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The Role of Precedent in Constitutional Decisionmaking and Theory

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Table of Contents

Introduction 70
I. Precedent as a Stabilizing Influence in Constitutional Decisionmaking 76
A. The Role of Precedent in the Certiorari Process ... 78
B. Precedent as a Source of Stability for Constitutional Law 83
1. The Historical Functions of Precedent 83
2. The Structural Functions of Precedent 85
3. The Immunization of Precedents from Overruling 87
II. Precedent as a Source of Indeterminacy in Constitutional Decisionmaking 90
A. Purposeful Versus Unintentionally Indeterminate Precedents 91
B. Four Sources of Indeterminate Precedents 92
1. The Consequences of Substantive Splits on the Court 92

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2. The Difficulties of Determining the Level of Generality at which to State the Rule of a Case . 94
3. The Art of Weakening Precedents 98
a. The Effects of the Court's Mood and Composition 99
b. The Court's Sensitivity to Current Political Mores 103
c. Perennial Controversy as a Deterrent to Explicit Overrulings 104
d. Weakening Precedents Through Distinctions 106
4. The Confusion over the Criteria for Overrulings 109
III. The Justices' Individual Approaches to Precedent 114
A. The Implications of Focusing on the Justices' Individual Approaches to Precedent 114
B. The Individual Justices' Views on Precedent 117
IV. Constitutional Theory and the Problem of Nonconforming Precedents 131
A. The Tension Between Unitary Theory and Precedent 131
B. The Challenge of Reconciling Standards for Reviewing Precedents and Interpreting the Constitution 137
1. Explaining Theories of Precedent 137
2. Critiquing Constitutional Hierarchies 139
C. Toward a Reconciliation of Theory and Precedent . 140
Conclusion 145
Appendix 147

"[T]he instant decision . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance . . . that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject."

Justice Owen Roberts[1]

"A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."

Justice William O. Douglas[2]

1. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).
2. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

The dramatic end of the 1990-1991 Supreme Court Term focused national attention on a perennial question in constitutional law: to what extent do the Justices follow precedents with whose reasoning or holdings they disagree. Justice Thurgood Marshall's abrupt resignation on the last day of the Term underscored his frustrations over the Court's overruling of two criminal procedure precedents on that same day in *Payne v. Tennessee,*[3] and over the possibility that "scores of established constitutional liberties are now ripe for reconsideration."[4] In the aftermath of Justice Marshall's resignation, including the contentious confirmation proceedings for Justice Clarence Thomas,[5] many Senators and concerned Americans expressed their frustration over the prospect of the Court's dismantlement of a significant number of precedents recognizing protection for individual liberties in such varied areas of constitutional law as abortion, affirmative action, separation of church and state, and criminal procedure.[6]

The anxiety generated by these events is complex. It includes concerns not only about the potential loss of specific liberties but also about the Court's abandonment of the institutional values normally associated with fidelity to precedent,[7] including the neutral, impartial, consistent application of the rule of law[8] as well as the

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3. Payne v. Tennessee, 111 S. Ct. 2597 (1991), *overruling* South Carolina v. Gathers, 490 U.S. 805 (1989) *and* Booth v. Maryland, 482 U.S. 496 (1987). *See infra* notes 38-39 & 44 and accompanying text for a discussion of *Payne.*

4. *Payne,* 111 S. Ct. at 2619 (Marshall, J., dissenting).

5. For a general commentary on Justice Thomas' confirmation proceedings, see Michael J. Gerhardt, *Divided Justice,* 60 GEO. WASH. L. REV. (forthcoming Apr. 1992) (discussing what the Thomas hearings revealed about Justice Thomas, the confirmation process, and the Supreme Court).

6. For a list of such precedents, see *Payne,* 111 S. Ct. at 2623 & n.2 (Marshall, J., dissenting); *infra* note 44.

7. As used in this Article, "precedent" refers to the facts, procedural posture, reasoning, and/or holding of the decision in which a court has resolved a particular legal dispute. *Cf. infra* note 18 (discussing stare decisis). *But see* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 COLUM. L. REV. 723, 763-67 (1988) (suggesting that there is no clear definition of precedent but that whatever definition people choose should include the rule or standard set forth in a case).

8. *See, e.g.,* ARTHUR J. GOLDBERG, EQUAL JUSTICE 75 (1971) (suggesting that fidelity to precedent "fosters public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinions"); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 56-84 (1961) (identifying certainty, consistency, fairness, equality, efficiency, and predictability as justifications for adherence to precedent); Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine,* 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) (explaining that a "doctrine of precedent" promotes efficient judicial decisionmaking, "predictability in our affairs," more attention to the "stakes" of resolving a particular legal dispute, caution in judicial decisionmaking, and chances that a justice can make lasting contributions. "If a justice disregards the judgments of those who preceded him, he invites the very same treatment from those who succeed him. A justice who wants to preserve the value of his own coin must not devalue the coin of his predecessors."). Although similar institutional values or values such as stability and continuity are promoted when a court follows a precedent in common law and constitutional adjudication, those values can be outweighed in constitutional adjudication by a Justice's normative views of the Constitution. *See infra* notes 215-27 and accompanying text (discussing how different Justices factor such values into their decisionmaking). For commentary on the role of precedent

legitimation of our system of government under which the Court and the other branches should be bound (at least in some meaningful way) by the rule of law.[9]

If the Justices were to adopt a low level of deference to precedent (for example, overruling a precedent merely deemed erroneously reasoned), then they will have increased the chances that a subsequent Court will take the same route. Future Justices could rely on past decisions as expressing a theory of precedent that supports them in overruling precedent based solely on disagreement with the underlying reasoning of those precedents. The inevitable consequence of all this would be chaos, lack of certainty regarding the durability of a number of individual freedoms, and/or proof positive that constitutional law is nothing more than politics carried on in a different forum.

A pervasive problem with trying to allay these concerns, however, is that it is difficult to determine how much the Supreme Court respects precedent as a source of decision. The subject often does not generate candor (or full explication) because it encompasses the attitudes someone may have but not be fully prepared, inclined, or even encouraged to disclose about constitutional law.[10] For example, the Justices infrequently debate openly and fully or reach any consensus on the reasons and criteria for affirming or overruling precedents. The Justices also have differed and not fully clarified when it would be appropriate for them to adopt a common law (or doctrinal) approach to constitutional adjudication, under which the Court moves incrementally, evolving its views over time and grounding them in experience,[11] or some other approach that would give more weight to their underlying views on constitutional

in common law adjudication, see Larry Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989) (analyzing three separate models of common law stare decisis); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987) (arguing for the development of "a rule of precedent" because respect for precedents strengthens judicial decisionmaking, increases social welfare, and ensures fairness by treating like cases alike).

9. *See* Monaghan, *supra* note 7, at 744-53 (arguing that precedents perform several functions other than providing stability in decisionmaking, including limiting the Court's agenda, illuminating the areas in which the Court has been consistently or perennially divided, and legitimating judicial review).

10. *Cf.* Steven Stark, *Comment: Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1392 (1984) (arguing that legal writing is unclear because lawyers try to obscure what they are really doing).

11. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY AND CONSTITUTION 39-58 (1982) (describing the evolution and significance of the doctrinal approach to constitutional adjudication); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 77-158 (1990) (maintaining that the common law method of judicial review best explains American constitutional law and is normatively superior to other approaches); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23 (1984) (advocating a common law approach to constitutional interpretation).

interpretation than to the values commonly associated with fidelity to precedent.

Similarly, commentators have not explained the process by which the Court reviews precedents, how it might be improved, or the reasons for their failure to do either of the above. Nor have commentators always acknowledged the relationship between their efforts to explain constitutional interpretation and their attitudes regarding certain precedents. For example, conservatives criticize the Warren Court's disregard for precedents,[12] but not the Rehnquist Court's assault on liberal precedents.[13] Likewise, liberals denounce the Rehnquist Court's attacks on their icons,[14] but not the Warren and Burger Courts' overrulings of conservative precedents.[15] Thus, the Court's review of its constitutional precedents remains the least understood of the processes by which such decisions can be limited or overruled.[16]

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12. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 130, 348-49 (1990) (characterizing the Warren Court's disregard for precedents as one example of its unprincipled activism); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404-06 (1988) (suggesting that the Warren Court's lack of respect for precedents was a product of its preference to do the convenient rather than the principled thing); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 344-46 (1977) (critiquing the Warren Court's disregard for precedents as evidence of its unprincipled decisionmaking); PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 37-38, 90-91 (1970) (suggesting that the Warren Court's overruling of precedents more often than any other Court threatened the legitimacy of the Court's decisionmaking); Jon D. Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 VAL. U. L. REV. 101, 112-31 (1969) (surveying precedents overruled by the Warren Court and rationales on which the Court relied); *cf.* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 467 (expressing one conservative commentator's concern over the Warren and Burger Courts' failure to respect precedents).

13. *See infra* notes 38-44 & 125-30 and accompanying text (discussing the views of the Rehnquist Court and of recent Justices toward Warren Court precedents).

14. *See, e.g.*, William W. Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 Sw. L.J. 657, 666-67 (1989) (accusing the Rehnquist Court of mischaracterizing the issues in fundamental rights cases to avoid being bound by precedent); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1344, 1359-61 (1990) (critiquing the Rehnquist Court's disregard for precedents involving abortion rights). *But see* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 103-04 (1990) (claiming that criticism of the Rehnquist, Burger, and Warren Courts' disregard for precedents is misguided because respect for precedent ultimately turns on the degree to which one agrees with the values underlying particular decisions).

15. For example, no liberal commentator has criticized Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Warren Court held that the Sixth and Fourteenth Amendments require the States to provide legal counsel for indigent defendants, overruling Betts v. Brady, 316 U.S. 455 (1942), or Batson v. Kentucky, 476 U.S. 79 (1986), in which the Burger Court held that a prosecutor cannot, consistent with equal protection, use peremptory challenges to exclude black jurors solely on the basis of their race, overruling Swain v. Alabama, 380 U.S. 202 (1965).

16. The other processes by which such decisions are traditionally narrowed or reversed include constitutional amendment, congressional modifications of the Court's jurisdiction, the President's power to nominate Justices who might agree with her criticisms of certain precedents, the Senate's power to advise and consent to judicial nominations, and impeachment. *See* MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (forthcoming 1992) (summarizing the ways in which the political branches can respond to the Court's precedents); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 71-84 (2d ed. 1991) (discussing various mechanisms of political control of the Supreme Court).

This Article offers a series of reflections on the role of precedent in constitutional decisionmaking and theory.[17] It examines the ways in which precedents operate as a stabilizing influence and source of indeterminacy in constitutional law, are factored into each Justice's decisionmaking, and pose problems for Justices and theorists that strictly adhere to some unifying principle that easily can be applied to strike down contrary views embodied in precedents.

This Article offers support for the traditional view that precedents should be overruled only when the prior decision was wrongly decided *and* there is some other important disadvantage in respecting that precedent. It also proposes a novel framework for understanding the Court's review of its precedents as a dynamic (dialogic) process in which the Justices individually try to balance their respective views on how the Constitution should be interpreted *and* certain social or institutional values such as the need for stability and consistency in constitutional law. This process is undermined or violated (and stability and consistency are sacrificed) when a majority of Justices dogmatically adhere to a single constitutional vision in its decisionmaking because such an approach aims to perpetuate or reinforce itself but not to mediate (as the dialogic process does) among different constitutional visions.

The first two Parts of this Article provide background for evaluating how much precedents matter as a source of decision to the Court and for determining whether a coherent body of case law or doctrine exists with respect to the Court's review of its precedents. In particular, Part I examines the ways in which precedents provide a stabilizing influence on constitutional decisionmaking. Precedents perform historical and structural functions that frame the Court's agenda in the certiorari process, shape governmental institutions and programs, and sometimes even immunize prior decisions from overruling. These functions illustrate many of the conditions under which the Court defers to, or at least seriously considers, precedents in its deliberations.

Part II explores four ways in which the creation and interpretation of precedents produce unpredictable constitutional decisionmaking.

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17. *See also* GERHARDT & ROWE, *supra* note 16; Michael J. Gerhardt, *Critical Legal Studies and Constitutional Law*, 67 TEX. L. REV. 393, 395 (1988) (reviewing MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)) (defining "grand" or unitary constitutional theory as the systematic effort to explain constitutional law or to defend constitutional decisions in terms of some overarching or unifying principle or set of principles from which certain conclusions flow logically); *see also* Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMM. 231, 249 (1989) (arguing that, inter alia, "constitutional theory is an effort to justify a constitutional practice—to justify, that is, a particular interpretive style and judicial role").

First, the Justices necessarily leave the scope of some decisions unclear, because they often gloss over their differences for the sake of forming coalitions. Second, the Justices have latitude in dealing with the ambiguities or ideas found in precedents and in choosing the level of generality at which they will state the rule of law of a case. Third, the Court's use of more than one technique to treat precedents generates confusion as to the status of, and the Court's real intentions regarding, those decisions. Last, there is no predictable pattern to the Court's explicit overrulings because the Justices do not consistently follow the same approach in making such decisions. Each of these sources of indeterminacy allows the Justices to be flexible (if not manipulative) when confronting new ideas and arguments.

Part III suggests that the Court's inconsistent rulings on precedents make sense in light of public choice theory, chaos theory, and legal pragmatism—all of which posit that multimembered institutions, such as the Court, inevitably render incoherent and inconsistent judgments despite their individual members' efforts to make principled decisions. This Part proposes that an effective way to measure the role of precedent in constitutional decisionmaking is to examine the degree to which each Justice consistently applies a coherent approach to constitutional stare decisis.[18]

Accordingly, Part III describes several themes gleaned from a review of how the Justices individually factor precedents into their decisionmaking. It shows, for example, that whenever the Court reviews its precedents, the Justices try to balance their views on how the Constitution should be interpreted with their recognition of the practical need to submerge those views for the sake of such social or institutional values as stability and continuity in constitutional law or consensus.

Part III also shows that the Court's conservative majority is split

18. "Stare decisis" has been defined variously as "to stand by the decisions and not to disturb settled points," Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 31 A.B.A. J. 501-02 (1945) (quoting JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (Lacy ed., 1889)); "let the decision stand and do not disturb things which have been settled," GOLDBERG, *supra* note 8, at 74; and "stand by the precedents and do not disturb the calm," Stanley Reed, *Stare Decisis and Constitutional Law*, 9 PA. B.A.Q. 131, 131 (1938) (Reed was then Solicitor General of the United States). Hence, the phrase "constitutional stare decisis" refers to the settled doctrine about the respect the Court should have for its own decisions interpreting the Constitution. *Cf. supra* note 7 (defining "precedent").

This Article does not, however, address the degree of respect the Court should have for stare decisis in cases involving statutory interpretation. For discussions on the deference the Court should show its prior statutory decisions, see William N. Eskeridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (criticizing the "super-strong presumption of correctness" accorded to statutory precedents and urging a more flexible approach incorporating changes in policy); Lawrence L. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (suggesting that an absolute rule mandating respect for stare decisis in statutory cases is justified under separation of powers analysis, which would give the Congress the final word on questions of statutory interpretation); *see also* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988) (suggesting that constitutional precedents deserve greater deference than statutory ones because the latter can be changed more easily through the political process).

between two views on the appropriate standard for overruling decisions. One view (followed in large part by Chief Justice Rehnquist and Justice Scalia) urges the overruling of virtually any precedent that they consider erroneously reasoned, while the other view (advanced at various times by Justices White, O'Connor, Kennedy, and Souter) bases the overruling of a precedent on its erroneous reasoning *and* some other substantial consideration. Part III argues that the latter view tracks the practice of an overwhelming majority of Justices to overrule precedents based on some extraordinary showing of need, while the former view, if adopted by a majority of the Court, would wreak havoc on constitutional law, because it would become a rule of law on which future Justices could rely to overrule any decision with whose reasoning they could find a flaw.

