as its foundation.”).

2. *Stare decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *Gamble v. United States*, 139 S. Ct. 1960, 1982–83 (2019) (Thomas, J., concurring) (describing the influence of *stare decisis* on common law judges: “In other words, judges were expected to adhere to precedents because they embodied the very law the judges were bound to apply.”). The extent to which common law courts adhere to precedent varies. See Tiersma, *supra* note 1, at 1226–34 (discussing “American [i]nnovations” that “eventually le[d] to a very different—and eventually, more textual—conceptualization of the notion of precedent.”); Lee Faircloth Peoples, *Controlling the Common Law: A Comparative Analysis of Non-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT’L & COMP. L. REV. 307, 344 (2007) (noting that “English courts’ approach to *stare decisis* is still very strict by American standards.”).

3. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* has been recognized as an integral component of the United States’ judicial system since its conception. THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . .”); Connors, *supra* note 1, at 685 (“Although the Constitution contains no reference to *stare decisis*, ample evidence suggests that the Framers and commentators at the time of ratification contemplated its application and supported some manner of its use.”); William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 40 (2011) (“[T]he common law respect for precedent inheres in the judicial power of the United States under Article III by means of the Framers’ intent. Judicial respect for precedent is, therefore, a constitutional imperative by virtue of original meaning.”). *But cf.* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001) (tracing changes in the application of *stare decisis* in the United States and arguing that our modern conception of *stare decisis* is significantly stronger than necessary to achieve consistency in judicial decisions).

4. Peoples, *supra* note 2, at 310–11.

5. *Id.* at 317; see also Tiersma, *supra* note 1, at 1222 (“After independence, printed law reports began to appear in the American states. Not surprisingly, reliance on English cases was felt to be inconsistent with independence and the development of a distinct American legal system.”).

authored by the judges themselves; rather, they were reconstructions of oral opinions crafted by enterprising court reporters (“Reporters”).<sup>6</sup> Early Reporters, in true American fashion, were entrepreneurs—they not only attended court and transcribed handwritten notes, but they also secured private publishing in hopes of turning a profit.<sup>7</sup> The United States Constitution, in establishing the Supreme Court, made no provision for an official Supreme Court Reporter;<sup>8</sup> thus, the Court’s early seminal cases were published privately, subject to selection by the Reporter.<sup>9</sup>

In this Comment, I will recount the history of the early Supreme Court Reporters and discuss how the position has evolved to ensure the preservation of precedent, and thus, the vitality of stare decisis in the United States. Then, looking to the present, I will detail how modern technological developments threaten stare decisis in new, insidious ways. Finally, with the early Reporters as inspiration, I will evaluate solutions to these threats.

## I. THE NOMINATIVE SUPREME COURT REPORTERS

The doctrine of stare decisis is predicated on the preservation and distribution of prior court opinions. Accordingly, the opinions of the United States Supreme Court are published to ensure the evenhanded, consistent distribution of the law across the United States.<sup>10</sup> Yet many take the Supreme Court’s current publication procedures for granted, including the very existence of a Reporter.<sup>11</sup>

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6. Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 15 (2001).

7. *Id.* at 14; see also Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 547–48 (2014); Ryan Schwier, *William T. Otto: The U.S. Supreme Court’s First “Anonymous” Reporter, 1875–1883*, IND. LEGAL ARCHIVE (May 28, 2015), <http://www.indianalegalarchive.com/journal/otto> [https://perma.cc/YP7M-HBY3].

8. Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294 (1985) (“The members of the first Congress in 1789, while laying out an elaborate blueprint for the structure of the new federal judiciary, were silent on the subject of a Reporter . . .”) (footnote omitted).

9. Lazarus, *supra* note 7, at 548 (“The earliest Reporters, including in particular each of the first three . . . had an established practice of not reporting all of the Court’s rulings.”).

10. This was not lost on the second Supreme Court Reporter, William Cranch, who “seems to have been motivated . . . by a keen appreciation of the importance of the task.” Joyce, *supra* note 8, at 1307–08 (footnote omitted). In Cranch’s own words:

Much of that *uncertainty of the law* . . . may be attributed to the want of American reports. . . . Uniformity . . . can not be expected . . . unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment can not be maintained if its adjudications are suffered to be forgotten.

*Id.* at 1308 (quoting 5 U.S. (1 Cranch) iii–v (1804) (emphasis in original)).

11. The Supreme Court Reporters remain largely unknown, even in the legal field. Craig Joyce, *Reporters of Decisions of the Supreme Court of the United States 2* (Univ. Hous. L. Ctr., Working Paper No. 2005-A-11, 2005) (“Their names . . . are remembered in association with particular volumes of

Law students may first encounter Reporters in the Bluebook,<sup>12</sup> a citation guide which requires the inclusion of the Reporter's name in any Supreme Court citation to the first ninety volumes of the *United States Reports*.<sup>13</sup> For these ninety volumes, which cover the Supreme Court's cases through 1874, the current Reporter's name appeared on the spine of each printed copy.<sup>14</sup> The Reporters who published these volumes are referred to as the "nominative" Supreme Court Reporters because their names are quite literally bound to their work.<sup>15</sup> This practice was discontinued when "the Judiciary appropriation of 1874 allotted \$25,000 to pay for the printing of the official Reports. After that, beginning with volume 91, the legend 'United States Reports' has appeared on the spines of all the books."<sup>16</sup>

#### A. *The First Reporters: Dallas & Cranch*

The Supreme Court of the United States initially convened in New York City, but in 1791, the Court—along with the rest of the federal government—relocated to Philadelphia.<sup>17</sup> This fortuitously brought the Court its first Reporter, Alexander Dallas. Dallas was working in Philadelphia and had recently published several "accounts of cases decided in the Pennsylvania and Delaware courts."<sup>18</sup> Initially, Dallas was seemingly unaware of the tremendous import of the Supreme Court's decisions—he simply sought to include them in his reports of cases heard in the State of Pennsylvania.<sup>19</sup> Dallas's motivation was likely financial, "spurred by the prospect of increased sales prompted by the inclusion . . . of the [opinions] of the federal courts newly located in Philadelphia . . ."<sup>20</sup> This is certainly plausible considering that Dallas, like most Reporters, had no governmental

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reports, if at all, only by direct descendants and antiquarians — and even their office has receded from the consciousness of members of the bar and students of the law.")

12. See, e.g., THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.3.2, at 104 (Columbia L. Rev. Ass'n et al. eds., 21<sup>st</sup> ed. 2020).

13. *Id.*; see also Schwier, *supra* note 7 (discussing Bluebook rules for the early *United States Reports*).

14. Wagner, *supra* note 6, at 15.

15. Schwier, *supra* note 7.

16. Wagner, *supra* note 6, at 15 (footnote omitted). William Otto was the first of the "nonnominative" Reporters. *Id.*

17. Joyce, *supra* note 8, at 1294.

18. *Id.* at 1295.