Part IV provides a descriptive analysis of, and normative response to, the conflict between precedents and unitary theory (an approach that prefers that the Court rigidly apply only one unifying principle of constitutional interpretation). Part IV suggests that this conflict results because the Court's review of precedent takes place as part of the more general dialogue in which the Justices debate whether the Court should perpetuate the values it previously has endorsed for the operation of government, while a unitary theorist usually seeks to cut off this dialogue, or at least, to restrict it to the terms of a single constitutional vision. Consequently, because so many precedents are based on, or, at least can only be explained as the result of the rejection of any one view of theory, this tension frequently presents a proponent of a rejected unitary theory with the dilemma of choosing to overrule the bulk of constitutional doctrine, or to abandon or modify the unifying principle dominating her theory in numerous substantive areas to provide constitutional law with stability and continuity. Moreover, theorists often fail to appreciate the relationship between their attitudes toward precedents and their proposed solutions to this dilemma. This dilemma also raises the question whether the public's respect for the Court depends on its aversion to any single theoretical approach to interpretation and adjudication.

This Article concludes with a normative proposal for reconciling theory and nonconforming precedents by treating the Court's review of its precedents as a dialogue in which the Justices each consider the "substantially countervailing considerations"[19] for no longer preserving the values their predecessors previously have endorsed for controlling the operation of government. This kind of decisionmaking is necessary to protect the rule of law, and the institutions and expectations built around it, *and* to allow some flexibility

19. *See* Monaghan, *supra* note 7, at 757.

and deviation from the past when there are substantial or important reasons to do so. The Article concludes that the Court's primary mission is to preserve and to enhance this dialogue in which the Justices take seriously precedents and the social values associated with their preservation.

I. Precedent as a Stabilizing Influence in Constitutional Decisionmaking

Precedents commonly are regarded as a traditional source of constitutional decisionmaking,[20] despite the absence of any clear evidence that they ever have forced the Court into making a decision contrary to what it would rather have decided.[21] Although some constraint is desirable because it ensures stability in constitutional law,[22] it is widely accepted that the Court should be able to review and, if necessary, to overrule its constitutional precedents because they are too difficult to overturn in the political process.[23]

Yet the apparent lack of consistency in the Justices' standards or reasons for overruling precedents has led many commentators to argue that precedents make little real difference to the Court.[24] Critics have tried to prove this point by measuring explicit overrulings because they believe such decisions provide the clearest instances in which the Court has expressed its lack of regard for

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20. The other traditional sources of constitutional decisionmaking include constitutional text, history, structure, and theory. *See* GERHARDT & ROWE, *supra* note 16; *see also* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation,* 100 HARV. L. REV. 1189 (1987) (attempting to construct a unified theory of constitutional interpretation through coordinating the traditional sources of decisionmaking).

21. *But see* KARL N. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 4 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) (1933) (claiming that in the American common law system precedents "constrain" judicial decisionmaking by providing historical perspective).

22. For purposes of this Article, "stability" refers to predictable and continuous application of previously formulated rules of law. *See* Monaghan, *supra* note 7, at 749 (viewing a critical function of precedents as providing predictability and "continuity by ensuring the survival of [important] governmental norms"); *see also id.* at 744-53 (arguing that precedents perform several functions other than providing stability in decisionmaking, including limiting the Court's agenda, illuminating the areas in which the Court has been consistently or perennially divided, and legitimating judicial review).

23. The classic statement of this view is by Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.:*

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting).

24. *See, e.g.,* Cooper, *supra* note 12, at 402 (suggesting that "*stare decisis* has always been a doctrine of convenience, to both conservatives and liberals"); Note, *supra* note 14, at 1345-47 (criticizing the Court for routinely failing to take a principled approach to precedent); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court,* 66 B.U. L. REV. 345, 371-75 (1986) (arguing that precedents have never barred the Court from doing what it would prefer to do); *cf.* Chemerinsky, *supra* note 14, at 103 (suggesting that it is the values underlying prior decisions and not the precedents themselves that carry weight in constitutional law).

precedents.[25] If the rules of law precedents embody do not constrain, then they do not function as a conventional source of decision. The public is more likely to retain confidence in the impartiality and consistency of the Court's decisionmaking if the reasons for the Court's choices are persuasive and if the Court generally adheres to principles that will reliably safeguard popular precedents.[26]

Focusing only on what the Court already has decided expressly, however, overlooks the degree to which precedents actually influence constitutional decisionmaking. By looking at what the Court has said, and not said or not decided regarding its prior judgments, one can discern that precedent contributes to the predictability and continuity of constitutional law. The weight of precedent performs historical and structural functions that help to frame the Court's agenda in the certiorari process, to shape government institutions

25. *See, e.g.*, Charlotte C. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55, 60 (1948) (omitting cases in which the Court qualified, distinguished, or expressed disapproval of precedents); Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 156-59 (1958) (noting the practical difficulties of analyzing "instances of erosion" as opposed to explicit overrulings); Jerrold H. Israel, Gideon v. Wainright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 214 n.15 (offering a limited definition of "directly overruled" cases); Maltz, *supra* note 12, at 494 (listing only explicit overrulings in appendix to article criticizing disregard of precedent); Noland, *supra* note 12, at 118 (commenting on the value of an objective measure of respect for precedent available through examination of explicit reversals); *cf.* Henry Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 20 TEMP. L.Q. 503, 506-12 (1947) (not distinguishing the ways in which the Court can weaken precedents); Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971 *passim* (1935) (treating implicit and explicit overrulings as the functional equivalents).

26. *See, e.g.*, John M. Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U. L. REV. 195, 237-38 (1980) (arguing that the purpose of the judiciary is to clarify and to fill in the gaps in the law, so that its interpretations of the law should be as significant and weighty as the text of the law); Maltz, *supra* note 12, at 472-84 (lamenting that the decline of stare decisis contributes to several problems in constitutional law, including uncertainty, unpredictability, and inconsistency); Michael S. Moore, *A Natural Law Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 277, 372 (1985) (suggesting that fidelity to precedent promotes the values of "equality, liberty, fairness, and utility" and that these values should be of sufficient weight to prevent the Court from completely abandoning precedent in favor of the "moral or natural" value found in directly interpreting the Constitution's text); Note, *supra* note 14, at 1356-57, 1361-62 (arguing that the need for stability, predictability, and legitimacy in the Court's decisionmaking require absolute deference to precedent, which should be modified only through constitutional amendment). *But see* Bernhardt, *supra* note 25, at 70 (suggesting that precedents should last as long as reasonably possible but must ultimately give way to changes in social and economic conditions); Blaustein & Field, *supra* note 25, at 183 (stressing that it is more important for the Court to be right than consistent); Cooper, *supra* note 12, at 404 (observing that the two major drawbacks to constructing a doctrine on stare decisis in constitutional law are that any such doctrine can be easily manipulated to hide the actual reasoning underlying certain decisions and that it shields mistakes from repair); Rehnquist, *supra* note 24, at 371-76 (suggesting that because the Justices will always do what they want when reviewing precedents the Court could better maintain the public's respect if it were to reject any formal rule dictating its level of respect for precedents).

and programs, and sometimes even to immunize prior decisions from overruling. These functions illustrate the Court's respect for its past practices and traditions.

A. The Role of Precedent in the Certiorari Process

Behind the scenes, precedents perform a crucial role in constitutional decisionmaking by framing the Court's decisions on whether to grant certiorari. After the virtual abolition of mandatory jurisdiction,[27] the Court has nearly complete discretion over its docket through the certiorari process. At the outset of each case, the Court in effect determines whether the questions brought to it have been settled through prior decisions or whether those decisions require clarification or reconsideration. It is practically impossible for the Court to decide any constitutional issue without first trying to determine the scope of prior decisions. The Justices' respect for the Court's precedents and historical practices is most evident in their choices of which matters not to hear. Thus, in the certiorari process, the Justices often demonstrate most clearly their desire to adhere to the precedents they might not have decided the same way in the first place.[28]

For example, the Court no longer considers whether the liberty component of the Fourteenth Amendment Due Process Clause applies the Bill of Rights (in whole or in part) to the states.[29] Nor do

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27. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (eliminating the Supreme Court's mandatory appeal jurisdiction).

28. At the very least, it is clear that precedents are important because the Supreme Court does not grant certiorari when it does not want to (or feels it cannot) change the law. *See, e.g.*, Turner v. California, 111 S. Ct. 768, 768 (1991) (Marshall, J., dissenting from the Court's denial of certiorari) (dissenting from the Court's refusal to reconsider his argument, rejected in previous cases, that the Court should recognize that "comparative proportionality review" is constitutionally required in capital cases); Teague v. Tennessee, 473 U.S. 911, 911-12 (1985) (Marshall, J., dissenting from the Court's denial of certiorari) (dissenting from the Court's repeated rejection of his argument that the Eighth Amendment prohibits requiring "a capital defendant to prove that any mitigating circumstances he has established outweigh any aggravating circumstances the State has proved"); Snead v. Stringer, 454 U.S. 988, 989 (1981) (Rehnquist, J., dissenting from the denial of certiorari) (protesting the Court's adherence to a line of precedents that, in his opinion, have culminated in the Court's failure to reverse a lower court's erroneous construction of the Sixth Amendment as mandating a new criminal trial for a defendant who by telephone, but without consulting counsel, volunteered a statement to a prosecutor); *see also* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991) (discussing how the Justices make initial decisions in the certiorari process about the precedents they wish to leave alone and those they want to clarify, narrow, expand, or reverse); *infra* notes 29-37 & 73-87 and accompanying text.

29. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment's prohibition on double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (recounting the Court's decisions from 1897 through 1967 incorporating most of the guarantees of the Bill of Rights through the Fourteenth Amendment's Due Process Clause and holding the Sixth Amendment's right to a jury trial applicable to the States through the same clause); Pointer v. Texas, 380 U.S. 400 (1965) (incorporating the Sixth Amendment's right to confrontation of opposing witnesses); Robinson v. California, 370 U.S. 660 (1962) (incorporating the Eighth Amendment's prohibition of cruel and unusual punishment); *see also* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 420 & n.46 (1990) (describing the relationship between the Court's precedents on incorporation and the history of the Fourteenth Amendment).

the Justices try to revisit the Warren Court decisions on reapportionment[30] or the precedents recognizing equal protection-fundamental rights or interests.[31] In the First Amendment area, the Court shows no interest in reconsidering its highly protective test for political expression in *Brandenburg v. Ohio*,[32] or the basic *New York Times v. Sullivan*[33] standard for the protection of public figures against libel suits. In addition, the Court exhibits no inclination to revisit its opinions defining the scope of Congress' spending, war, and taxing powers.[34] The Justices also do not rehear many significant Warren Court precedents subjecting state criminal procedures

30. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (striking down an Alabama apportionment scheme); Wesberry v. Sanders, 376 U.S. 1 (1964) (striking down a Georgia apportionment scheme); Baker v. Carr, 369 U.S. 186 (1962) (holding that malapportionment presented a justiciable political question).

31. Equal protection-fundamental rights generally are regarded as those interests that are sufficiently important that distinctions regarding such rights and interests require compelling interest justification. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down state and federal provisions denying welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking down a Virginia poll tax); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (using the Equal Protection Clause to strike down an Oklahoma law providing for the sterilization of persons convicted of two or more "felonies involving moral turpitude" but expressly exempting from the terms of the statute offenses such as embezzlement and violations of revenue acts); *see also* Gerhardt, *supra* note 29, at 421-22 (describing the relationship between equal protection-fundamental rights and the history of the Fourteenth Amendment).

32. 395 U.S. 444, 447 (1969) (holding that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

33. 376 U.S. 254 (1964) (holding that a public official must prove "actual malice" to recover for defamation). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 770-71 (1985) (White, J., concurring in the judgment) (arguing that public figures should have to prove falsity only, and not actual malice, to recover for defamation).

34. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding a federal statute passed pursuant to Congress' spending power that directed the Secretary of Transportation to withhold a portion of federal highway funds from states that do not prohibit the purchase of alcohol by people under the age of 21); United States v. Kahriger, 345 U.S. 22 (1953) (upholding occupational tax on gamblers as long as the congressional measure was revenue producing on its face); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (upholding use of Congress' war powers to remedy effects of war even after the conflict is over).

to federal standards.[35] In the controversial area of implied fundamental rights, the Court does not reopen several previously questionable rulings,[36] including the much-criticized decision in *The Slaughter-House Cases.*[37]

Certiorari decisions also reveal the Court's present agenda to reconsider precedents in specific areas. For example, the Court clearly has tried to redefine several aspects of criminal procedure law. This intent is evidenced by its consideration three times within the past four years of the admissibility of victim impact statements in the sentencing phase of capital trials,[38] culminating in the overruling of the Court's first two rulings on that subject in *Payne v. Tennessee.*[39] The Court's desire to undo or limit criminal procedure precedents is also apparent in its implicit overturning of a decision that automatically invalidated the criminal conviction of a defendant whose coerced confession had been admitted into evidence,[40] and its limiting of the scope of the exclusionary rule.[41] The Court also

35. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that statements obtained from a defendant during incommunicado interrogation in a police-dominated atmosphere, without full warning of the defendant's constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination); Douglas v. California, 372 U.S. 353 (1963) (using the Equal Protection Clause to require a state to provide counsel for all indigent defendants challenging their criminal convictions as of right); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment's right to counsel and requiring the States to provide counsel to indigent defendants); Griffin v. Illinois 351 U.S. 12 (1956) (holding that a state must furnish an indigent criminal defendant with a free trial transcript if such a transcript is necessary for "adequate and effective appellate review" of his conviction). *But see infra* notes 38-41 and accompanying text (discussing some of the Court's recent overrulings and narrowings of criminal procedure precedents).

36. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right of married couples to use contraception); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing a substantive due process fundamental right to send one's child to a private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing a substantive due process fundamental right to teach one's child a foreign language).

37. 83 U.S. (16 Wall.) 36 (1873) (interpreting the Fourteenth Amendment Privileges and Immunities Clause as merely protecting interests already protected by other federal constitutional and statutory provisions). This may be an especially good example of a previously controversial decision that the Court will not revisit despite its transparently dishonest reasoning and shaky doctrinal result. *See generally* Gerhardt, *supra* note 29, at 417-19, 426-30 (critiquing *The Slaughter-House Cases*).

38. *See* Payne v. Tennessee, 111 S. Ct. 2597 (1991); South Carolina v. Gathers, 490 U.S. 805 (1989) (holding that a prosecutor had engaged in an improper argument during the sentencing phase when he read from a religious tract that the victim had been carrying and commented on personal qualities he had inferred from the victim's possession of the tract and a voter registration card); Booth v. Maryland, 482 U.S. 496 (1987) (holding that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violated the Eighth Amendment).

39. 111 S. Ct. 2597, *overruling Gathers,* 490 U.S. 805 *and Booth,* 482 U.S. 496.

40. *See* Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (ruling that the use of a coerced confession in a criminal trial is not grounds for the automatic reversal of a conviction), *implicitly overruling in part* Chapman v. California, 386 U.S. 18 (1967) (identifying coerced confession, biased judge, and deprivation of counsel as errors so serious as to invalidate a criminal conviction automatically, and noting that the errors were not subject to harmless-error analysis); *see also* McNeil v. Wisconsin, 111 S. Ct. 2204 (1991) (holding that neither the Fifth nor the Sixth Amendment prohibited police from questioning a man jailed for armed robbery about an unrelated murder charge without his lawyer in the robbery case present).

41. *See, e.g.,* United States v. Leon, 468 U.S. 897 (1984) (holding that the Fourth

has invited and considered various challenges to precedents involving abortion rights[42] and the separation of church and state.[43] This trend lends some credence to Justice Marshall's admonition in his *Payne* dissent that the Court is prepared to weaken, if not overrule, as many as seventeen constitutional precedents.[44]

Although more explicit overrulings have occurred in this century

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Amendment exclusionary rule should not be applied to bar the prosecutor's use of evidence obtained by officers acting in reasonable reliance on an invalid search warrant issued by a magistrate).

42. For a discussion of the Court's recent rulings cutting back on precedents involving abortion rights, see *infra* notes 125-30 & 154-58 and accompanying text.

43. The Court's precedents regarding the Establishment Clause and the Free Exercise Clause have been in flux for years. The Court's tripartite test for evaluating Establishment Clause guarantees has been challenged since it was first set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) (upholding a law under the Establishment Clause only if (1) it has a secular legislative purpose; (2) its principal or primary effect is neither to advance nor inhibit religion; and (3) it does not foster an excessive government entanglement with religion). For cases challenging *Lemon*, see Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990) (directly challenging the *Lemon* test), *cert. granted*, 111 S. Ct. 1305 (U.S. March 19, 1991) (No. 90-1014); Board of Education v. Mergens, 110 S. Ct. 2356, 2377 (1990) (Kennedy, J., concurring) (proposing, as an alternative to the *Lemon* test, that government cannot give direct benefits to religion to such a degree that it effectively establishes a state religion, and government cannot coerce any student to participate in religious activity); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (examining whether the government's practice had the purpose or effect of endorsing religion); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (refusing to endorse "any single test or criterion in this sensitive area"). Before *Lemon*, the Court varied in its approach to Establishment Clause challenges. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a state program to loan secular textbooks to parents of children attending private schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional a state law requiring that ten verses from the Bible be read aloud at the opening of each school day); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding a New Jersey statute authorizing local school boards to reimburse the cost of bus transportation to parents with children in private schools, most of which were Catholic parochial schools).

The Court's two-part test for evaluating free exercise of religion claims also has been under attack from the time it was first set forth in Sherbert v. Verner, 374 U.S. 398 (1963) (upholding a law under the Free Exercise Clause only if it does not substantially burden the free exercise of religion, or if the government has a compelling reason for doing so). For precedents challenging *Sherbert*, see Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (holding that an Oregon criminal statute prohibiting peyote use did not violate the Free Exercise Clause); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that the Forest Service's plan to permit logging and road construction in areas of forest used by Indian tribes for religious rituals did not violate their free exercise of religion); Bowen v. Roy, 476 U.S. 693 (1986) (rejecting a free exercise challenge to government welfare programs requiring social security numbers, even though the claimants believed that the use of the number would impair their child's spirit). Before *Sherbert*, the Court varied in its approach to free exercise claims. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (rejecting a free exercise challenge by Orthodox Jews claiming that a state law requiring stores to be closed on Sundays put them at a competitive disadvantage because their religion required closing their stores on Saturday); Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing the disturbing the peace conviction of a Jehovah's Witness who played a record attacking all organized religions).

44. Payne v. Tennessee, 111 S. Ct. 2597, 2623 & n.2 (1991) (Marshall, J., dissenting) (stating that the following 17 precedents are "endangered" based on the criteria the Court used in *Payne*: Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990) (upholding the

than in the previous one, and consequently seem to be on the rise,[45] the Court is not necessarily showing less regard for its precedents.[46] During this same period of time, the Court's case load has increased at a rate even higher than that of explicit overrulings.[47] It stands to

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authority of the federal government to set aside broadcast licenses for minority applicants); Rutan v. Republican Party, 110 S. Ct. 2729 (1990) (holding that the First Amendment prohibits denial of public employment on the basis of party affiliation); Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990) (First Amendment right to advertise legal specialization); Grady v. Corbin, 110 S. Ct. 2084 (1990) (holding that the Double Jeopardy Clause forbids repeated prosecution for the same criminal conduct); Zinermon v. Burch, 494 U.S. 113 (1990) (finding a due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to a mental hospital); James v. Illinois, 493 U.S. 307 (1990) (holding that the Fourth Amendment demands exclusion of illegally obtained evidence introduced for impeachment of defense witness); Mills v. Maryland, 486 U.S. 367 (1988) (holding that the Eighth Amendment requires jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); Rankin v. McPherson, 483 U.S. 378 (1987) (holding that the First Amendment protects public employees when expressing views on matters of public importance); Rock v. Arkansas, 483 U.S. 44 (1987) (holding that the Fifth and Sixth Amendments support a right of a criminal defendant to provide hypnotically refreshed testimony on her own behalf); Gray v. Mississippi, 481 U.S. 648 (1987) (rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by "death qualified" jury); United States v. Paradise, 480 U.S. 149 (1987) (right to promotions as remedy for racial discrimination in government hiring); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment forbids execution of the insane); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (reaffirming right to abortion); Maine v. Moulton, 474 U.S. 159 (1985) (holding that the Sixth Amendment is violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy); Aguilar v. Felton, 473 U.S. 402 (1985) (finding that the Establishment Clause forbids certain governmental assistance to parochial schools); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting theory that Tenth Amendment provides immunity to the States from federal regulation); Pulliam v. Allen, 466 U.S. 522 (1984) (holding that injunctive relief is available for constitutional violations committed by judicial officers)).

45. *See generally* Appendix (listing all explicit overrulings).

46. Even though the cases in which the Court grants certiorari present especially difficult constitutional issues, this does not mean that the Court is more likely to overrule itself. For one thing, the statistics do not support this proposition. *See infra* note 47; *see also* Frank H. Easterbrook, *Ways of Criticizing the Court,* 95 HARV. L. REV. 802, 805-07 (1982) (explaining that the Court has agreed to consider an increasing number of difficult cases, which inevitably divide the Court); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint,* 47 WASH. & LEE L. REV. 281, 284-85 (1990) (suggesting that explicit overrulings are the rare exception rather than the rule in constitutional decisionmaking); John P. Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U. L. REV. 1, 3-5 (1983) (attempting to dispel the myth that stare decisis no longer matters to the Court).

47. The Court has explicitly overruled itself only about 100 times. *See* Appendix; *see also* CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 2115-27 (1987 & Supp. 1988) [hereinafter CONSTITUTION REPORT]. The relatively small number of explicit overrulings may be explained partially by the fact that explicit overrulings represent the most extreme kind of decisive action, which is difficult to achieve in controversial cases. *See supra* note 46. Moreover, explicit overrulings have not increased at the same rate as the Court's case load. For example, during the decade 1960-70, the Court had an average case load per year of 2660.82 cases and averaged 4.09 explicit overrulings per year; however, during the decade 1980-90 the Court had its case load increase to an average of 4354.44 cases per year but explicitly overruled an average of 2.22 cases each year. *See* CONSTITUTION REPORT, *supra* (listing all overrulings through June 29, 1988); *The Statistics,* 75-103 HARV. L. REV. (1960-1990) (providing annual surveys of the Supreme Court's case load); *see also Payne,* 111 S. Ct. at 2610 n.1 (observing that the Court had overruled 33 cases in 20 Terms); Powell, *supra* note 46, at 284 (suggesting that there are only two or three overrulings each Term despite the Court's increasing case load); Stevens, *supra* note 46, at 4-5 (pointing out that even

reason that if the Court is being asked to hear an increasing number of cases, there will be more questions about the scope of prior decisions, and the greater number of such issues, the greater opportunities for overruling precedents. Yet Justice Marshall remains the only modern Justice to suggest that the Court in recent years has been targeting a greater proportion of its cases for reconsideration.[48]

Precedents clearly do matter to the Court in setting its agenda. When considering which cases to hear, the Court has its first and most important chance to deliberate on the degree to which it intends to be constrained by a prior opinion. Once the Court chooses to decide an issue, however, there arise more nuanced questions as to the degree to which precedents still constrain or matter to the Court. I consider these nuances next.

B. Precedent as a Source of Stability for Constitutional Law

Precedents perform historical and structural functions that help stabilize the branches' operations and interactions.[49] This Section considers each of these functions in turn, and then examines the special conditions under which they can help to immunize certain decisions from reconsideration.

1. The Historical Functions of Precedent

Precedents can serve two historical functions. First, the Court's

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though the Court's case load has been increasing the Court still explicitly overrules itself no more than two or three times each Term).

48. Several other modern Justices have noted the importance of following precedent. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986) (acknowledging that a Justice has a "general duty" to follow precedents); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (suggesting that the real work of the Court consists of distinguishing, clarifying, and interpreting precedents); *see also* Powell, *supra* note 46, at 285; Stevens, *supra* note 46, at 4-5. In addition, in his press release announcing his resignation from the Court, Justice Brennan expressed his belief that many of the precedents he helped construct would survive the test of time. *See* Linda Greenhouse, *Brennan, Key Liberal, Quits Supreme Court; Battle for Seat Likely*, N.Y. TIMES, July 21, 1990, at 1 (quoting Justice Brennan's press release). Some might argue, however, that changes in personnel on the Court may lead some Justices to avoid calling attention to their own disregard for precedent by overruling or narrowing precedents in more subtle and less principled ways. *See supra* note 24. This argument overlooks the critical fact, discussed at *infra* notes 119-77 and accompanying text, that the Justices may choose to forego explicit overrulings for a variety of defensible reasons.

49. Neither the historical nor structural functions of precedents receive adequate attention from other commentators. *See, e.g.*, Fallon, *supra* note 20, at 1260-62 (describing precedent's relative status vis-a-vis other sources of decisionmaking but not considering the historical and structural functions performed by precedents); Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1044 (1977) (suggesting that the authority of a precedent turns solely on the degree to which it can be linked to the constitutional text).

decisions often are intertwined with historical events to such an extent that it is not possible to understand those events without considering the degree to which precedents contributed to their development. A famous illustration of this function is *Dred Scott v. Sandford*,[50] which divided the Court and the nation on whether the Constitution had an answer to the moral, social, and political dilemma posed by slavery and set the stage for the Civil War and the Reconstruction Amendments.[51] *Dred Scott* is important to the Justices (and others) as the precedent overturned by the Reconstruction Amendments and as an important symbol for the consequences of the Court's reliance on questionable historical analysis and interference with socially divisive issues.[52]

Second, the Justices can be the constitutional historians for their successors as well as for the elected branches. Because the Court is a critical interpreter of and player in historical events,[53] its precedents preserve, illuminate, and provide a perspective on the nation's social, political, and legal traditions.[54] The Court often defines the relevant past for itself and the other branches so that the Court's assertions about history can matter to present and future Justices and other government decisionmakers even more than anything the Framers may have said. Consequently, there are a number of areas in which the Court and the elected branches are likely to consult the Justices' historical commentary, as reflected in *New York Times v. Sullivan*[55] regarding the original understanding of the scope of the First Amendment's protection of the press from libel actions and, more recently, in *Harmelin v. Michigan*[56] regarding the extent to which the Framers meant for the Eighth Amendment to guarantee proportionality of punishment.[57] The more each of the branches,

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50. 60 U.S. (19 How.) 393 (1856) (holding that neither slaves nor their descendants could be citizens of the United States).

51. *See generally* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 894-95 (1986) (discussing the role of *Dred Scott* in influencing the development of the Reconstruction Amendments).

Precedents can also reflect the attitudes of a particular historical period. For example, the development of the civil rights movement in this country was intertwined with the long line of cases in which the Supreme Court restricted government's use of race as a classifying trait in legislation. *See generally* RICHARD KLUGER, SIMPLE JUSTICE 82-83, 88, 118-19, 122-23, 134-35, 219-20, 239-46 (1975) (discussing the relationship between various Supreme Court decisions and the development of the civil rights movement).

52. *See, e.g.*, BORK, *supra* note 12, at 28-33 (describing *Dred Scott* as illustrating substantive due process at its worst); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700-02 (1976) (pointing to *Dred Scott* as an example of the damage judicial activism can wreak).

53. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (observing that Supreme Court Justices "are not final because [they] are infallible, but [they] are infallible only because [they] are final"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that it is the province of the Court to "say what the law is").

54. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1051-55 (1990) (arguing neither precedent nor tradition in our past should be ignored because our legal precedents and traditions have shaped our current attitudes and practices).

55. 376 U.S. 254 (1964).

56. 111 S. Ct. 2680 (1991).

57. Other examples of precedents whose historical analysis may be consulted subsequently by the Court and the other branches include Marsh v. Chambers, 463 U.S. 786, 786-92 (1983) (reconciling the history of the Establishment Clause with the practice of

including the Court, accepts the Court's historiography, the more entrenched the precedents become structurally and the less likely the Court will revisit or overrule them.[58]

The Court's mediations of past events[59] can be more reliable than the histories compiled by the elected branches because the latter traditionally do not have to explain the reasons for their positions on historical questions as fully and openly as does the Court.[60] Moreover, the adversaries in each case closely scrutinize the information submitted to the Court. A premise of the adversarial system is that strong advocacy on each side of a dispute will expose the flaws of the historical material submitted to the Court. If the Court's historiography is self-serving and, therefore, cannot be relied upon by subsequent Justices or the other branches,[61] then one must concede that the adversarial system works less than ideally.

2. The Structural Functions of Precedent

Precedents perform two kinds of structural functions. First,

opening legislative sessions with prayer); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-44 (1968) (recounting the history of the Congress' power to pass appropriate legislation to enforce the Thirteenth Amendment); Adamson v. California, 332 U.S. 46, 68, 92-123 (1947) (Black, J., dissenting) (providing an appendix detailing the original understanding of incorporation of the Bill of Rights via the Fourteenth Amendment); *see also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 45, 115, 186-87 (1988) (showing, inter alia, how the other branches consult precedents to obtain information on the ways in which past conflicts over foreign affairs have been resolved). In addition, the Court's choice to join one side in a historical debate is itself a matter of historical concern. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (agreeing with Hamilton's rather than Madison's interpretation of the Congress' spending power); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (siding with Hamilton's rather than Madison's construction of the Necessary and Proper Clause); *see also* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 135-49 (1990) (detailing the regularity with which the Court has sided with the President on separation of powers issues).

58. *See infra* notes 72-86 and accompanying text (discussing the conditions immunizing precedents from overruling).

59. Written history usually is recorded by someone other than the primary historical actor. For one discussion of the consequences of this, see Akhil R. Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281 (1987) (observing that the text of the Constitution we use today is not the actual one originally ratified by the States).

60. On the need for, and practice of, the Justices to discuss the reasons for their judgments, see *infra* notes 209 & 356-59 and accompanying text.