19. *Id.* at 1296. Ironically, Dallas's first volume of the *United States Reports* does not contain a single Supreme Court decision; they first appear in Dallas's second volume of Reports. *Id.* at 1296, 1298.

20. *Id.* at 1301.

support for his efforts,<sup>21</sup> and depended solely on the sales of published volumes to make his venture worthwhile.<sup>22</sup>

While Dallas may be credited with the initial publication of Supreme Court opinions, his work was marred by a number of issues—namely, “delay,<sup>23</sup> expense, omission<sup>24</sup> and inaccuracy.”<sup>25</sup> Eventually, Dallas grew weary of his Reports, and “[w]hen at last the federal government, including the Supreme Court, moved to Washington City in 1800, [he] seems almost to have rejoiced to have the yoke of reporting . . . lifted from his shoulders.”<sup>26</sup>

Dallas was soon replaced by William Cranch, who was eager to improve upon his predecessor’s work.<sup>27</sup> Unfortunately, Cranch’s Reports suffered from many of the same deficiencies; indeed, Cranch’s enthusiasm prompted him to include additional notes that increased the length of the Reports, causing a corresponding increase in cost<sup>28</sup> and contributing to severe publication delays.<sup>29</sup> Furthermore, his work was described as “particularly & painfully erroneous” by none other than Justice Joseph Story,<sup>30</sup> who would soon prove instrumental in the evolution of the Supreme Court Reporter position.<sup>31</sup>

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21. Like Dallas, Ephraim Kirby was not an official Reporter, but he obtained some financial assistance from the State of Connecticut to publish the judgments of the State’s courts. *Id.* at 1298–1300.

22. Lazarus, *supra* note 7, at 548 (“With no government salary, the Reporter’s sole source of income for this work derived from the sale of published volumes.”); *id.* at 548–49 (observing that even after the Reporter became an official, paid position, the Reporter “remained dependent on sales”).

23. For example, Dallas’s fourth volume contained cases that had been decided nearly seven years prior. Joyce, *supra* note 8, at 1301.

24. Scholars have asserted that Dallas omitted anywhere from ten to seventy percent of the Court’s opinions from his reports. *Id.* at 1303; *see also* Lazarus, *supra* note 7, at 548 (“Reporters exercised great discretion in deciding which rulings to report. Such discretion both reduced the publication costs and made the resulting volumes more substantively attractive.”) (footnote omitted); J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek Behind the Robes in a Whole New World – A Look at Global “Democratizing” Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOB. STUD. L. REV. 55, 65–66 (2019) (“A reporter’s discretion included deciding which opinions to eliminate entirely from publication.”).

25. Joyce, *supra* note 8, at 1301. That being said, these issues were hardly unique to Dallas: “[s]omewhat counterintuitively, the first Reporters . . . were essentially self-appointed, enhancing their ability to influence opinions. Nor was this a problem original to a then-new [United States]. The same practice had long persisted in England.” Lazarus, *supra* note 7, at 547 (footnote omitted).

26. Joyce, *supra* note 8, at 1306.

27. *Id.* at 1308.

28. *Id.* at 1308–09.

29. *Id.* at 1310 (“[V]olume 7 of Cranch’s *Reports* . . . appeared only after a five-year delay . . .”).

30. *Id.* at 1309–10.

31. *Id.* at 1312.

*B. The Official Reporter: Wheaton*

“The stories of Cranch’s successors, Henry Wheaton and Richard Peters, Jr., are inextricably intertwined with the foresight and ambition of Joseph Story. . . . [T]hese three men redefined the responsibilities and significance of the Reporter in the life of the Supreme Court.”<sup>32</sup>

It is unknown when Wheaton first met Story,<sup>33</sup> but the two quickly bonded over their “shared fascination with legal scholarship.”<sup>34</sup> Meanwhile, Story and the rest of the Court grew increasingly dissatisfied with Cranch’s work,<sup>35</sup> and Story resolved to replace Cranch with the more scholarly Wheaton.<sup>36</sup> “By the opening of the Supreme Court’s February 1816 Term . . . [,] Cranch had indeed been supplanted — not surprisingly — by Wheaton.”<sup>37</sup> Wheaton threw himself into his work, and the quality of the Reports improved tremendously.<sup>38</sup> However, Wheaton failed to turn his Reports into a proper livelihood—in fact, he was forced to sell the copyright to his first volume in order to convince a publisher to print it.<sup>39</sup> Upon securing publishing, Wheaton still struggled to sell copies of his Reports, which had ballooned in size to accommodate meticulous notes and appendices.<sup>40</sup> His zeal for legal scholarship became his Achilles heel: “If omission and inaccuracy had been Dallas’ principal weakness and ‘inexcusable delay’ Cranch’s, the *Reports* of Henry Wheaton suffered most seriously from inordinate expense. . . . Wheaton had inadvertently pushed the cost of the final product well beyond the reach of . . . ordinary practitioners.”<sup>41</sup> Fortunately, Story, ever the Reporter’s ally, had a plan to alleviate this profit-making pressure—a plan that would forever change the role of the Reporter. Story wrote a proposal asking Congress to appropriate funds to support an official Supreme Court Reporter and the publication of the *United States Reports*.<sup>42</sup> Surprisingly, Wheaton and Story initially

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32. *Id.*

33. *Id.*

34. *Id.* at 1313.

35. *Id.* at 1319.

36. *Id.* at 1320. Story was especially attuned to “the importance of court reporters in disseminating the law” because “[his] own elevation to the bench in 1811 brought the immediate appointment of a reporter — the first ever in the First Circuit . . .” *Id.*; see also R. Kent Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History*, 14 AM. J. LEGAL HIST. 112, 119 (1970) (Story “kept a close eye on the publication of circuit opinions” as the circuit justice).

37. Joyce, *supra* note 8, at 1321.

38. *Id.* at 1327 (noting the timeliness of Wheaton’s Reports); *id.* at 1329–30 (discussing the quality of Wheaton’s work and highlighting his incredible accuracy).

39. *Id.* at 1326.

40. *Id.* at 1332, 1337–39.

41. *Id.* at 1337–38.