61. *See* R.G. COLLINGWOOD, THE IDEA OF HISTORY 9-12 (1946) (noting that history furthers self-knowledge only if it contains the interpretation of evidence; mere recounting of facts is useless); LEO MARX, THE MACHINE IN THE GARDEN 4 (1964) (stressing the need to understand the relationship between a reader, the text she is trying to interpret, and the cultures in which she lives and in which the text was written); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. THEORY 3, 30-35 (1969) (criticizing the failure of many readers to appreciate the strategies authors employ to disguise their true meaning); *see also* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (criticizing the Court's historiography as having been written solely for the purpose of supporting results that the Justices wanted to reach). *But cf.* DAVID L. HOROWITZ, THE COURTS AND SOCIAL POLICY 45, 50 (1977) (suggesting that courts are better equipped to find "historical" rather than "social" facts).

precedents help to establish and maintain government operations and relationships.[62] For example, the Court's decisions on separation of powers have defined the relationships among the three branches of the federal government,[63] and those on the nature of the rights protected by the Fourteenth Amendment have clarified the relationship between the federal and state governments in certain areas.[64]

Second, the Court's decisions inform the choices or agendas of the other branches.[65] For example, two precedents set the terms and illuminated the roles of the elected branches in the recent controversy whether flag burning should be protected as political protest under the First Amendment. No sooner had the Court held in *Texas v. Johnson*[66] that a state law prohibiting desecration of the flag violated the First Amendment, than much of the public denounced the ruling, prompting President Bush to try to overturn it through a constitutional amendment.[67] Congress responded that a constitutional amendment would be premature, and instead tried to draft a statute that would preserve the flag's integrity without conflicting with *Johnson*. Hence, Congress passed a federal statute[68] that sought to protect the flag on a content-neutral basis.[69] After the Court struck down the statute in *United States v. Eichman*,[70] Congress debated, but rejected, the President's renewed proposal to amend the Constitution.[71] In short, the flagburning dispute shows how the

62. *See generally* Easterbrook, *supra* note 18, at 431-32 (maintaining that some precedents can have immutable structural effects on governmental operation); Monaghan, *supra* note 7, at 730-34, 749-52 (demonstrating how precedents have shaped governmental structure).

63. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (holding that Congress may delegate the authority to create mandatory sentencing guidelines to an independent commission located in the judicial branch); Morrison v. Olson, 487 U.S. 654 (1988) (upholding Congress' power to delegate to the judiciary the appointment of an independent prosecutor charged with investigating certain high-level executive officials); INS v. Chadha, 462 U.S. 919 (1983) (holding that Congress violated the Presentment and Bicameral Clauses of the Constitution by enacting a one-house veto over the decisions of certain executive officials); *see also* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 50-65 (1989) (discussing many of the precedents that have laid the foundation for the modern understanding of the separation of powers).

64. *See generally* Gerhardt, *supra* note 29, at 421 & n.50 (describing the precedents exploring the nature of the rights protected by the Fourteenth Amendment).

65. Another function of precedents is reflected in the influence they wield in setting the Court's own agenda. *See supra* notes 27-48 and accompanying text.

66. 497 U.S. 397 (1989).

67. President Bush's proposed amendment provided that "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States." *See* Tom Kenworthy, *Flag Amendment Fails in Decisive House Vote; Year-Long Fight on Desecration Put to Rest*, WASH. POST, June 22, 1990, at A18.

68. Flag Protection Act of 1989, Pub. L. No. 101-131, 1989 U.S.C.C.A.N (103 Stat.) 777 (providing criminal penalties for desecration of the American flag).

69. *But cf.* Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1339 (1990) (arguing that the statute was an attempt to slow down the amendment process).

70. 110 S. Ct. 2404 (1990) (striking down the federal flag protection statute as content-based regulation of political speech).

71. 136 CONG. REC. 4035-88 (daily ed. June 22, 1990); 136 CONG. REC. H400b-29 (daily ed. June 21, 1990); *see also* Kenworthy, *supra* note 67 (reporting the House's 254-177 defeat of President Bush's proposed amendment). Interestingly, *Johnson* framed the

Court's decisions can shape the elected branches' agendas.[72]

3. The Immunization of Precedents from Overruling

Part I thus far has suggested but not yet shown how some precedents become immune to overruling. In fact, there are times when the Court does not reconsider previously adjudicated issues because the relevant issues have become practically immutable. Furthermore, there are cases that the Justices decide a particular way because there is a secure ruling on point, even though they might have decided the question another way had they been doing so in the first instance.

A precedent does not achieve permanency solely because it performs a historical or structural function. Rather, it achieves such

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issue for every government decisionmaker except that of the *Eichman* dissenters. In writing for the latter, Justice Stevens did not show any deference to *Johnson*, nor even try to distinguish it. In his only reference to *Johnson*, Justice Stevens explained that deferring to it "would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake. I remain persuaded that the considerations identified in my [dissenting] opinion in *Texas v. Johnson* are of controlling importance in this case as well." *Eichman*, 110 S. Ct. at 2412 (Stevens, J., dissenting).

72. Once they have acted in pursuit of the agendas or choices shaped by the Court's precedents, the other branches may effectively nullify or obviate the need for the Court to revisit those decisions. For example, Congress effectively nullified the specific result in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), through its subsequent enactment of antitrust legislation in the latter part of the nineteenth and in the early part of the twentieth centuries, and The Civil Rights Cases, 109 U.S. 3 (1883), through its enactment of the Civil Rights Act of 1964. Similarly, after the Court in Goldman v. Weinberger, 475 U.S. 503 (1986), rejected a free exercise challenge to an Air Force regulation prohibiting the wearing of headgear while indoors as applied to an orthodox Jewish officer who was disciplined for wearing a yarmulke, Congress passed a law that provides: "[A] member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed forces [unless] the wearing of the item would interfere with the performance of the member's military duties [or] the item of apparel is not neat and conservative." Yet another example is Congress' passage of legislation to prohibit third-party searches of newspapers, Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. §§ 2000aa to 2000aa-12 (1988)), a practice the Court had upheld in Zurcher v. Stanford Daily, 436 U.S. 547, 550-53 (1978). For further discussion of how the political branches can take action to buttress (rather than undermine) precedents, see *infra* notes 73-87 and accompanying text.

status when its structural function combines with its age (or historical purpose),[73] social or institutional reliance,[74] or political acceptance.[75] Although these factors do not all need to apply simultaneously for precedents to become secure, immutability is most likely to result when all three apply.

For example, all three elements have helped to insulate *The Legal Tender Cases*[76] from reconsideration. The decision is over one hundred years old; financial and other important social institutions have been built on expectations that decision will not be overruled; and, even though it has been criticized as a deviation from original understanding,[77] it has been accepted by a wide range of political interests such that there is no well-organized political force working to undo it.[78] It is hard to conceive of circumstances in which the Court would even consider overruling it.

When all three factors do not apply simultaneously, the most important source of permanence is institutional reliance based on political acceptability (or at least on the absence of any serious political opposition). The precedents upholding the New Deal[79] and the

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73. The combination of structure and age can be seen as the intersection between structural and historical functions. Indeed, it is rare for history standing alone to immunize a precedent from reconsideration. *Cf.* Kronman, *supra* note 54 (arguing for greater deference to precedents because we are obligated to, and constrained by, the past and because we want later generations to show respect for our judgments).

74. *See* BORK, *supra* note 12, at 155-59 (suggesting that substantial institutional reliance on a precedent can protect it from overruling even if it deviated from original understanding); Cooper, *supra* note 12, at 409-10 (suggesting that institutional reliance is the only justification for following a precedent that conflicts with original understanding); Easterbrook, *supra* note 18, at 431 (discussing legislative and administrative reliance as a powerful factor in immunizing a precedent from overruling).

75. *See* BERGER, *supra* note 12, at 412-13 (conceding that precedents that at one time should have been properly overruled as wrongly decided become entitled to recognition as authoritative after the passage of enough time and after the citizenry has come to rely on them); *see also* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 382 (1981) (noting the role expectations should play in mitigating the degree to which original intent should control constitutional decisions).

76. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) (upholding the constitutionality of paper money), *overruling* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (holding it unconstitutional to make paper money legal tender for antecedent debts).

77. *See* BORK, *supra* note 12, at 156-57; Cooper, *supra* note 12, at 410; Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389.

78. But all three factors did not prevent the Court from eventually reconsidering Plessy v. Ferguson, 163 U.S. 537 (1896), discussed in more detail at *infra* notes 143-48 and accompanying text, or from rendering several decisions, *see infra* note 80, upholding congressional legislation effectively nullifying The Civil Rights Cases, 109 U.S. 3 (1883). The nullification of these two well-established precedents not only caused profound social disruption but also demonstrated the Court's willingness to buck considerable criticism for the sake of endorsing certain values. The critical thing to keep in mind, however, is that during the substantial period of time that passed prior to their nullifications, support for those decisions diminished *and* opposition to those decisions increasingly developed social and political respectability and power.

79. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal legislation regulating the production of wheat for personal consumption on the family farm); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state regulation of minimum wage laws for women); Nebbia v. New York, 291 U.S. 502 (1934) (upholding New York's regulation of milk prices).

Great Society[80] exemplify this point, because they have become immune to reconsideration even though they are less than half as old as *The Legal Tender Cases.* These decisions were secured by reasonably swift[81] and sufficiently widespread political support for New Deal and Great Society programs, despite ongoing academic skepticism about the legitimacy of the relevant precedents[82] and the opposition of some political leaders.[83] Today, these precedents form the bedrock of the administrative state, which is so well entrenched that it could be done away with only by constitutional revolution.

The failure to overrule precedents that initially were controversial[84] has not turned simply on the perceived correctness of, or on the degree of textual support for, those decisions.[85] Rather, the permanency of such decisions has rested on the degree to which initially hostile political forces cease to have much influence.[86] The longer such groups take to weaken a Court ruling, the greater

80. *See, e.g.,* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding Congress' amendment of the Voting Rights Act of 1965 allowing citizens of New York—primarily from Puerto Rico—to vote even though they could not read English); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Congress' power to pass the Civil Rights Act of 1964 under its Commerce Clause power); Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that the Civil Rights Act of 1964 could be applied, through the Commerce Clause, to small, local establishments).

81. Within ten years of the Supreme Court's endorsement of the New Deal, and within half a decade of the Court's endorsement of the Great Society, the institutions that they sanctioned became widely accepted by both Republicans and Democrats. *See* Easterbrook, *supra* note 18, at 431-33 (discussing the degree to which certain precedents have influenced the structure and agenda of government).

82. *See, e.g.,* BORK, *supra* note 12, at 56-61, 129-30, 156 (criticizing the precedents upholding the New Deal and Great Society as deviating from original understanding); CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 8-9, *passim* (1984); Raoul Berger, *The Activist Legacy of the New Deal Court,* 59 WASH. L. REV. 751, 755-56 (1984) (denouncing various precedents upholding the New Deal for having deviated from original intent).

83. *See, e.g.,* Sidney Blumenthal, *Stirring Populist Emotions for a Country Club Cause,* WASH. POST, June 2, 1985, at C1 (noting President Reagan's opposition to the programs comprising President Franklin D. Roosevelt's second New Deal); William J. Eaton, *Congressional Liberals Switch to the Offensive,* L.A. TIMES, May 1, 1988, Part I, at 1 (describing President Reagan's fundamental disagreements with, and attacks on, federal programs spawned by the New Deal and Great Society); Jon Margolis, *Party Labels Just Aren't Sticking to Voters Anymore,* CHI. TRIB., Aug. 31, 1986, at 1 (observing that the Reagan administration had failed to persuade a majority of lawmakers and their constituents into abandoning New Deal and Great Society policies).

84. Controversy here is measured by the Justices' contemporaneous and subsequent attitudes toward the original precedent, the academic and political reaction to the decision at the time it was decided, and the degree to which lower courts seem to have problems applying or interpreting the precedent.

85. *But see* Munzer & Nickel, *supra* note 49, at 1044 (arguing that the "authority" of a precedent depends on its textual support or how well it fits the purpose and meaning of the constitutional text).

86. For example, Brown v. Board of Education, 347 U.S. 483 (1954), became secure after many southern Democrats and Republicans, who had initially resisted it, accepted it as the law of the land. Similarly, by acquiescing in many of the New Deal and Great Society programs they initially had opposed, the southern Democrats and Republicans reduced any political support for criticisms of the precedents upholding them. The

chance the ruling has to become entrenched. The more entrenched precedents become, the more difficult it is to undo them. And there is a point at which precedents can be so ingrained that they become a permanent baseline for any constitutional dispute about the values that should guide government operation.[87]

II. Precedent as a Source of Indeterminacy in Constitutional Decisionmaking

Ideally, precedents should contain identifiable rules of law and have some measurable degree of influence on subsequent decisionmaking.[88] But unless the instant case is on all fours with some prior decisions, the Justices have significant latitude in how they view, define, and apply the inconsistencies and ambiguities in such prior decisions.[89] The Justices may conscientiously disagree over the scope and reach of a prior decision and may even make some decisions intentionally vague as a result of their conscious choices to gloss over their differences of opinion for the sake of forming coalitions.

The creation and interpretation of precedents, however, involves an unavoidable degree of indeterminacy.[90] In particular, it is difficult, if not impossible, to predict how the Justices will deal with the ambiguities in prior decisions, the ideas new Justices get looking at old decisions, and how those decisions will influence the Justices' choices of the level of generality at which to state the rule of a case. Furthermore, it is unclear how the Justices will manage the confusion generated by the Court's use of more than one method to weaken or bolster its precedents and the uncertainty fostered by the

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Republicans also opposed the Court's narrow interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), but later came to embrace that opinion as part of the Party's political theory of government. For their part, many Democrats initially opposed, but accept today, the Court's general practice to recognize that the Constitution primarily protects negative rights, which require the government to refrain from certain conduct, rather than positive rights, which impose affirmative duties on the government to take actions or to expend resources to meet the needs of certain citizens. *See* Gerhardt, *supra* note 29, at 410.

87. Another example of a permanent precedent is Bolling v. Sharpe, 347 U.S. 497 (1954), which prohibited the federal government from maintaining segregated public schools in the District of Columbia on the ground that the Fifth Amendment Due Process Clause imposed the same equal protection of the laws concept on the federal government as the Fourteenth Amendment had imposed on the states. *Bolling* has become immutable despite the considerable academic and political controversy it has generated. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). Indeed, *Bolling* has been criticized as recently as 1989 by one of President Reagan's Supreme Court nominees. *See* BORK, *supra* note 12, at 83-84 (maintaining that no neutral principles can be derived from original understanding to support the result in *Bolling*).

88. *See* Moore, *supra* note 26, at 359.

89. Precedents are sometimes termed "horizontal" when being reviewed by the same court issuing them or "vertical" when constraining a lower court obliged to follow them. Marshall, *supra* note 18, at 178 n.1; Cooper, *supra* note 12, at 6. This Part focuses on the extent to which precedents can "horizontally" constrain the Supreme Court.

90. *Cf.* LLEWELLYN, *supra* note 21, at 4, 73-76 (observing that precedents can "liberate" judicial decisionmaking because they inherently contain inconsistencies, which can be manipulated easily).

Court's inconsistent explanations for explicit overrulings. These sources of indeterminacy in dealing with precedents have the effect of enabling the Justices to engage in conscientious disagreements over the scope of precedents, to consider new or renewed arguments, and to contribute to the evolution of constitutional doctrine.[91]

A. Purposeful Versus Unintentionally Indeterminate Precedents

A purposefully indeterminate precedent, difficult as it might be to spot, results from the Justices' efforts to gloss over their differences for the sake of creating working majorities, or from their conscious or deliberate choices to leave some constitutional matters unresolved, or both. The larger the coalition on the Court, the more differences the Justices may have to submerge for the sake of consensus, and the scope or reach of even unanimous opinions may be ambiguous or vague.