42. *Id.* at 1342.

encountered resistance to their bill,<sup>43</sup> even though several states had official Reporters at this time.<sup>44</sup> But three years later they succeeded, and the United States Supreme Court Reporter became an official, federally funded position as of March 3, 1817.<sup>45</sup>

Wheaton served as the Supreme Court Reporter for over a decade after this victory, but he had grander ambitions.<sup>46</sup> Upon receiving an appointment from President Adams as the *chargé d'affaires* to Denmark, Wheaton resigned from his post.<sup>47</sup> In hindsight, Wheaton arguably did more than anyone to elevate the role of the Supreme Court Reporter in the early years of the United States. Not only did he successfully advocate for federal compensation,<sup>48</sup> paving the way for an unbroken line of Reporters that continues to this day,<sup>49</sup> but he also substantially improved the quality of the Reports.<sup>50</sup>

### C. *The Ownership of the United States Reports: Peters*

Richard Peters, Jr. succeeded Wheaton, but took a markedly different approach to the Reporter position.<sup>51</sup> In contrast to Wheaton's "embrac[e] . . . [of] scholarly excellence and improvement of the law,"<sup>52</sup> "[a]bove all else, [Peters] saw court reporting as an entrepreneurial venture."<sup>53</sup> To that end, Peters would "increase dramatically the profession's access to the Court's decisions, both at the practical level of decreased expense and as a matter of legal doctrine."<sup>54</sup> But Peters was not the scholar

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43. *Id.* at 1342–47. It took Wheaton and Story three tries to convince Congress to fund an official Supreme Court Reporter. *Id.*

44. *Id.* at 1342 (noting that Massachusetts, New York, New Jersey, and Kentucky all had "appoint[ed], . . . salaried reporter[s] [for] the highest court of the state . . .").

45. *Id.* at 1347. However, the Reporter was still expected to cover the costs of publication, which "effectively decreas[ed] Wheaton's 'take-home pay' to \$600" from \$1000. *Id.* Congress first appropriated additional funds to cover the costs of publication in 1874, marking the end of the nominative Reporters. Schwier, *supra* note 7; *see also supra* note 16 and accompanying text.

46. Joyce, *supra* note 8, at 1348–50.

47. *Id.* In fact, Wheaton had little interest in this appointment, but he was desperate after several failed attempts to attain a more prestigious post. *Id.*

48. *See supra* note 45 and accompanying text.

49. *See* Press Release, U.S. Supreme Court, Rebecca Anne Womeldorf Named Reporter of Decisions of the Supreme Court of the United States (Dec. 28, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_12-28-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-28-20) [<https://perma.cc/8MKS-GH2U>].

50. Joyce, *supra* note 8, at 1351 (noting "the vast advances in completeness, accuracy, promptitude and scholarship that Wheaton's *Reports* constituted in comparison with his predecessors' volumes"); Wagner, *supra* note 6, at 18 ("Wheaton is regarded as the ablest of the early Reporters.").

51. *See* Joyce, *supra* note 8, at 1351 ("Peters' eagerness for the appointment, however, while superficially resembling Wheaton's quest a dozen years before, sprang from motives significantly different in character.").

52. *Id.* at 1331.

53. *Id.* at 1351.

54. *Id.* at 1352.

that Wheaton was,<sup>55</sup> and his work was roundly criticized.<sup>56</sup> To make matters worse, despite his high hopes, Peters encountered the same financial dilemma as his predecessor: high publication costs and comparatively diminutive returns.<sup>57</sup> But Peters had a solution—he resolved to “publish[] a six-volume ‘bare bones’ edition of his predecessors’ Reports at more affordable prices,” and to convince the federal government to stock his abridged collection in every public office in the United States and its territories, thereby guaranteeing the sales that had eluded Wheaton.<sup>58</sup> Though Peters failed to garner support for the latter part of his plan, he forged ahead with his *Condensed Reports*.<sup>59</sup>

Reactions to Peters’ *Condensed Reports* were mixed. While the *Condensed Reports* increased circulation of Supreme Court opinions at a lower cost, they eliminated a tremendous amount of previously published material, including concurring and dissenting opinions.<sup>60</sup> Among those most critical of Peters’ venture were the former Supreme Court Reporters.<sup>61</sup> Each of the former Reporters still had a copyright interest in their work—they were no doubt furious that Peters altered and republished the opinions they had initially transcribed. Thus, when “Peters’ *Condensed Reports* quickly became a roaring success,”<sup>62</sup> Wheaton and his publisher<sup>63</sup> sued Peters for copyright infringement in what became a seminal intellectual property case.<sup>64</sup>

The setting of *Wheaton v. Peters* borders on satire: a former Reporter sued the current Reporter, alleging copyright infringement of the opinions of the Supreme Court, where the case was eventually argued. One would be hard pressed to find another case where the plaintiff, the defendant, and the justices of the Supreme Court knew each other and the issue at hand so intimately. *Wheaton v. Peters* was destined to be monumental from the

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55. See *id.* at 1360 (“Wheaton’s prolixity had now been traded for Peters’ imprecision . . .”).

56. *Id.* at 1361 (“To some, his work became a benchmark of mediocrity.”). The quality of Peters’ work would eventually bring an end to his tenure as the Supreme Court Reporter. Lazarus, *supra* note 7, at 551 (“Peters . . . was ultimately forced out by a group of Justices, including Justice Catron, who published a lengthy letter listing all the errors that Peters had committed in publishing [his] opinions . . .”) (footnotes omitted).

57. See Joyce, *supra* note 8, at 1352; see also *id.* at 1362 (“Peters quickly discovered upon assuming the reportership that it could not easily be made to pay nearly so well as he had imagined.”).

58. *Id.* at 1363; see also *supra* notes 39–40 and accompanying text.

59. See Joyce, *supra* note 8, at 1364.

60. *Id.* at 1365–66.

61. *Id.* at 1366. Except for Dallas, who had died by this time. *Id.* at 1366 n.428.

62. *Id.* at 1369.

63. Because Wheaton sold the copyright to his first volume of Reports, his publisher had an interest in the litigation as well. See *supra* note 39 and accompanying text.

64. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); see also Joyce, *supra* note 8, at 1371 (“The significance of the resolution of the issues in *Wheaton v. Peters* to the law of intellectual property in the life of the new nation can scarcely be overstated.”); *id.* at 1386 (noting *Wheaton v. Peters* was “the Court’s first pronouncement on the subject of copyright.”).



start—Wheaton argued for the status quo,<sup>65</sup> while Peters, unwittingly,<sup>66</sup> argued for a sea change.<sup>67</sup> Ultimately, the Supreme Court sided with Peters, holding that Reporters have no copyright in their work.<sup>68</sup> Craig Joyce eloquently articulates the implications of this decision:

[The Court’s decision] destroyed . . . a presumption of ownership, long shared by Wheaton, his predecessors and the Justices themselves, which if given the force of law would have bestowed upon the Reporters of the Supreme Court exclusive title to those classic expressions of American law that constitute the Court’s essential legacy to the nation. The decision thus stands as an indispensable prerequisite to the emergence of a truly national Supreme Court. No doubt, Wheaton and Peters saw the matter in more narrow and immediate terms. But their contribution to the development of a national jurisprudence, and the advancement of the Court they both served, is no less for that.<sup>69</sup>

#### *D. The Modern Supreme Court Reporter*

Today, the role of the Supreme Court Reporter looks quite different. To start, the official title has changed from “Reporter” to “Reporter of Decisions” to avoid any potential confusion with court stenographers.<sup>70</sup> Furthermore, the Reporter no longer composes any part of the Court’s opinions.<sup>71</sup> Instead, the Reporter authors a syllabus that can be found at the beginning of every opinion, summarizing its contents and major holdings.<sup>72</sup> Additionally, the Reporter is responsible for ensuring the accuracy of each opinion, functioning as a highly specialized editor. Or, as the thirteenth Reporter Henry Putzel, Jr. put it, the Reporter and their staff are “double

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65. See Joyce, *supra* note 8, at 1373 (“Wheaton’s central point — that the decisions of the Court as rendered by the Reporter had always been regarded as subject to copyright by him — was not without substantial foundation. . . . [S]carcely anyone had questioned . . . [that] Wheaton and his predecessors . . . [had] the exclusive right to multiply copies of their works.”); see also *id.* at 1373–74 (observing that Justices Story and Marshall had seemingly assumed this as well, notwithstanding their support for an official, salaried Reporter).

66. See *id.* at 1389 (“[Peters] quite inadvertently . . . occasioned young America’s first landmark decision in the law of literary property.”) (footnote omitted).

67. *Id.* at 1378 (“Reporters had always been assumed to acquire copyrightable interests in . . . their works. To rule otherwise now would be to deprive not only Wheaton, but all other reporters as well, of their familiar rights. Such a result . . . would alter fundamentally the entrepreneurial underpinnings of court reporting throughout the country.”) (footnotes omitted).

68. *Wheaton*, 33 U.S. at 593 (“No reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court: and the judges of the court cannot confer on any reporter any such right.”).

69. Joyce, *supra* note 8, at 1386 (footnote omitted).

70. Wagner, *supra* note 6, at 17. The Court’s twelfth Reporter, Walter Wyatt, insisted on this change. *Id.*

71. *Id.* at 15.

72. *Id.* at 12.

revolving peripatetic nitpicker[s].”<sup>73</sup> The Reporter must “carefully examine each draft of each opinion to assure the accuracy of its quotations and citations[,] and to [some] extent[,] . . . its facts. [The Reporter] also check[s] for any typographical errors, misspellings, grammatical mistakes, and deviations from the Supreme Court’s complicated style rules.”<sup>74</sup>

## II. NEW THREATS TO STARE DECISIS

The evolution of the Supreme Court Reporter was instrumental in the development of American jurisprudence. By preserving opinions for posterity, the early Reporters ensured the continued vitality of stare decisis in a young nation. However, modern technological developments present new, insidious threats to stare decisis. The judiciary’s struggle to keep pace with technology is nothing new,<sup>75</sup> but when technological developments affect the *opinions* themselves, it is an entirely different matter. This Comment cannot provide an exhaustive account of these developments, but I will highlight three such threats: the revision of Supreme Court opinions, the rise of electronic citations, and the reliance on private databases.

### A. Revision of Supreme Court Opinions

The duties of the Reporter and “[t]he process of revising Supreme Court opinions ha[ve] changed considerably since [the] early days . . . .”<sup>76</sup> The publication delays that plagued early Reporters were eventually minimized, and over time, the Justices began to provide the Reporter with draft written opinions,<sup>77</sup> forestalling undue editorial discretion.<sup>78</sup> However, “[o]nce it became well known that the Justices were providing the Reporter with draft written opinions, the pressure naturally increased for earlier publication of those initial drafts.”<sup>79</sup> The Court responded by “develop[ing] formal

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73. *Id.* at 9 (alteration in original).

74. *Id.* For an interesting and humorous example of this process at work, see Jack Metzler, *Did John Marshall Harlan II Misuse the Word “Suppletive”?*, 20 GREEN BAG 2d 239 (2017).

75. See, e.g., Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1842–43 (2009) (mapping the delay between technological developments and their legal resolution in copyright law and concluding “the average time that it takes to ascertain an innovation’s copyright status is approximately seven years and two months”); Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 126–27 (2019) (discussing jurisdiction and the Internet: “[The test used to determine jurisdiction] is ultimately problematic because it is the product of an internet that no longer exists.”).

76. Lazarus, *supra* note 7, at 546.

77. *Id.* at 551.

78. *Id.* at 549 (“The potential for divergence between the Court’s orally announced ruling and the Reporter’s subsequent written opinion was great, especially when the Justice did not provide the Reporter with a draft written opinion.”).

79. *Id.* at 551.

procedures for releasing and publishing advance opinions [known as ‘slip opinions’] prior to final publication in the *United States Reports*.<sup>80</sup> These procedures include “a series of pathways for revising opinions after initial publication. Some . . . are more transparent than others,”<sup>81</sup> but ultimately, the Court is not required to disclose revisions.<sup>82</sup> Furthermore, the Court can amend prior opinions in later *editions* of the *United States Reports*.<sup>83</sup> This lack of transparency in the revision process has been rightfully criticized,<sup>84</sup> and it is especially concerning given the importance of precedent in a common law legal system.<sup>85</sup> The delay between the initial publication of a slip opinion and its official publication in the *United States Reports* can be several years.<sup>86</sup> Thus, the initial publication will be cited until the official publication is available, and revisions appearing in the official publication will be lost amidst years of new precedent built on the text of the initial

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80. Lazarus, *supra* note 7, at 553.

81. *Id.* at 555. The Court revises opinions in three ways: (1) errata lists, (2) orders of revision, and (3) change pages. The first two methods require formal publication in the *United States Reports*. Method 1 calls attention to errors in previously published opinions and Method 2 announces revisions of previously published opinions. Method 3 “is the least transparent.” *Id.* at 555–56. The Reporter and the Justices correct errors in published slip opinions before their final (and official) publication in the *United States Reports*. This method “has become the most common for making changes in recent decades.” *Id.* at 581; *see also id.* at 585–86 (discussing what is known of the Court’s internal procedures for making editorial changes).

82. *See id.* at 581 (“[T]he only way to discover [certain editorial] changes is a tedious process of comparing prior versions of the opinion to the final version.”).

83. *See id.* at 561 (“[T]he Court’s current and historic practices extend to correcting mistakes of all types, large and small, including those made decades (or even a century) earlier.”).