Brown v. Board of Education[92] may be the most famous example of a purposefully indeterminate precedent. Having taken two years to write, *Brown* glossed over the concerns of several of the Justices as to the historical and textual support for the Court's striking down laws explicitly mandating racial segregation in public schools.[93] *Brown* raised more questions than it answered, including the timing and nature of a remedy,[94] the continued constitutionality of segregation outside the public school context, and the standards for determining when the States could be held responsible for segregated conditions in public schools.[95]

Of course, *Brown* could decide only so much, inevitably leaving many questions to be resolved and debated later. Indeed, in trying to dispose of the case before it, the Supreme Court almost always leaves related, but not identical, issues to be resolved through subsequent decisionmaking.[96] Because there is no way to ensure that

91. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 808-09 (1983) (arguing that the institutional pressures on the Court to obtain clear majorities undercut the Court's ability to produce opinions based on the application of neutral principles which the entire majority addresses). The resulting ambiguities can be intentional or accidental. *See, e.g.*, Vincent Blasi, *The Unanswered Questions of the First Amendment*, 33 WM. & MARY L. REV. (forthcoming 1992) (discussing eight questions regarding the central meaning of the First Amendment left unresolved by constitutional adjudication).

92. 347 U.S. 483 (1954).

93. *See generally* WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 113-15 (1980) (describing the evolution of *Brown* and suggesting that its appearance of unanimity is misleading); KLUGER, *supra* note 51, at 694-99 (describing the Justices' responses to Chief Justice Warren's draft of *Brown*).

94. *Brown* was, however, saving this question for reargument.

95. To be sure, the Court made clear and unequivocal its disapproval of segregation of public schools. *See infra* notes 143-48 and accompanying text.

96. For example, the Court has had to address the questions left unanswered or

later decisions will preclude ambiguities, an inevitable degree of indeterminacy creeps into the Court's decisionmaking. In other words, vagueness in the scope and reach of the Court's precedents can exist and pose the same problems for subsequent decisionmaking independently of the Justices' intentions. The next section explores more fully this kind of indeterminacy.

B. Four Sources of Indeterminate Precedents

1. The Consequences of Substantive Splits on the Court

Judicial decisionmaking imposes pressure to find common ground. In some cases, the Justices disagree strongly but can still find the common ground to state a clear rationale,[97] but, in other cases, no clear rule may emerge from the decisionmaking process. For example, from 1976 through 1990, the substantive differences of opinion among the Justices prevented them from producing a clear holding regarding an affirmative action measure under the Equal Protection Clause.[98] As a practical matter, these decisions signaled only the constitutionality or unconstitutionality of a specific

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unclear by *Brown* in a number of cases. *See* Brown v. Board of Educ. (*Brown* II), 349 U.S. 294 (1955) (ordering a gradual adjustment to an integrated school system, rather than immediate integration, and vesting significant discretion in the lower courts); Green v. County Sch. Bd., 391 U.S. 430 (1968) (holding that a plan allowing a student to choose her own public school does not constitute adequate compliance with the school board's responsibility to achieve desegregation when there is a history of intentional segregation in the school system); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that the command to desegrate schools does not mean that every school must reflect the racial composition of the community as a whole, but that busing is permissible if necessary to dismantle a dual school system); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (holding that whenever a policy of intentional segregation is proved with respect to a portion of a school system, the burden of proving that other schools in the system were not intentionally segregated falls on the government).

97. Arguably, this was the case in *Brown,* to the extent that the Court explained that segregation of the races in public schools violated the Equal Protection Clause because such segregation negatively stigmatized black children. *See* KLUGER, *supra* note 51, at 655-99 (describing the differences of opinion of the Justices on the *Brown* Court, and the willingness of those Justices to suppress those differences to reach a unanimous result); *see also* BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT *passim* (1986) (describing the strong differences of opinion among the Justices over the constitutionality of court-ordered busing that ultimately did not preclude them from consenting to a clear endorsement of that remedy under certain circumstances).

98. *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding that layoff provisions of a collective bargaining agreement between a school board and a union were not narrowly tailored to achieve a compelling state interest); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal set-aside program to increase minority participation in government contracting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down a medical school admissions program setting aside a specific number of seats for minorities). Even though there were clear holdings in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a city program setting aside thirty percent of its subcontracts for minority businesses), and Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (upholding FCC broadcast license issuing policies favoring minority firms), these two cases are not easily reconciled with each other, or with the Court's previous decisions. *See* Neal Devins, Metro Broadcasting, Inc. v. FCC: *Requiem for a Heavyweight,* 69 TEX. L. REV. 125, 125-35 (1990) (noting that the Court treated governmental decisions differently in the two cases, depending upon whether federal or state action was involved); Charles Fried, *Comment:* Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality,* 104 HARV. L. REV. 107 (1990) (noting *Metro Broadcasting*'s focus on group rights in direct contrast to *Croson*'s reliance on an individual rights approach to the Equal Protection Clause).

law.[99] Similarly, no sooner had the Court held in *Board of Education v. Dowell*[100] that federal courts could end their supervision of school desegregation plans after a school district has eliminated "the vestiges of past discrimination to the extent practicable" then the Court understandably granted certiorari in *Freeman v. Pitts*[101] to clarify when a school district has met its duties under a desegregation order.[102]

The ambiguities reflected in these and other cases may be a substitute for an elusive neutrality. For example, even if the Justices think they have been impartial in using such terms or phrases as

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99. Sometimes the seemingly strong feelings among the Justices on certain issues perhaps can be inferred from fractured majorities. For example, during the 1989 Term, there were five instances in which a concurring member of the Court provided the critical fifth vote to decide a case and thereby rendered the rationale, and perhaps even the holding, in the case unclear. *See, e.g.*, United States v. Kokinda, 110 S. Ct. 3115, 3125 (1990) (Justice Kennedy's concurrence in the judgment provided the fifth vote to uphold a restriction on solicitation outside a post office); American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2343 (1990) (Justice Scalia providing the crucial fifth vote to strike down an Arkansas highway tax under the Commerce Clause); Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281, 2293 (1990) (Justice Marshall providing the crucial fifth vote to strike down certain restrictions on attorney credentialing as violative of the First Amendment); Burnham v. Superior Court, 110 S. Ct. 2105 (1990) (in which Justice Scalia wrote a plurality opinion on transient jurisdiction, commanding only two other votes, while Justice White concurred in part and in the judgment and five other Justices concurred only in the judgment); North Dakota v. United States, 110 S. Ct. 1986, 1999 (1989) (Justice Scalia providing the crucial fifth vote to uphold under the Twenty-first Amendment North Dakota laws regulating liquor sold to military bases within the state).

At other times, the strong feelings among the Justices may not preclude a clear ruling but rather lead to intemperate language. For example, in Burnham v. Superior Court, 110 S. Ct. 2105, 2117-19 (1990), Justice Scalia inserted into his plurality opinion a gratuitous section in which he uncharitably attacks Justice Brennan's dissent, commenting, for example, that "one can marvel at Justice Brennan's assertion." In addition, in Michael H. v. Gerald D., 491 U.S. 110, 122 n.2, 124 n.4, 126 n.5, 127 n.6 (1989), Justice Scalia caustically comments on four occasions that he has no idea what Justice Brennan is arguing. Several other Justices have also demonstrated a harsh and intolerant tone for their colleagues on the Court. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 538, 559-60 (1989) (Blackmun, J., concurring in part and dissenting in part) (claiming that the plurality had "gone about [its] business in . . . a deceptive fashion . . . . [and had invited] charges of cowardice and illegitimacy"); FERC v. Mississippi, 456 U.S. 742, 781 (1982) (O'Connor, J., concurring in part and dissenting in part) (suggesting that the majority's analysis of law was an "absurdity"). *See generally* Brenda J. Quick, *Whatever Happened to Respectful Dissent?*, 77 A.B.A. J. 62 (1991) (discussing the Justices' increasing tendency to berate each other).

100. 111 S. Ct. 630, 638 (1991).

101. 111 S. Ct. 949 (1991), *granting cert. to* 887 F.2d 1438 (11th Cir. 1989).

102. Yet another example of substantive splits on the Court precluding a clear rationale or rule is the Court's approach to obscenity cases from 1967 to 1973. During those years the Court's inability to articulate a definition of obscenity that could command the allegiance of the majority created chaos. In Redrup v. New York, 386 U.S. 767 (1967), the Court began the practice of per curiam reversals of convictions for the sale or exhibition of materials that at least five members of the Court, applying their separate tests, deemed to be obscene. The Court disposed of some 31 cases in this fashion from 1967 to 1973.

"neutral" state action, "innocent whites," or "benign racial discrimination," other Justices (as well as other people) may debate whether these terms or phrases are justifiable, and disagree as to what they imply, including whether they reflect the speaker's or writer's unconscious attitudes about race and racism in American society.[103] Others may suspect that something more is going on than the opinions suggest and try to dissect them to uncover the values truly underlying them. The perspectives with which others on the Court read what the Justices say often can dictate subsequent debates over the use of the terms or phrases used in various opinions. Thus, the Justices often leave uncertainty over the scope of the precedents they have made by relating disputes in ways that other Justices believe do not disclose fully the actual underlying reasons or values.

2. *The Difficulties of Determining the Level of Generality at which to State the Rule of a Case*

Precedents contain two elements that contribute to the flux in, or the unpredictability of, constitutional decisionmaking. First, precedents contain ambiguous terms or principles that can leave a wide scope of choices because Justices acting later can deal with the ambiguities in ways that state a desired principle or reach a desired result while claiming fidelity to the precedent. Second, precedents can prompt, generate, or be the source of ideas on which later Courts can build constitutional doctrine. Because there is no way to predict who future Justices will be or how they may interpret the ambiguities or develop the ideas in precedents, there is inevitably substantial uncertainty over the direction of constitutional law.[104]

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103. Scholars debate the degree to which the language used in debates on affirmative action reflects unconscious attitudes about race and racism in American society. *See, e.g.*, Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 76-77 (1985) (criticizing "formal equality" and color-blind adjudication as methods of protecting white control over the black struggle for meaningful equality); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that a symbolic message test is superior to the current discriminatory intent test for determining equal protection violations because the former can root out unconscious racism); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (suggesting that the rhetoric surrounding affirmative action conceals a strong undercurrent of unconscious racism).

104. Some uncertainty about the meaning of precedents is inherent in the interpretation of legal texts. The interpretive process is the broad enterprise of trying to assign meanings or underlying intentions or understandings to the documents being read. *But see* Moore, *supra* note 26, at 284 (suggesting the interpretive process consists solely of the application of the law to the facts). The interpretive process is unpredictable because there are no universally accepted rules for interpreting the ambiguities, gaps, and contradictions inherent in every legal text, and because, even if there were such rules, they too would be texts subject to interpretation. *See* Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1326-32 (1984); Michael J. Gerhardt, *Interpreting Bork*, 75 CORNELL L. REV. 1358, 1365-71 (1990) (book review) (discussing the inherent difficulties in interpreting legal texts).

The degree to which constitutional decisionmaking is inevitably indeterminate is not, however, as a practical matter, boundless. To preserve the rule of law, some commentators have argued that it is necessary to have a structure to assign at least a range of meanings to a legal dispute at some point in the adjudicative process. Consequently, the Constitution recognizes an authoritative reader of the Constitution in the form of the

The latitude that subsequent Justices might have in defining the scope of ambiguously phrased precedents is similar to the well-known difficulties in searching for original understanding. Originalists argue that judges should enforce a constitutional provision according to its original understanding.[105] Originalists maintain that the relevant understanding to constitutional interpretation is not the Framers' specific views regarding particular constitutional issues but rather the general understanding of the public at the time of the framing and ratification of the constitutional text in question.[106]

Although originalists usually agree that the critical question is the level of generality at which the judge chooses to state the intent of the Framers and ratifiers,[107] they often disagree on how to specify the appropriate level of understanding in a particular case. In a recent article, Professor Michael Perry explains that the inquiries of even a "sophisticated originalist" into the original meaning and into how to specify in a particular case "the principle that represents the relevant aspect of the original meaning" are indeterminate, subject to different readings depending upon the Justice or theorist's particular moral or political judgments of a good society and of the Court's role in our political system.[108]

The interpretation of precedents involves a similar process. In trying to determine the extent to which some prior decision points to a definite resolution of how the Justices should decide the case in front of them, they too must choose the appropriate level of generality at which to state the rule of law embodied in the original decision.[109] But once the Justices depart from the specific facts or

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Supreme Court, which embodies its pronouncements in precedents that are handed down to guide the lower courts, the rest of the legal community, and subsequent generations and Justices. *Compare* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740 (1982) (suggesting that a conceptualization of the judicial role and a hierarchy of constitutional decisionmakers may ensure objective interpretation) *with* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 401-02 (1982) (suggesting that the cooperative framework, which Fiss sees as protecting objective interpretation, does not exist within the judicial system).

105. *See generally* BORK, *supra* note 12, at 139-40.

106. *See id.* at 144.

107. *See id.* at 149.

108. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 668, 715 (1991). Many critics of originalism maintain, however, that as long as it is permissible to ignore the actual, specific opinions of the Framers and ratifiers, and instead rely on general principles, the choice of a general principle depends on the interpreter or theorist's construction of a fiction. As Professor Dworkin has stated: "[T]here is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented." Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981).

109. *See* Scalia, *supra* note 48, at 1179 (suggesting that a critical task for each Justice is to determine the appropriate level of generality at which to state a rule of law); *see also* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 71-73 (1991) (indicating that the level of generality in precedents often "is where the battle for constitutional meaning is joined"); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in*

rationale of a precedent, they are in a position to reshape its ambiguities and tensions beyond the original configurations of that precedent. The Justices' efforts to define the scope of the rule of law set forth in a prior opinion illustrate that precedents can often open rather than close the range of choices for subsequent Courts to make.[110]

The ideas used in precedents can become the seeds of doctrine seemingly unimportant to the initial case but of such importance to a subsequent Court as to overshadow the specific ruling in the original decision. Constitutional adjudication develops in part through subsequent Justices' scanning precedents for concepts and principles that can resolve present controversies.[111] In this sense, precedents serve as the repository for ideas on which future Justices can build constitutional doctrine.

Perhaps the most prominent example of this aspect of constitutional decisionmaking is *United States v. Carolene Products.*[112] *Carolene Products* held that state laws restricting the transportation of filled milk across state lines violated the Commerce Clause. But the case is little remembered for its facts or holding. *Carolene Products* has had its greatest impact on modern equal protection jurisprudence through the ways subsequent Justices have interpreted its fourth footnote, which suggested that the Equal Protection Clause might

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the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990) (exploring the problem of trying to determine the appropriate level of generality at which to construe broad constitutional language arguably protecting implied fundamental rights).