84. *See id.* at 546 (“The process of revising Supreme Court opinions . . . has become both more and less transparent over time.”); *see also* Adam Liptak, *Final Word on U.S. Law Isn’t: Supreme Court Keeps Editing*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/us/final-word-on-us-law-isnt-supreme-court-keeps-editing.html> [<https://perma.cc/VT6F-EWNS>] (“In Supreme Court opinions, every word matters . . . [w]hen they’re changing the wording of opinions, they’re basically rewriting the law.”) (quoting Jeffrey L. Fisher, Professor of Law, Stanford Law School). The Supreme Court’s internal procedures recently made headlines when a controversial draft opinion was leaked. *See* Aaron Tang, *Did the Supreme Court’s Leak Investigation Let the Justices Off the Hook?*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/opinion/abortion-supreme-court-leak.html?searchResultPosition=7> [<https://perma.cc/XEY5-USZP>]; *see also* *Read Justice Alito’s Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022, 9:20 PM), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<https://perma.cc/4ARQ-JUAL>]; *cf. Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

85. If any doubt remains as to the importance of even small revisions, see Michael Allan Wolf, *A Reign of Error: Property Rights and Stare Decisis*, 99 WASH. U. L. REV. 449, 516 (2021) (“What a difference a lone letter can make in our wonderfully quaint and curious world of stare decisis.”). Indeed, beyond systemic concerns, precedent also gives rise to personal and societal reliance interests. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1061 (2003) (discussing the importance of reliance interests when courts consider overruling precedent and noting “the protection of reliance interests from judicial flip-flops is the doctrine’s animating force”).

86. *See* Lazarus, *supra* note 7, at 543; *see also* *U.S. Reports*, SUP. CT. U.S., <https://www.supremecourt.gov/opinions/USReports.aspx> [<https://perma.cc/8K27-FK2R>] (last visited Apr. 11, 2023) (providing access to the most recent publication of the *United States Reports*, which only provides Court decisions up to 2016).

publication.<sup>87</sup> This issue is exacerbated by the speed with which information spreads via the Internet.<sup>88</sup> A number of reforms have been suggested,<sup>89</sup> but it remains to be seen how this revision process will continue to affect the judiciary at large, and how the Reporter may be involved.<sup>90</sup>

### B. Rise of Electronic Citations

The Internet provides ready access to sources, resulting in the widespread use of electronic citations (i.e., links) in court opinions. Electronic citations are now standard in the legal industry<sup>91</sup>—one need look no further than this Comment for examples.<sup>92</sup> But what happens if one of these webpages is

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87. See, e.g., Wolf, *supra* note 85, at 515–16 (observing that the continued reproduction of a slip opinion error that read ‘property,’ rather than the corrected official publication that reads ‘properly,’ illustrates “the fragility of stare decisis”); Lazarus, *supra* note 7, at 600 (noting numerous citations to a sentence from Justice O’Connor’s concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), that was deleted between the initial publication of the decision and its official publication); see also *id.* at 611 (concluding that this method of revision “invariably perpetuates the Court’s initial error long after the correction has been made and risks considerable confusion about what the law actually is.”).

88. See, e.g., *Opinions of the Court – 2022*, SUP. CT. U.S., <https://www.supremecourt.gov/opinions/slipopinion/22> [<https://perma.cc/F88U-9UCT>] (last visited Apr. 11, 2023) (“These opinions are posted on the website within minutes after the opinions are issued and will remain posted until replaced with opinions edited to reflect the usual publication style of the United States Reports . . .”). In the Internet age, revisions are even more consequential because of the speed at which information spreads—slip opinions will be cited far more frequently than in the days of the early Supreme Court Reporters. Cf. Robert C. Berring, *Legal Information and The Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1691 (2000) (focusing on the variety of information available in the Internet age as opposed to the speed at which information spreads: “[T]he information used by courts is dependent on what information is easily available to them. Thus as the Internet makes more and more sources available, a greater variety of information will be used.”). This makes consistency all the more difficult to achieve. See, e.g., Liptak, *supra* note 84 (noting that some of the Court’s changes appeared on Lexis but not on the Court’s own website).

89. Lazarus, *supra* note 7, at 618–22. Lazarus suggests that the Court (1) clarify when an opinion is final; (2) “adopt[] different procedures for addressing different kinds of errors”; (3) “distinguish[] among possible revisions based on the identity of the person proposing the change[.] . . . whether a party, amicus, or third person, and those proposed within the Court”; and (4) “provide after-the-fact public notice of any revisions made, just as Congress does in revising its legislation and federal agencies do in correcting errors in regulations.” *Id.* Perhaps the Supreme Court could learn from states that have made the transition to official electronic publication. See Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, 12 J. APP. PRAC. & PROCESS 25, 39 (2011) (noting that, in Arkansas, slip opinions are watermarked with “SLIP OPNION” on every page, while final opinions are marked with “the deciding court’s seal, together with a digital signature applied by the Reporter’s office.”).

90. For more information on the Reporter’s role in the revision and publication process, see Lazarus, *supra* note 7, at 584–85 (observing that slip opinions are reviewed by all chambers and the Reporter prior to publication, whereas official opinions are often reviewed solely by the author of the opinion and the Reporter prior to publication in the *United States Reports*).

91. Even the Bluebook contains guidelines for the citation of electronic sources. See THE BLUEBOOK, *supra* note 12, R. 18, at 174.

92. In Part II thus far, see *supra* notes 84, 86, 88.

altered (i.e., content drift) or disappears entirely (i.e., link rot)?<sup>93</sup> While this may seem like the premise of a science fiction novel,<sup>94</sup> courts have already grappled with content drift.<sup>95</sup> And even Supreme Court opinions are susceptible to link rot. One study “found that 50 percent of the links embedded in [Supreme] Court opinions since 1996, when the first hyperlink was used, no longer work[.]”<sup>96</sup> To combat this, the Supreme Court website now contains a webpage devoted exclusively to online sources that have been cited, which bears the following disclaimer: “Because some URLs cited in the Court’s opinions may change over time or disappear altogether, an attempt is made to capture in PDF format the material cited in an opinion.”<sup>97</sup> The potentially enormous implications of link rot cannot be ignored—what would the early Reporters and Justice Story make of this? What of stare decisis? While there is awareness of this threat, there is no solution that has garnered consensus. It is telling that the best the Supreme Court has come up with is a list of sources and a disclaimer. However, preservationist efforts are underway. For example, Perma.cc is a website that enables the preservation of webpages as they were when last visited.<sup>98</sup> “Authors of enduring documents . . . can ask Perma to convert the links included within them into permanent ones archived at <http://perma.cc>; participating libraries treat snapshots of what’s found at those links as accessions to their collections, and undertake to preserve them

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93. Jonathan Zittrain, *The Internet Is Rotting*, ATLANTIC (June 30, 2021), <https://www.theatlantic.com/technology/archive/2021/06/the-internet-is-a-collective-hallucination/619320/> [<https://perma.cc/95YG-UU7H>] (“Changing what’s there would be an example of content drift; eliminating it entirely is known as link rot.”); INTERNET LIVE STATS, <https://www.internetlivestats.com> [<https://perma.cc/T7CZ-6USK>] (last visited Apr. 11, 2023) (showing live changes in various internet-related statistics); *see also* Martin, *supra* note 89, at 79–80 (discussing yet another issue with electronic sources: obsolete file formats).

94. *See, e.g.*, WALTER M. MILLER, JR., *A CANTICLE FOR LEIBOWITZ* (BANTAM BOOKS 1997) (1959) (describing a post-apocalyptic world where a monastery attempts to preserve the scattered remains of mankind’s scientific knowledge in hopes that society will rebuild itself one day).

95. *See, e.g.*, *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020), *cert. denied* 141 S. Ct. 1684 (2021). Consumers sued Facebook over the terms of service on its website; however, the terms were changed prior to trial. *See id.* at 602 (referring to Facebook’s posted policies “at the time” of the alleged invasion of privacy).

96. Zittrain, *supra* note 93.

97. *Online Sources Cited in Opinions*, SUP. CT. U.S., [https://www.supremecourt.gov/opinions/cited\\_urls/22](https://www.supremecourt.gov/opinions/cited_urls/22) [<https://perma.cc/LFC3-L8VE>] (last visited Apr. 11, 2023). Ironically, the disclaimer changed while this Comment was being written. It previously read:

Because some URLs cited in the Court’s opinions may change over time or disappear altogether, an attempt is made to capture, as closely as possible, the material cited in an opinion at the time of its release. Capture dates, when they appear on the material, may not match the “as visited” date contained in an opinion’s citation to the material. *Id.* (archived version on file with author).

98. PERMA.CC, <https://perma.cc> [<https://perma.cc/JKU9-XXZD>] (last visited Apr. 11, 2023). Perma.cc is utilized by many institutions and publications, including the *Washington University Law Review. Creating Perma.cc Links for Law Review Cite Checks*, WASH. U. L. LIBR., <https://libguides.wustl.edu/c.php?g=1034178> [<https://perma.cc/2VLN-VNLX>] (last visited Apr. 11, 2023).

indefinitely.”<sup>99</sup> While this is a step in the right direction, Perma.cc “can’t guarantee that these records will be preserved forever.”<sup>100</sup> Furthermore, even if Perma.cc could guarantee the preservation of every Perma.cc link, there may be copyright issues<sup>101</sup> in a postmodern twist on *Wheaton v. Peters*. Thus, even some of the more promising and ambitious efforts to combat this threat to stare decisis are questionable as long-term solutions.

### C. Reliance on Private Databases

The federal government currently publishes the *United States Reports*,<sup>102</sup> but private publishers such as Thompson Reuters and LexisNexis persist, and many states have now outsourced the hassle of publishing their courts’ opinions.<sup>103</sup> Private parties have long published corresponding unofficial reports, but states are now eliminating their own reports in lieu of these private publications, designating them as “official.”<sup>104</sup> The elimination of

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99. Zittrain, *supra* note 93.

100. *Perma.cc User Guide/FAQ*, PERMA.CC, <https://perma.cc/docs/faq> [<https://perma.cc/3L9U-VTCX>] (last visited Apr. 11, 2023).

101. Paul D. Callister, *Perma.cc and Web Archival Dissonance with Copyright Law*, 40 LEGAL REFERENCE SERVS. Q. 1, 3 (2021).

102. *See Opinions*, SUP. CT. U.S., [https://www.supremecourt.gov/opinions/info\\_opinions.aspx](https://www.supremecourt.gov/opinions/info_opinions.aspx) [<https://perma.cc/FP7Z-K6L2>] (last visited Apr. 11, 2023); *see also* Wagner, *supra* note 6, at 15 (discussing publication of the *United States Reports*).

103. Leslie A. Street & David R. Hansen, *Fifty State Survey Addendum to Who Owns the Law? How to Restore Public Ownership of Legal Publication*, MERCER UNIV. RSCH., SCHOLARSHIP, & ARCHIVES (2018), <https://ursa.mercer.edu/bitstream/handle/10898/9937/Fifty%20State%20Survey%20corrected%5b3%5d.pdf?sequence=1&isAllowed=y> [<https://perma.cc/UAK5-KRKC>] (detailing state publishing practices); *see* Leslie A. Street & David R. Hansen, *Who Owns the Law? How to Restore Public Ownership of Legal Publication*, 26 J. INTELL. PROP. L. 205, 219 (2019) [hereinafter Street & Hansen, *Who Owns the Law?*] (discussing the effects of recent consolidation in the legal publishing industry and the rise of online publishing).

104. *See generally* Martin, *supra* note 89 (discussing the transition from print publication to electronic publication in Arkansas). This outsourcing of the publication process has already created issues that implicate stare decisis. For example, when the State of Arkansas transitioned to an exclusively electronic format, it decided to “treat all decisions of its appellate courts as precedent, erasing the historic separation of opinions into two categories: published decisions, which counted as precedent, and unpublished decisions, a much larger group, which did not.” *Id.* at 63–64. Consequently, the number of precedential decisions suddenly increased. *Id.* at 64. But even if the technical distinction between published and unpublished opinions is preserved, any practical distinction has been erased by electronic publication. *See* Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 214 (“Technically . . . ‘unpublished’ opinions lack precedential effect, yet are increasingly cited by practitioners in official contexts. Questions of precedent and what constitutes law from the judicial branch of government are more complex in this new information environment.”) (footnotes omitted). Prior to electronic publication, an unpublished decision was truly unpublished; now, it likely appears in an electronic database. *See* Robert A. Mead, *A Eulogy for New Mexico Reports: The Evolution of Appellate Publication from 1846 to 2012*, 42 N.M. L. REV. 417, 453–54 (2012); *see also* Peoples, *supra* note 2.

state-published reports is often accompanied by the elimination of the state Reporter position as well.

[T]he public office of law reporter . . . [is] an endangered species. Today, far fewer than half the states have a judicial officer so denominated and there are no more than a baker's dozen of jurisdictions (twelve states plus the United States Supreme Court) in which a public reporter of judicial decisions and staff perform the full range of functions traditionally associated with official case law publication.<sup>105</sup>

This outsourcing to private publishers raises several concerns.<sup>106</sup> Without oversight from a state entity responsible for publishing, the preservation of precedent is left in the hands of unaccountable private parties.<sup>107</sup> Furthermore, without the promise of a print edition, there are malleability concerns that accompany all electronic sources.<sup>108</sup> Additionally, the consolidation of the private publishing industry has limited access to opinions, despite the potential for wider circulation in an electronic

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105. Martin, *supra* note 89, at 34.

106. See Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 220 (“While the increasing availability of legal information in an electronic format has disseminated legal materials to a wider audience, it also presents a new set of challenges . . . [N]ew questions about authenticity, access to and preservation of legal information also emerge.”); *id.* at 210 (“[A]ny commercial entity may determine that it is not in their commercial interest to continue to preserve older versions of legal documents.”); Lynn Foster & Bruce Kennedy, *Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275, 298 (2000) (“‘Who owns the law?’ is a question that the twentieth century could readily answer. . . . The key question for the twenty-first century is ‘who controls access to the law?’ Emerging technology and laws are forming non-property barriers around information.”).