110. For example, in FCC v. League of Women Voters, 468 U.S. 364 (1984), Justices Brennan and Rehnquist argued over the extent to which Regan v. Taxation with Representation, 461 U.S. 540 (1983), should have controlled. Justice Brennan read *Regan* as holding that Congress could choose, under its spending power, not to subsidize lobbying activities of tax-exempt charitable organizations by prohibiting those groups from using tax-deductible contributions to support their lobbying efforts, but only if the statute provided the organizations some method to separate tax-deductible funds from nondeductible funds. *League of Women Voters,* 468 U.S. at 399-400. Justice Rehnquist read *Regan* as holding that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right," so that Congress could absolutely bar organizations receiving federal funds from editorializing. *Id.* at 405-07 (Rehnquist, J., dissenting) (quoting *Regan,* 461 U.S. at 549). Subsequently, Chief Justice Rehnquist relied on this latter language from *Regan* in his opinion for the Court in Rust v. Sullivan, 111 S. Ct. 1759, 1763 (1991) (upholding federal regulations prohibiting counseling services that receive federal funds from mentioning abortion).

Another recent example of a disagreement over the proper reading and application of a precedent is County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991), in which Justices O'Connor and Scalia disagreed over the definition of the term "promptly" as used by the Court in Gerstein v. Pugh, 420 U.S. 103, 125 (1975), to hold that officials must provide for a probable cause hearing "either before or promptly after [the] arrest" of a suspect. Justice O'Connor suggested that a judicial determination of "promptness" was sufficient to satisfy the *Gerstein* standard, *Riverside,* 111 S. Ct. at 1670, while Justice Scalia argued that tradition and current state practices suggested that "promptly" meant within 24 hours; *id.* at 1676-77 (Scalia, J., dissenting).

111. In constitutional law, chronology of decision is of major significance, regardless of whether the order results from happenstance or from the Court's conscious choices in setting its agenda. The order in which decisions are made underlies the development of the common law and constitutional doctrine. *See generally* WELLINGTON, *supra* note 11, *passim* (arguing that the Supreme Court should continue to interpret the Constitution by common law principles, evolving its views over time and grounding them in experience).

112. 304 U.S. 144 (1938).

protect "discrete and insular minorities" from adverse state regulations.[113] This footnote planted the idea that subsequent Courts developed into the doctrine that effectively granted different levels of protection under the Equal Protection Clause for different groups, depending on the relative degree of their powerlessness.[114]

The major difference in the debates over the levels of generality at which to state rules of decision or original understanding is that judges can all agree on the authority of precedents as a source of decisionmaking whereas they may not agree on the degree to which original understanding should constrain what they do. With the possible exception of the Supreme Court, all players in the legal system are bound more stringently by a Supreme Court decision than they are bound by original understanding. This difference stems from the relatively strong respect for the Supreme Court as a critical interpreter of the Constitution itself,[115] as compared to the lesser degree of respect among judges and scholars for, or consensus on, the Framers' understanding of the constitutional text.[116]

This difference in the debates over the level of generality at which

113. *Id.* at 152 n.4; *see also* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281-82 (1989) (suggesting that footnote four has taken on far greater significance than the original holding of the case, despite the irony that the Court's dramatic message regarding marginalization was itself marginalized into a footnote to the text of the opinion). Another prominent example of this phenomenon is Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), which has come to be generally regarded as the first case holding prior restraints presumptively invalid. In fact, *Near* involved a slightly different question. In *Near*, the Court struck down the Minnesota Gag Law authorizing a permanent injunction against any person engaged in the business of regularly publishing a "malicious, scandalous and defamatory newspaper." *Id.* at 702. Although the Supreme Court reversed the Minnesota Supreme Court's affirmation of a permanent injunction against the publication of the *Saturday Press*, the letter's publisher, Jay Near, was not under a true prior restraint. First, there was no licensor whose approval needed to be obtained prior to the publication. Second, there was an adversarial, not an ex parte, proceeding prior to any determination. Third, the Gag Law was aimed at providing a remedy for those libel plaintiffs suing impecunious publishers.

114. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77, 135-79 (1980) (explaining the relationship between footnote four and the theory of representation-reinforcement); Balkin, *supra* note 113, at 301 (suggesting that, even when not invoked, the footnote can provide support for virtually all contemporary due process and equal protection decisions). *But see* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1100-05 (1982) (asserting that much of the theoretical and judicial reliance on the footnote is based on overbroad or erroneous interpretations of its meaning).

115. *See supra* note 53.

116. Indeed, the Justices themselves talk about respect for precedents in a way that they do not talk about original understanding. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) ("Stare decisis is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *see also* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 786-87 (1986) (White, J., dissenting) (stating that "*stare decisis* is essential if case-by-case adjudication is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results").

to state the rule of a case and original understanding has operational consequences for the ways the Justices treat precedents and original understanding. First, every court of law, including the Supreme Court, tries to reconcile its present decision with at least some precedents, whereas references in judicial decisionmaking to original understanding are less common.[117] The courts give more widespread deference to and discuss precedents more often than original understanding. Second, everyone agrees on what the text of a precedent is (if not what it means), though there is extensive dispute over which components of original understanding are relevant to judicial decisionmaking.[118] Any lawyer knows where to find the text of a specific decision, whereas the same cannot be said for original understanding.

3. The Art of Weakening Precedents

The Supreme Court can overturn or otherwise weaken precedents through explicit overrulings, overrulings sub silentio, or subsequent decisionmaking that narrows or distinguishes precedents to the point of practical nullification.[119] Neither the Court nor commentators have discussed fully the reasons for, or consequences of, the

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117. Two Supreme Court decisions explicitly endorsing recourse to the framers' intent are Marsh v. Chambers, 463 U.S. 783 (1983), and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). But a more common phenomenon encountered when Justices try to rely on original understanding is reflected in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), in which the majority split over the degree to which the original understanding showed that "the Eighth Amendment contains no proportionality [of punishment] guarantee." *Id.* at 2686. On behalf of himself and Chief Justice Rehnquist, Justice Scalia found that all relevant historical materials indicated that the framers and ratifiers of the Eighth Amendment "chose . . . not to include within it the guarantee against disproportionate sentences that some state constitutions contained." *Id.* at 2696. Justice Scalia also found that many of the Court's precedents recognized this same principle. *Id.* at 2699-702.

On behalf of the four dissenters, however, Justice White argued that the evidence was not "strong enough to come close to proving an affirmative decision against the proportionality component." *Id.* at 2710 (White, J., dissenting) (noting that a plain reading of the text of the Amendment and the Court's precedents supported the inclusion of a proportionality principle).

This debate reflects two things. First, the common source of decision in Justices White and Scalia's analysis was precedent. Second, the Justices encountered a common problem limiting the Court's reliance on historical data for its decisions: such data may often be inconclusive or indeterminate (or at least not overwhelmingly persuasive).

118. *Compare* WELLINGTON, *supra* note 11, at 50-60 *and* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980); Ronald M. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981) *with* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988) *and* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-65 (1989).

119. Implicit overrulings or overrulings sub silentio occur when the Court suggests obliquely or by inference that some precedent(s) may no longer be viable. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that the Court can overrule precedents either explicitly or sub silentio). Implicit overrulings and distinguishing cases differ in their respective practical effects: an implicitly overruled precedent no longer controls even the fact situation it initially purported to resolve, while a distinguished precedent at least retains sufficient vitality to resolve a fact situation identical to that which it originally settled. Sometimes the Court can cause confusion when the Court does not make clear whether it is distinguishing or implicitly overruling a precedent.

Court's choice of one of these methods. By weakening precedents through inconsistent means, the Court can confuse the public, the legal community, and subsequent Justices as to the status of, and its real intentions, regarding such decisions.

There are, however, four interrelated factors that seem to influence the Justices' choice of a method to weaken precedents: (1) the mood and composition of the Court; (2) the political climate or timing; (3) the subject matter; and (4) the facts of the case. Although some combination of these factors is usually at work when the Court weakens precedents, it is possible to identify situations when at least one factor applies.

a. The Effects of the Court's Mood and Composition

Change in personnel on the Court is often the catalyst for overrulings. New Justices may bring novel insights into old issues and sometimes help to bring about an unforeseen overruling. For example, even though the Court upheld state laws mandating flag salutes in public schools in *Minersville School District v. Gobitis*,[120] a change in personnel contributed to the Court's explicit overruling of *Gobitis* three years later in *West Virginia Board of Education v. Barnette*.[121]

For example, the Court generated considerable confusion in a series of decisions involving whether private shopping centers could regulate political speech. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (reversing the conviction of a Jehovah's Witness for distributing religious literature on the premises of a company-owned town); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (holding that the prohibition of peaceful labor picketing of a store within a shopping center violated the First Amendment); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (upholding a privately owned shopping center's prohibition of union picketing of a store on the premises); Hudgens v. NLRB, 424 U.S. 507 (1976) (clarifying that *Lloyd* effectively had overruled *Logan Valley*).

120. 310 U.S. 586 (1940).

121. 319 U.S. 624, 642 (1943). By the time the Court heard *Barnette*, Chief Justice Hughes and Justice McReynolds, both of whom had been in the *Gobitis* majority, retired from active service on the Court. Justice Stone, who dissented in *Gobitis*, replaced the Chief Justice, while Robert Jackson and Wiley Rutledge replaced Stone and McReynolds, respectively, as Associate Justices. The new members of the Court, particularly Justice Jackson (who wrote for the majority in *Barnette*), convinced Justices Douglas, Black, and Murphy that intervening events had proven that the political process could not represent fairly the interests of, or protect, the children of the plaintiff Jehovah Witnesses from violence. Justices Black and Murphy each wrote separate concurrences to explain how their views had changed. *Barnette*, 319 U.S. at 624 (Black, J., concurring); *id.* at 644 (Murphy, J., concurring).

Another example of new Justices bringing new insight into old issues is Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), in which the Court overruled Low v. Austin, 80 U.S. (13 Wall.) 29 (1871). In *Michelin*, the Justices decided that the original package doctrine set forth in *Low* (providing that all state taxes, however nondiscriminatory, were void if imposed on foreign imports before the package in which the goods arrived was broken or before actual sale or use, whichever occurred first) was nonsensical enough to modern minds to be abandoned.

The Legal Tender Cases[122] offer perhaps an even more dramatic example of an overruling traceable to a change in personnel. In 1870, the Court ruled 5-3 in *Hepburn v. Griswold*[123] that paper money was unconstitutional. In the year following *Hepburn,* Justice Grier, who had been in the *Hepburn* majority, resigned and was replaced by Justice Strong, and the Congress added a ninth seat to the Court, filled by Justice Bradley. In 1871, Justices Strong and Bradley joined the three *Hepburn* dissenters (Justices Miller, Swayne, and Davis) in overruling *Hepburn,* prompting a heated dissent from Chief Justice Chase (who had written the Court's opinion in *Hepburn*) charging, inter alia, that *Hepburn* was being overruled under the unprecedented circumstances in which none of the Justices who had participated in *Hepburn* had been persuaded in the meantime to vote differently on the constitutionality of paper money, and in which "the then majority find themselves in a minority on the court."[124]

The Legal Tender Cases are only one illustration of the fact that it is not unusual for Presidents to appoint certain Justices for the purpose of weakening, if not overruling, certain precedents. A vivid recent example of this phenomenon involves *Roe v. Wade.*[125] Both Presidents Reagan and Bush campaigned against *Roe,* and there has been widespread expectation that their appointments to the Court portend the end of *Roe.* In fact, Presidents Reagan and Bush have had the opportunity to replace five members of *Roe*'s majority with their six appointments to the Court.[126] Not surprisingly, in *Webster v. Reproductive Health Services,*[127] three of President Reagan's appointees to the Court, Chief Justice Rehnquist and Justices Scalia and Kennedy, voted to abandon *Roe*'s trimester framework for measuring the strength of the state's interest in regulating abortions.[128] More recently, in *Rust v. Sullivan,*[129] Justice Brennan's replacement, Justice Souter, cast the crucial fifth vote to uphold federal regulations prohibiting counseling services receiving federal funds from mentioning abortions. Both *Webster* and *Rust* have narrowed public access to abortions and have increased the States' ability to regulate abortion.[130]

Similarly, Presidents Reagan and Bush both campaigned on the

122. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871), *overruling* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

123. 75 U.S. (8 Wall.) 603 (1870).

124. *Knox,* 79 U.S. at 572 (Chase, C.J., dissenting).

125. 410 U.S. 113 (1973).

126. President Reagan nominated Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy to replace Justices Potter Stewart, William Rehnquist, and Lewis Powell, respectively; President Reagan also nominated Justice Rehnquist to replace Chief Justice Warren Burger. President Bush nominated David Souter to replace Justice William Brennan and Clarence Thomas to replace Justice Thurgood Marshall. Chief Justice Burger and Justices Brennan, Stewart, Marshall, and Powell had been in the majority in *Roe, see id.,* while then-Justice Rehnquist had dissented in *Roe. Id.* at 171 (Rehnquist, J., dissenting).

127. 492 U.S. 490 (1989).

128. *Id.* at 516-21.

129. 111 S. Ct. 1759 (1991).

130. *See, e.g., Rust,* 111 S. Ct. at 1784-86 (Blackmun, J., dissenting); *Webster,* 492 U.S. at 537-38, 539 n.1, 554-56 (Blackmun, J., concurring in part and dissenting in part).

need to appoint federal judges who would be tougher on criminals, and, in three of the more important criminal procedure cases from the 1990 Term, their appointees to the Court cast the decisive votes to cut back or narrow the rights of criminal defendants. For example, in *Payne v. Tennessee,*[131] President Reagan's and Bush's appointees to the Court uniformly agreed to join Justice White in overruling two recent precedents barring the admission of victim impact statements in the sentencing phase of capital trials. In *Harmelin v. Michigan,*[132] the five-member majority, all of whom had been appointed by Presidents Reagan and Bush, agreed either to overrule or severely narrow a prior precedent applying proportionality of punishment analysis to noncapital criminal sentences. In addition, in *Arizona v. Fulminante,*[133] Presidents Reagan and Bush's appointees again joined to implicitly overrule a prior ruling that automatically invalidated the criminal conviction of a defendant whose coerced confession had been admitted into evidence.

In all of these cases—*Webster, Rust, Payne, Fulminante,* and *Harmelin*—spirited dissents charged the majorities with not having sufficiently important and nonpolitical reasons for cutting back on prior decisions and for not deciding cases incrementally.[134] Ironically, the conventional complaint about the Warren Court's numerous decisions overruling precedents is really a complaint about the Justices' failure to adopt a common law approach to constitutional adjudication, under which the Justices could have built upon their predecessors' experience and reasoning while maintaining a healthy degree of stability and continuity in constitutional law.[135]

When overrulings have been made possible only as the result of

131. 111 S. Ct. 2597 (1991), *overruling* South Carolina v. Gathers, 490 U.S. 805 (1989) *and* Booth v. Maryland, 482 U.S. 496 (1987).

132. 111 S. Ct. 2680 (1991) (practically nullifying the Court's prior decision in Solem v. Helm, 463 U.S. 277 (1983)).

133. 111 S. Ct. 1246 (1991) (holding that the admission of a coerced confession does not require automatic reversal of a criminal conviction, thereby partially reversing Chapman v. California, 386 U.S. 18 (1967)). Justice Souter also cast the critical fifth vote in Harmelin v. Michigan, 111 S. Ct. 2680 (1991), nullifying the Court's prior decision in Solem v. Helm, 463 U.S. 277 (1983) (striking down a mandatory life sentence without parole), and he was a member of the six-person majority in Payne v. Tennessee, 111 S. Ct. 2597 (1991), which reversed *Gathers*, 490 U.S. 805, and *Booth*, 482 U.S. 496.