107. See Tiersma, *supra* note 1, at 1278 (arguing the Internet has eliminated the “gatekeeping” function of publications, leaving judges to decide which opinions are precedential). This lack of oversight is also troubling given the tremendous financial resources of legal publishers. Olufunmilayo B. Arewa, *Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 827 (2006) (noting the multi-billion-dollar revenues of LexisNexis and Westlaw). There may also be ownership concerns, once again implicating the copyright issues raised in *Wheaton v. Peters*. Martin, *supra* note 89, at 67–70; see *supra* note 101 and accompanying text.

108. See, e.g., Eugene Volokh, *Klein v. Amtrak Opinions, Which Were Removed from Lexis and Westlaw Pursuant to a Settlement*, THE VOLOKH CONSPIRACY (Aug. 19, 2009, 6:52 PM), <https://volokh.com/2009/08/19/klein-v-amtrak-opinions-which-were-removed-from-lexis-and-westlaw-pursuant-to-a-settlement/> [<https://perma.cc/NQY3-S9MG>] (“[T]he 3rd U.S. Circuit Court of Appeals agreed . . . to remand the case to the trial judge . . . who, in turn, agreed to vacate eight of his published opinions and to ‘direct’ Lexis and Westlaw to remove them from their databases . . . .”); Zittrain, *supra* note 93 (recounting an incident where Amazon deleted a book from every Kindle user’s personal download library after being notified of a copyright issue).

format.<sup>109</sup> Thus, while the use of private databases is second nature for most lawyers, oversight, malleability, and access concerns warrant vigilance.<sup>110</sup>

### III. ARGUMENT

Each of these threats to stare decisis alone could serve as the subject of this Comment.<sup>111</sup> In uniting them, I hope to illustrate the breadth of the issue. History needs individuals, like Justice Story, who ensure the vitality of our legal system. Justice Story faced the challenge of creating new precedent for a young nation.<sup>112</sup> He knew an official Reporter was necessary to ensure the preservation of opinions, thus giving weight to the doctrine of stare decisis and protecting the integrity of the judiciary.<sup>113</sup> Today, the judiciary faces the challenge of keeping pace with technological changes that threaten this same doctrine.<sup>114</sup> Thus, I argue for similar vigilance and foresight. To that end, I will consider changes to current practices that may prove fruitful as the judiciary adjusts to these modern challenges.

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109. See Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 219. Price is the most obvious factor limiting access to these opinions, but publishers also condition access on their terms. “For example, to access the free, unannotated code of Mississippi, Georgia, and many other states, one must assent to the exclusive jurisdiction of the courts of New York for the resolution of any disputes.” *Id.* at 234–35. Street and Hansen attribute this “entirely . . . [to] the online environment.” *Id.* at 235; see also Ian Gallacher, “Aux Armes, Citoyens!” *Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. TOL. L. REV. 1, 15 (2008) (discussing access issues resulting from publisher consolidation and observing that while “cases might not be copyrightable . . . someone seeking to repackage case law likely cannot obtain the raw data necessary from a licensed source”).

110. Reporters, in particular, have been vocal about this issue. See Association of Reporters of Judicial Decisions, *Statement of Principles: “Official” On-line Documents* (May 2008), [https://www.arjd.org/\\_files/ugd/a78015\\_2ecfbee897e4c46aa320e81a49b3b9a.pdf](https://www.arjd.org/_files/ugd/a78015_2ecfbee897e4c46aa320e81a49b3b9a.pdf) [<https://perma.cc/T9EH-XLKU>] (“By publicizing its views, the ARJD hopes to alert its public-sector colleagues to the reality that the on-line publication of unauthenticated and impermanent ‘official’ documents in an attempt to save publication costs may unwittingly result in the adulteration or loss of valuable and irreplaceable primary government source materials.”); see also Gallacher, *supra* note 109, at 16 (“The impermanence of technology means that firms cannot be sure that they have permanent access to the law. Whereas books were a known commodity . . . CD-ROM technology rose and fell as a proposed alternative to the physical library.”).

111. See, e.g., Lazarus, *supra* note 7 (revision of court opinions); Zittrain, *supra* note 93 (electronic citations); Tiersma, *supra* note 1 (private databases).

112. See Peoples, *supra* note 2, at 317 (noting that, “[a]fter the Revolutionary war, [there was a] need for uniquely American jurisprudence,” distinct from English precedent); see also Bader & Cleveland, *supra* note 3, at 41 (quoting Justice Story on the importance of precedent).

113. Justice Story’s efforts to protect the integrity of the judicial system extended beyond his advocacy for a Supreme Court Reporter. He was also an early proponent of codification. See Entrikin, *supra* note 1, at 401–02.

114. See *supra* Part II.



### A. Revisions

The Supreme Court has recently reported some revisions, likely in response to highly publicized criticism.<sup>115</sup> However, the Court's internal policies remain opaque,<sup>116</sup> providing no guarantee that revisions will be reported or that current reporting practices will persist. Furthermore, there are two significant issues with this approach: (1) it does not address citations to slip opinions in the interim between initial publication and publication in the *United States Reports*, and (2) the Court's reliance on its website to publicize revisions implicates the permanency concern that inspired this Comment.<sup>117</sup>

Citations to slip opinions will continue, and the Supreme Court will continue to revise slip opinions prior to official publication. But lower courts would undoubtedly benefit from a transparent revision process. Indeed, lower courts should be aware of revisions, the procedures followed to make said revisions, and the implications for decisions handed down in the interim between publication of a slip opinion and its official publication in the *United States Reports*.<sup>118</sup> To that end, the role of the Reporter could be expanded to oversee this process.<sup>119</sup>

The permanency concern with the Supreme Court's website, while troubling, does not necessitate a return to print.<sup>120</sup> Rather, the website should be insulated from foreseeable threats. For example, Jonathan Zittrain recounts how the government shutdown in 2013 terminated access to

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115. Lazarus, *supra* note 7, at 625 n.462.

116. Entrikin, *supra* note 24, at 76 n.72 (“The Supreme Court does not publish its internal operating procedures, although most other federal courts do. However, the Supreme Court’s formal rules, as they have been amended over time, are available on the Supreme Court’s website.”).

117. See, e.g., *supra* note 110 and accompanying text.

118. For another take on this issue, see Zittrain, *supra* note 93 (“It is really tempting to cover for mistakes by pretending they never happened. Our technology now makes that alarmingly simple, and we should build in a little less efficiency, a little more inertia that previously provided for itself in ample qualities because of the nature of printed texts.”).

119. For similar arguments, see Lazarus, *supra* note 7, at 624 (“At the very least, the Court should end the fiction of labeling its initial, published opinions as neither ‘final’ nor ‘official,’ and any specific changes should be subject to after-the-fact public notice. The latter reform in particular should mitigate electronic media’s tendency to perpetuate inaccurate versions of opinions.”); see also *supra* note 89 and accompanying text.

120. There are efforts underway to “provid[e] online legal material with the same level of trustworthiness traditionally provided by publication in a law book.” *Electronic Legal Material Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=02061119-7070-4806-8841-d36afc18ff21> [<https://perma.cc/UZP4-UTQX>] (last visited Apr. 11, 2023). The Uniform Electronic Legal Material Act (UELMA), which has been enacted in several states, “requires that official electronic legal material be: (1) authenticated, by providing a method to determine that it is unaltered; (2) preserved, either in electronic or print form; and (3) accessible, for use by the public on a permanent basis.” *Id.* But see Association of Reporters of Judicial Decisions, *supra* note 110 (“Print publication, because of its reliability, is the preferred medium for government documents at present.”).

websites that hosted “thousands, perhaps millions, of official government documents, both current and archived.”<sup>121</sup> Access to important documents should not be subject to the whims of Congress, or any other foreseeable threat. Appropriating funds to ensure consistent access to electronic sources of information is a start, but the government could also establish an archival project like Perma.cc to preserve important documents (including a list of revisions to Supreme Court opinions).

### B. *Electronic Citations*

Electronic citations are here to stay; but given the implications of link rot and content drift, some safeguards are necessary. The most effective safeguard is awareness: there is a growing wealth of legal scholarship, including this Comment, that cautions against blind reliance on modern technology.<sup>122</sup> However, more can be done. I am inclined to agree with Zittrain—the preservation of permanent copies of electronic sources is a reasonable solution for the time being.<sup>123</sup> But, as noted above, there are potential copyright issues that must be accounted for.<sup>124</sup> Additionally, there is the question of who should be responsible for this undertaking.<sup>125</sup> Hopefully, awareness of this issue will encourage caution with electronic sources and prompt renewed dedication to original, printed works that are not as easily manipulated (or eliminated).<sup>126</sup> Again, the role of the Reporter could be expanded to oversee the preservation of these sources.

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121. Zittrain, *supra* note 93.

122. See Tiersma, *supra* note 1, at 1278; see generally Niesel, *supra* note 75; Liptak, *supra* note 84; Martin, *supra* note 89; Zittrain, *supra* note 93; Callister, *supra* note 101; Street & Hansen, *Who Owns the Law?*, *supra* note 103; Mead, *supra* note 104; Foster & Kennedy, *supra* note 106; Volokh, *supra* note 108; Gallacher, *supra* note 109; Association of Reporters of Judicial Decisions, *supra* note 110.

123. See Zittrain, *supra* note 93 (“A technical infrastructure through which authors and publishers can preserve the links they draw on is a necessary start. But the problem of digital malleability extends beyond the technical.”); see also Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996-2010)*, 15 YALE J. L. & TECH. 273, 308 (2013) (recommending that “the Supreme Court should . . . archive cited websites on the Court’s own website; and . . . form partnerships with existing Internet archiving organizations . . .”). *But cf.* *supra* note 118 and accompanying text (regarding the permanency concern with the Supreme Court’s website).

124. See Callister, *supra* note 101.

125. See *infra* notes 129–131.

126. See *supra* note 108 and accompanying text.

### C. Private Databases

In a world where private publishers are the exclusive source for many cases, oversight, malleability, and access concerns must be addressed.<sup>127</sup> Because most states outsource publication, there should be clear guidelines for how private publishers treat opinions (e.g., whether the opinions have precedential value),<sup>128</sup> and there should be strict safeguards in place to prevent the editing or removal of opinions. This could be accomplished in part by requiring publicly available contracts that hold publishers accountable.<sup>129</sup> Furthermore, states could appropriate funds for an official to oversee the publication of opinions, even if the majority of the work is outsourced.<sup>130</sup> Given the elimination of many state Reporter positions, however, this task would need to be assumed by a comparable official or accomplished at the federal level.<sup>131</sup>

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127. See Martin, *supra* note 89, at 31 (noting that many states “ced[e] an exclusive role to West [publisher]”); Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 244 (discussing solutions to the “problem that users face where, depending on the electronic database they pay to use, they may have access to different and exclusive opinions”).

128. However, ‘no-citation’ rules, dictating which cases may be cited as precedent, have prompted debate. There are arguments on both sides of the issue. See Tiersma, *supra* note 1, at 1269–71; Bader & Cleveland, *supra* note 3, at 35 (“Issuance of the vast majority of decisions as non-precedential tears the justice-seeking mechanism of precedent from the heart of our common law system.”); *cf. supra* note 104 and accompanying text. For a comparison of ‘unreported’ cases in England and ‘unpublished’ cases in the United States, see Peoples, *supra* note 2, at 310.

129. *But see* Gallacher, *supra* note 109, at 24 (discussing the contentious termination of a federal contract between the Department of Justice and West that resulted in “West’s removal of ten years worth of federal opinions” from the DOJ database, and arguing that “the government’s relationships with commercial entities like West make governmental oversight likely ineffective as the sole protection for open access to the law”). Gallacher concludes that law schools are the only institutions capable of completely archiving the law and providing open access to the public. *Id.* at 7, 21–22, 50; *see also* Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 245 (“[T]here are a myriad of steps law libraries . . . can take with regard to ensuring that legal information is accessible and preserved.”).

130. That being said, there are excellent arguments to be made for an open access system rather than a hybrid system dependent on governmental oversight of private publishers. *See generally* Arewa, *supra* note 107, at 834–39 (arguing that “[t]he development of open access means of accessing legal scholarship and other legal information may provide an increasingly important counterweight in the current environment of greater industry concentration.”).

131. Some have argued that a governmental solution is “hopeless[ly] naïve[.]” Gallacher, *supra* note 109, at 22–23; *cf. supra* note 123 and accompanying text; Street & Hansen, *Who Owns the Law?*, *supra* note 103, at 243 (“State governments have the largest role to play in ensuring the public has access to official law in an electronic format.”). However, given the history of the Reporter position and the stability of the office since receiving federal support, it is plausible that awareness of this issue will prompt a viable governmental solution. Case law is generated by the judiciary, which is itself a branch of government, lending a natural appeal to this approach. And a federal solution in particular would ensure the uniformity that has eluded state efforts. *See Electronic Legal Material Act*, *supra* note 120 (showing which states have adopted UELMA). The judiciary will need to advocate for a uniform, governmental solution and impress upon the legislative branch the importance of this issue. *See supra* Section I.B (regarding Justice Story’s advocacy for a federally funded Reporter position).

### CONCLUSION

It is easy to take stare decisis for granted when case law spanning hundreds of years is available on a searchable electronic database. But the history of the early Reporters is more than just a fascinating narrative, it is a reminder that the legal system as we know it developed not just by fortune, but by foresight. The early Reporters and Justice Story understood the importance of preserving and distributing court opinions—we should look to them for inspiration as we devise solutions to the unique threats to stare decisis we face today.