134. *See, e.g., Payne,* 111 S. Ct. at 2619-25 (Marshall, J., dissenting) (accusing the majority of departing from an established precedent without "special justification"); *Rust,* 111 S. Ct. at 1786 (Blackmun, J., dissenting) (The "majority [opinion] disregards established principles of law and contorts this Court's decided cases to arrive at its preordained result."); *Harmelin,* 111 S. Ct. at 2709-19 (White, J., dissenting) (arguing that the majority's decision effectively nullified a number of past cases without providing adequate justification for doing so); *Webster,* 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (describing the majority's decision as " 'it-is-so-because-we-say-so' jurisprudence," substituting brute force for reasoning).

135. *See generally supra* notes 11, 24 & 111 and accompanying text (discussing the common law approach to constitutional adjudication).

the participation of new Justices, the new Justices are particularly susceptible to charges that they have abandoned the doctrinal approach to constitutional adjudication for no good (or new) reason, and they instead have exercised raw power to reject prior experience in favor of ruling in conformity with their political preferences.[136] At least for the time being, this charge seems to have some merit because President Reagan's and Bush's appointees to the Court have strong conservative ideologies and have thus far generally followed them in voting to overrule or narrow several precedents conflicting with those ideologies.[137]

But changes in the composition of the Court do not, of course, invariably produce overrulings. Even though new Justices might have decided some precedents differently in the first instance, they begrudgingly may accept certain precedents as a permanent baseline,[138] which, under certain circumstances, may even compel them to expand those decisions. For example, *Minnick v. Mississippi*[139] surprised many critics expecting the Rehnquist Court to curtail *Edwards v. Arizona*[140] and *Miranda v. Arizona*,[141] which had restricted police interrogation of criminal suspects whose legal counsel were not present throughout questioning. In fact, the Court expanded *Edwards* and *Miranda* by establishing a bright-line rule that once a detained suspect declines to talk to police without a lawyer, the police can never thereafter initiate questioning without the suspect's attorney present.[142]

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136. *See, e.g., Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."); *id.* at 2627 (Stevens, J., dissenting) ("Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.").

137. *See* Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, at 15 (criticizing the Court for following a "statist" ideology to enhance the power of government at the expense of individual liberty and, thus, to engage in behavior inconsistent with "what a judicious moderate, or even conservative, judicial body should do").

138. *See supra* notes 73-87 and accompanying text (providing a general discussion of some of the conditions that immunize certain precedents from being overruled).

139. 111 S. Ct. 486 (1990).

140. 451 U.S. 477 (1981) (holding that once an accused requests counsel, officials may not reinitiate questioning until counsel has been made available to him).

141. 384 U.S. 436 (1966) (holding that police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel).

142. *See* 111 S. Ct. 486 (1990). *But cf.* McNeil v. Wisconsin, 111 S. Ct. 2204 (1991) (holding that neither the Fifth nor the Sixth Amendment prohibits police from questioning a man jailed for an armed robbery about an unrelated murder charge without his lawyer in the robbery case present). In two recent decisions, the Court has expanded Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to strike black jurors on the basis of their race). *See* Edmondson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that private lawyers in civil cases cannot exclude potential jurors because of their race); Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that under the Equal Protection Clause a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors are the same race).

b. The Court's Sensitivity to Current Political Mores

The Justices may be sensitive to the social disruption and political backlash that explicit overrulings might produce, and consequently opt for something less than an outright overruling of a precedent with which they disagree. In some significant ways, *Brown v. Board of Education*[143] illustrates this kind of sensitivity. The Court delayed oral argument in *Brown* until after the 1952 presidential election to avoid having *Brown* become an issue in the election.[144] More important, *Brown* did not explicitly overrule *Plessy v. Ferguson,*[145] in which the Court upheld segregation of the races in public transportation as long as the separate facilities were equal. Rather, the Court in *Brown* implicitly abandoned its prior practice of allowing separate but equal facilities in public education, with the effects of (1) partially deflecting controversy over precisely how much the Court would undo segregation outside the public school context; (2) adhering to the Court's practice of issuing separate lines of decision on segregation in public schools and in other areas such as public transportation;[146] and (3) suggesting that the stigma from segregation in education had more severe, immediate, and lasting consequences on its victims than those on the victims of segregation in other areas.[147] In short, the writing of *Brown* reflects many of the Justices' concerns about the propriety of overruling *Plessy* while at the same time taking a stand against segregation in public education.[148]

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143. 347 U.S. 483 (1954).

144. *See* KLUGER, *supra* note 51, at 539.

145. 163 U.S. 537 (1896). *But cf.* Israel, *supra* note 25, at 214 n.15 (suggesting that *Brown* overruled *Plessy*).

146. *Compare* Sweatt v. Painter, 339 U.S. 629 (1950) (ordering the admission of a black student to a white law school because there was no substantially equal black law school in the same state); McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950) (holding unconstitutional a state's practice of admitting a black student into an all white school but separating him physically from the other students) *and* Sipuel v. Board of Regents, 332 U.S. 631 (1948) (holding that a state was constitutionally obliged to provide a black student with an equal legal education) *with* Henderson v. United States, 339 U.S. 816 (1950) (holding that the rules and practices of a railway to separate black and white diners violated a provision of the Interstate Commerce Act prohibiting any railroad from subjecting any person to prejudice) *and* Buchanan v. Warley, 245 U.S. 60 (1917) (holding that a statute prohibiting blacks from occupying a residence in a block where the majority of the houses were occupied by whites, and vice versa, violated the Fourteenth Amendment).

147. *Brown,* 347 U.S. at 493 (acknowledging that "education is perhaps the most important function of state and local governments"). Interestingly, in a series of terse per curiam opinions handed down in the years immediately after *Brown,* the Court held unconstitutional segregation in a wide variety of other public facilities. *See, e.g.,* Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches and bathhouses).

148. Of course, the hesitancy to overrule *Plessy* was not just a concern about timing. It also derived from a concern about substance. Indeed, Justice Douglas noted in his

c. Perennial Controversy as a Deterrent to Explicit Overrulings

In his excellent 1988 study on constitutional stare decisis, Professor Henry Monaghan wondered about, but did not reach any firm conclusion regarding, the role that precedent should play in the Court's decisionmaking when "judicial closure" is not likely with respect to contested areas of constitutional law.[149] Not surprisingly, precedent seems to be particularly unstable in disputed areas. For example, in such perennially contested areas of constitutional law as affirmative action,[150] church-state relations,[151] criminal procedure,[152] and hate speech,[153] the Court occasionally has overruled itself during the past two or three decades but repeatedly has shifted directions and established new lines of decision by distinguishing

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autobiography that had the Court decided *Brown* when it was first argued in 1952, the decision would have been 5-4 to uphold *Plessy*. DOUGLAS, *supra* note 93, at 113.

149. *See* Monaghan, *supra* note 7, at 746.

150. *See supra* note 98 and accompanying text (listing recent affirmative action precedents and noting the perennial division of the Court on the issue).

151. *See supra* note 43 and accompanying text (discussing the Court's consistently inconsistent Establishment Clause jurisprudence).

152. *Compare supra* note 35 and accompanying text (listing certain expansive Warren Court precedents left untouched by the Burger and Rehnquist courts) *with* notes 38-41 and accompanying text (discussing the Court's willingness to revisit many criminal procedure precedents).

153. Although the Court has recently agreed to hear R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991) (granting certiorari to consider whether a city ordinance violates the First Amendment by criminalizing the use of symbols, graffiti, or other objects that would arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender"), it has been unclear whether the government may regulate offensive expression directed at, and harmful to, the status of certain social groups. For example, not everyone agrees that New York Times v. Sullivan, 376 U.S. 254 (1964), implicitly overruled Beauharnais v. Illinois, 343 U.S. 250, 251 (1952), in which the Court upheld a "group libel" statute that criminalized the speech of any person who "exposes the citizens of any race, color, creed or religion to contempt." *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974); Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Yet the Court has relied on *Beauharnais* on at least two occasions. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (citing *Beauharnais* to show that some content-based regulation of speech is permissible); New York v. Ferber, 458 U.S. 747, 763-64 (1982) (citing *Beauharnais* as an example of one type of speech that is not protected by the First Amendment). Moreover, *Beauharnais* is a source of much of the growing commentary favoring regulations of racist and sexist hate speech. *See, e.g.*, Richard Delgado, *Legal Theory: Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 376 (1991) (arguing that *Beauharnais* may remain a viable source of authority for regulating hate speech); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 464 n.120 (acknowledging "compelling arguments . . . for the continued viability of *Beauharnais*") (citation omitted).

In addition, the Court held that fighting words are not constitutionally protected in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which the Court subsequently narrowed in Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974) (stating that words conveying or intended to convey disgrace do not necessarily constitute fighting words); Plummer v. City of Columbus, 414 U.S. 2, 3 (1973) (per curiam) (striking down as overbroad a statute prohibiting a person from abusing another by using menacing, insulting, slanderous, or profane language); Gooding v. Wilson, 405 U.S. 518, 522-24 (1972) (striking down as overbroad a statute that prohibited people from using insulting language that tended to breach the peace against another). For a further illustration of the confusion in the case law on hate speech, compare Cohen v. California, 403 U.S. 15 (1971) (holding that a state could not prohibit the use of profanity expressed as part of a message critical of government) with FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (holding that the government could prohibit using certain words on the radio through reasonable content-neutral regulations).

precedents (sometimes on dubious bases). These fluctuations suggest that agreement even about the basic concepts has been so unlikely in these areas that consensus on something as extreme as an explicit overruling is even rarer. Thus, there is no guarantee that the changes in these four areas represent anything more than the continuation, rather than the resolution, of the underlying political and legal conflicts.

As a normative matter, though, it is important to understand the benefits and the costs of continued instability in certain areas of constitutional law. The principal benefits are: first, some groups might feel as if they are part of an ongoing debate in the Supreme Court on the issues involved; and second, the Court appears sensitive to the social consequences of doctrinal shifts in these areas and to new arguments and the lessons of history.

The costs of instability in persistently contested areas of constitutional law, however, affect both the Court and the citizenry. First, the Court might appear indecisive or incapable of asserting a lasting leadership role in resolving these tough questions. Second, the Court's fluctuations create uncertainty in many people about their individual rights in these areas. This uncertainty can be particularly problematic because these four areas—affirmative action, church-state relations, criminal procedure, hate speech—involve some of the most intimate and sensitive ways people interact with their government.

A particularly controversial example of a case illustrating the costs of the Court's failure to reach "judicial closure" is *Roe v. Wade.*[154] Whatever the merits of *Roe,* it has never stabilized; from the beginning it has been criticized by a wide spectrum of politicians and scholars,[155] and has been the subject of constant challenges. In recent years, the Court formally has rejected invitations to overrule *Roe,*[156] even while gradually dissecting it.[157] Indeed, this incremental dismantling is precisely the fate that Justice Scalia predicted for *Roe* in spite of his own stated preference to explicitly overrule the

154. 410 U.S. 113 (1973).

155. Critics on the right include ROBERT BORK, *supra* note 12, at 111-17; and Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law,* 98 YALE L.J. 1501, 1539-41 (1989) (book review). Critics on the left include MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 172-78 (1988); ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113-14 (1976); and John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

156. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419-20 (1983).

157. *See supra* notes 125-30 and *infra* notes 218-27 and accompanying text (describing many of the precedents arguably narrowing *Roe*).

decision.[158]

It is difficult to see much of an upside to *Roe*'s prolonged instability. Most of the people involved in the public and legal debate about *Roe*'s future feel strongly about the need for the Court (1) to protect women's unfettered discretion to make decisions about what to do with their bodies, (2) to restore an important principle of federalism under which the elected branches assume the responsibility for regulating or permitting abortions, *or* (3) to recognize abortion as the moral equivalent of murder.[159] Moreover, the uncertainty about *Roe*'s future raises profound questions about precedent: are the reasons for *Roe*'s instability unique, and, if so, why. Alternatively, if *Roe*'s fate is not unusual, to what extent can people ever feel secure that the Court will adhere to its rights-granting decisions.

Whatever happens to *Roe,* its fate will serve as an excellent illustration of the problems that controversial precedents can cause for the Court. *Roe*'s subsequent judicial treatment has been and will continue to be a microcosm of how a number of themes involving precedent interact, including changes in the Court's personnel, substantive differences of opinion over the merits of a decision, the influence of politics and public opinion, and the consequences of not having judicial closure on a significant social problem.[160]

d. Weakening Precedents Through Distinctions

A common way to determine the scope of a rule of law announced by the Court is to test the degree to which it can or should control factual situations similar to, but not precisely the same as those in the original decision. It is routine for the Court to develop or probe a constitutional principle through a series of similar identical cases.

Sometimes this kind of decisions can set the stage for explicit

158. *Webster,* 492 U.S. at 537 (Scalia, J., concurring in part and concurring in the judgment). Of course, Justice Marshall's departure from the Court makes it more likely that *Roe* could be overruled rather than eviscerated. But whichever of these two fates is in store for *Roe* will depend on the prevailing Justices' attitudes about *Roe* as a precedent.

Assuming *arguendo* Justice Scalia's prediction is correct and the Court incrementally shifts the forum of dialogue about abortion from the federal courts to the legislatures, then *Roe*'s dismantling would resemble the shifts in other, perennially divisive areas. *See supra* notes 35, 43 & 98. It would also resemble the fate of Lochner v. New York, 198 U.S. 45 (1905), whose recognition of an implied fundamental right to contract was displaced by the Court in a series of decisions that ultimately shifted debate about the propriety of regulating private economic interests from federal court to state legislatures. *See generally* Cass Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873 (1987) (describing *Lochner*'s decline as a precedent but its persistence as an idea). Chief Justice Rehnquist routinely has urged the same kind of reasoning—recognizing a right or interest but treating it as not fundamental—in the abortion cases that the Court used to displace *Lochner. See infra* note 265.

159. *See* LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990) (discussing the difficulty of finding the proper forum for meaningful dialogue about abortion, given the strong differences people have about the subject); *cf.* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 98 (1985) (arguing that the problem with *Roe* is that the Court should have acknowledged the claims and feelings of antiabortionists as a legitimate voice in the community, even while proclaiming that they could not override the liberty interests of women choosing to pursue abortions).

160. *See infra* notes 215-306 and accompanying text (discussing the attitudes of individual Justices toward precedents with which they disagree).

overrulings. For example, the Court explicitly overruled *National League of Cities v. Usery*[161] in *Garcia v. Metropolitan Transit Authority*[162] only after deciding several cases that progressively undermined *National League of Cities.*[163] These decisions highlighted the degree to which *National League of Cities* had deviated from the Court's intervening rulings upholding congressional enactments under the Commerce Clause in spite of their arguable impact on traditional state activities. Indeed, in overruling the Court's 1968 decision in *Maryland v. Wirtz,*[164] *National League of Cities* became the first case in forty years to invalidate a congressional enactment pursuant to the Commerce Clause.[165] In the nine years between *National League of Cities* and *Garcia,* in four decisions the central issue was the applicability of *National League of Cities'* rule prohibiting the federal government from regulating traditional state functions under the Commerce Clause;[166] the Court, however, did not grant states immunity from federal regulation in any of those cases. Consequently, those rulings destabilized *National League of Cities.*[167] Although the Court could have kept distinguishing and narrowing *National League of Cities* in its Commerce Clause decisions, overruling *National League of Cities*

161. 426 U.S. 833 (1976) (holding that the Tenth Amendment protected the States' traditional functions from being impaired by Congress' attempt to use its Commerce Clause power to apply the provisions of the Fair Labor Standards Act to state and municipal employees).

162. 469 U.S. 528 (1985) (holding that Congress has the power under the Commerce Clause to apply the provisions of the Fair Labor Standards Act to state and municipal employees).

163. *See* EEOC v. Wyoming, 460 U.S. 226 (1983) (holding that the Age Discrimination in Employment Act, enacted under Congress' commerce power, could be applied to state and local employees); FERC v. Mississippi, 456 U.S. 742 (1982) (upholding the application of the federal Public Utility Regulatory Policies to the States); United Trans. Union v. Long Island R.R., 455 U.S. 678 (1982) (holding that the Tenth Amendment did not prohibit application of the Railway Labor Act to state-owned railroads because operation of these railroads was not clearly a traditional state function); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding application of the federal Surface Mining and Reclamation Control Act of 1977 to the States as a valid exercise of the Commerce Clause).

164. 392 U.S. 183 (1968) (upholding the application of amendments to the Fair Labor Standards Act to state employees under Congress' Commerce Clause power).

165. For commentaries describing *National League of Cities* as an aberration from the Court's Commerce Clause jurisprudence, see Martha A. Field, *Comment:* Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine,* 99 HARV. L. REV. 84, 85-87 (1985) (challenging the rationale in, and the States' need for, *National League of Cities*); Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities,* 2 CONST. COMM. 341 (1985) [hereinafter Frickey, *Further Comment*] (emphasizing *National League of Cities'* weaknesses as a precedent); Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities,* 2 CONST. COMM. 123, 129-32 (1985) [hereinafter Frickey, *Stare Decisis in Constitutional Cases*] (highlighting the weak reasoning and lack of respect for precedent exhibited in *National League of Cities* as important factors making it a weak precedent).

166. *See supra* note 163 and accompanying text.

167. *See* Frickey, *A Further Comment on Stare Decisis, supra* note 165, at 345-46; Frickey, *Stare Decisis in Constitutional Cases, supra* note 165, at 132-38.

ironically demonstrated some respect for precedent, because reaffirming the core principles of *National League of Cities* in *Garcia* would have compelled the Court to weaken the series of decisions leading up to *Garcia*.[168]

Sometimes, however, the Court can destroy a precedent without overruling it by distinguishing precedents in ways that practically nullify them, thereby obscuring the differences between distinctions and implicit overrulings.[169] The Court's decisions on proportionality of punishment present such a quandary. In 1980, *Rummel v. Estelle*[170] held by a 5-4 vote that Texas' statutory requirement of mandatory life sentence for a defendant convicted of three felonies, consisting in that case of fraudulent practices cumulatively depriving people of property totaling less than two hundred dollars, did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. But this holding cast doubt on the validity of the Court's prior practice of applying, beyond the death penalty context, the standard that the Eighth Amendment prohibited imposition of a sentence that is grossly disproportionate to the severity of the crime.[171]

Subsequently, the Court by a 5-4 vote in *Solem v. Helm*[172] struck

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168. Two of the dissenters in *Garcia*, however, made clear their intention to overrule *Garcia* as soon as they could command five votes. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting). In one recent decision, the Court may have begun to take its first step in retreat from *Garcia*. *See* Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (holding that the Age Discrimination in Employment Act did not apply to a state's mandatory retirement provisions applying to appointed state judges on the ground that, inter alia, those provisions fell into exemptions for "appointee[s] on a policymaking level" and intruded on matters of a "fundamental sort for a sovereign entity").

169. The slight differences between cases, however, might lead the Court to define the outer limits of a rule it has formulated previously. For example, in Stanley v. Georgia, 394 U.S. 557 (1969), the Court held that the Fourth Amendment prohibited searching a person's home for obscene materials, but, in Osborne v. Ohio, 110 S. Ct. 1691 (1990), the Court held *Stanley* did not apply to the possession of child pornography.

A variation occurs when the Court claims to be relying on a precedent in a decision but is, in fact, mischaracterizing it for the purpose of weakening it. For example, in Brandenburg v. Ohio, 395 U.S. 444 (1969), the Court did not overrule, but grossly mischaracterized, Dennis v. United States, 341 U.S. 494 (1951), as having "fashioned the principle that the constitutional guarantee[ ] of free speech . . . do[es] not permit a State to forbid . . . advocacy of the use of force or of law violation except where such advocacy is directed to incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447 & n.2. In fact, *Dennis* had upheld the federal antisubversive law, the Smith Act, under a test that required the Court to "ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. at 510 (citation omitted). Nevertheless, subsequent to *Brandenburg*, the Court relied on *Dennis* on at least one occasion. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563 (1976). Even more surprising may be that after *Brandenburg* explicitly overruled Whitney v. California, 274 U.S. 357 (1927), the Court subsequently relied on Justice Brandeis' concurrence in *Whitney*, *id.* at 377 (Brandeis, J., concurring), even as recently as Texas v. Johnson, 491 U.S. 397, 419 (1989).

170. 445 U.S. 263 (1980).

171. *See* Weems v. United States, 217 U.S. 349, 372, 377, 380 (1910) (striking down a penalty for falsifying a public record that included a twelve-year prison term with "accessories" or "accompaniments" such as hard labor while chained).

172. 463 U.S. 277 (1983). In an intervening case, Hutto v. Davis, 454 U.S. 370 (1982), the Court upheld a sentence of forty years' imprisonment and a $20,000 fine for possession of marijuana with intent to sell. *Id.* at 371.

down a punishment scheme almost identical to *Rummel,* except that *Solem* involved a mandatory life sentence without the possibility of parole. Justice Blackmun was the swing vote in *Solem,* but he did not write an opinion. Rather, Justice Powell's opinion for the Court in *Solem* was virtually identical to his *Rummel* dissent, prompting the dissenters in *Solem* to claim that *Rummel* was being overruled sub silentio.[173]

In *Harmelin v. Michigan,*[174] the Court recently tried to resolve the confusion *Rummel* and *Solem* had generated. The five-member majority upheld Michigan's imposition of a mandatory life sentence without parole for drug possession but split over how to deal with *Solem.* While Chief Justice Rehnquist and Justice Scalia argued that *Solem* should be overruled because it embodied an unworkable standard and was inconsistent with prior decisions and original intent,[175] Justice Kennedy in a separate concurrence (joined by Justices Souter and O'Connor) refused the entreaty to overrule *Solem* and instead tried to reconcile *Solem* and *Harmelin* on the ground that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate to the crime.' "[176]

In summary, the degree to which the Court weakens precedents in unpredictable ways can reflect the Court's flexibility. Indeed, this flexibility is not necessarily undesirable because most observers would prefer the Justices to be sensitive to changes in social conditions and to new arguments, while maintaining a healthy respect for stability and for the past. These debates will persist unless and until precedents become practically immune to overruling.[177]

4. The Confusion over the Criteria for Overrulings

Even if all the Justices agree that they should reconsider a prior ruling, they may disagree on the appropriate criteria or standards for making such a determination. In his classic 1963 study on overruling, Professor Jerrold Israel argued that the reasons given by the Justices for overruling prior cases fell into three categories: changed conditions, the lessons of experience (including unworkability), and conflicting precedents.[178] As a descriptive matter,

173. *Solem,* 463 U.S. at 304 (Burger, C.J., dissenting) (complaining that "[a]lthough today's holding cannot rationally be reconciled with *Rummel,* the Court does not purport to overrule *Rummel*").

174. 111 S. Ct. 2680 (1991).

175. *Id.* at 2683-96.

176. *Id.* at 2702, 2705 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted).

177. *See supra* notes 73-87 and accompanying text.

178. *See* Israel, *supra* note 25, at 219-23 (observing that these are the three most significant bases on which the Court overrules precedents). For example, the Court relied on changed circumstances in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 233, 239 (1851) (stressing that the definition of "public rivers" in Article III had

the Court has, both before and after Professor Israel's article, generally grounded its overrulings on one or more of these reasons.[179] Moreover, these reasons generally reflect the Court's established practice to ground its overrulings on the erroneous reasoning of the prior decision *and* some other substantial consideration such as the proven unworkability of that decision.

Professor Israel, however, failed to account for the inapplicability of these reasons to the numerous cases in which the Court has overruled itself in a short period of time.[180] In addition, the Court's stated reasons do not necessarily fully explain certain overrulings. For example, Justice Blackmun was the swing vote in both *National League of Cities v. Usery*[181] and *Garcia v. San Antonio Mass Transit Authority*,[182] and it was his belief that *National League of Cities* proved itself unworkable that became the Court's rationale in *Garcia*.[183] The four other Justices who joined his opinion in *Garcia*, however, joined at least in part because they believed *National League of Cities* simply had been decided wrongly as evidenced by their dissents in *National League of Cities*.[184]

As a normative matter, these criteria might be criticized for being

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changed), to overrule The Steamboat Thomas Jefferson, 23 U.S. (12 How.) 428 (1825). The Court relied on the lessons of experience in Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (applying the exclusionary rule to the States), to overrule Betts v. Brady, 316 U.S. 455 (1942); and in United States v. Scott, 437 U.S. 82, 86-87 (1978) (declaring that the Double Jeopardy Clause is not violated when a state appeals from a decision in favor of the defendant when the defendant sought termination of the proceeding on a basis other than guilt or innocence), to overrule United States v. Jenkins, 420 U.S. 358 (1975). The Court relied on inconsistent precedents in City of New Orleans v. Dukes, 427 U.S. 297, 305-06 (1976) (holding that a grandfather clause permitting pushcart vendors with eight years' operation to continue was valid under the Equal Protection Clause), to overrule Morey v. Doud, 354 U.S. 457 (1957); and in Tyler Pipe Industries v. Washington State Department of Revenue, 483 U.S. 232, 252 (1987) (holding that a Washington state business and occupation tax on manufacturing discriminated against interstate commerce), to overrule General Motors Corp. v. Washington, 377 U.S. 436 (1964).

179. *See supra* note 178 and accompanying text.

180. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (holding that police can search even closed containers in a car's trunk whenever a police officer has reasonable cause to suspect that the car contains contraband), *overruling* Robbins v. California, 453 U.S. 420 (1981); United States v. Scott, 437 U.S. 82 (1978) (holding that the Double Jeopardy Clause is not violated when the state appeals from a judgment in the defendant's favor when the defendant had tried to terminate the proceedings on a basis other than guilt or innocence), *overruling* United States v. Jenkins, 420 U.S. 358 (1975); United States v. Rabinowitz, 339 U.S. 56 (1950) (holding that a warrantless search, conducted as incidental to the defendant's arrest, was reasonable and valid, even though the officers had time to procure a warrant prior to the arrest and search), *overruling* Trupiano v. United States, 334 U.S. 699 (1948); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (overturning the convictions of Jehovah's Witnesses for soliciting without a permit), *overruling* Jones v. Opelika, 316 U.S. 584 (1942); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871) (upholding the constitutionality of paper money), *overruling* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

181. 426 U.S. 833 (1976).

182. 469 U.S. 528 (1985).

183. *Id.* at 531.

184. *See National League of Cities*, 426 U.S. at 856 (Brennan, J., joined by White, J., and Marshall, J., dissenting); *id.* at 880 (Stevens, J., dissenting). In addition, one could speculate that the real explanation for any inconsistencies between Solem v. Helm, 463 U.S. 277 (1983), and Rummel v. Estelle, 445 U.S. 263 (1980), turns on the undisclosed reasons for Justice Blackmun's casting the critical fifth vote in both cases, in neither of which did he write an opinion. *See supra* notes 170-76 and accompanying text.

manipulated too easily to produce overrulings or refusals to overrule. For example, some Justices have argued that changed conditions should have led the Court to overrule its precedents upholding the death penalty, while other Justices have argued that changed conditions are better taken into account by legislatures in the process of designing punishment schemes.[185]

Inconsistent precedents also have not invariably produced overrulings. For example, they have not produced explicit overrulings in the area of separation of powers, in which the Court repeatedly has used inconsistent methodologies,[186] or under the religion clauses, in which the Court's shifts perennially defy explanation.[187]

Nor is there consensus on what would qualify as a lesson of experience requiring an explicit overruling. For example, even though Justice Lewis Powell joined the majority in *Bowers v. Hardwick*[188] to uphold criminal prosecution of persons engaging in consensual homosexual sodomy, he admitted after his retirement from the Court that he had been mistaken to join the *Bowers* majority because he had underestimated the harm that *Bowers* would cause homosexuals.[189] Yet none of the other members of the *Bowers* majority nor

185. *Compare* Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (holding that mandatory death sentences violate the Eighth Amendment's prohibition of cruel and unusual punishment because "evolving standards of decency respecting the imposition of punishment in our society . . . conclusively point to the repudiation of automatic death sentences") *and* Furman v. Georgia, 408 U.S. 238 (1972) (striking down the death penalty, in part, as violative of contemporary sense of decency), *with* Walton v. Arizona, 110 S. Ct. 3047, 3067 (1990) (Scalia, J., concurring) ("It is quite immaterial that most states have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime[;] still less is it relevant that mandatory capital sentencing is (or alleged to be) out of touch with 'contemporary community values' regarding the administration of justice."); *see also* Rummel v. Estelle, 445 U.S. 263, 283-84 (1980) (then-Justice Rehnquist arguing that changed conditions should not influence the Court, but rather should guide legislative decisions on the proportionality of punishment).

186. *Compare* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991) (striking down as violative of separation of powers Congress' conditioning of the transfer of control over Washington area airports to the Metropolitan Washington Airports Authority on the creation of a Board of Review partially composed of Congressmen with veto power over the decisions of the directors of the Authority) *and* Bowsher v. Synar, 478 U.S. 714 (1986) (holding that Congress cannot confer certain executive functions over the budgetary process on officials within its removal power), *with* Morrison v. Olson, 487 U.S. 654 (1988) (upholding Congress' delegation of the executive function of criminal prosecution to an individual not formally associated with any of the three branches). *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (critiquing the fundamentally incompatible methodologies used by the Court in several recent separation of powers decisions).

187. *See supra* note 43.

188. 478 U.S. 186, 197 (1986) (Powell, J., concurring).

189. *See* Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3. Similarly, Chief Justice Warren and Justice Douglas let it be known after their retirements that they each had regretted their efforts (Warren as California's Attorney General and Douglas as a Justice) to support the internment of Japanese-Americans during World War II, which had been upheld in Korematsu v. United States, 323 U.S. 214

any of the Justices who have been appointed to the Court since Justice Powell seem disposed to learn the same lesson he did from the aftermath of *Bowers*.[190]

Nevertheless, although the criteria discussed above may mean different things to different Justices, this may not be a problem but rather a function of conscientious disagreements among the Justices. In this regard, Professor Israel's categories of reasons for overrulings may not be any more difficult to apply or follow than any other standard the Court tries to use.

Perhaps as an alternative to (or an expansion of) the criteria often followed by the Justices in making overruling decisions, Chief Justice Rehnquist declared in *Payne v. Tennessee*[191] that the Court's two prior decisions on victim impact statements deserved less than the usual deference owed to constitutional precedents because they were both decided by 5-4 votes with vigorous dissents and that the Court's practice has been to overrule prior decisions when those decisions "are unworkable or are badly reasoned."[192] He then cited thirty-three decisions in twenty Terms to support his statement.[193]

There are three serious problems with the Chief Justice's statements regarding the deference to precedent and the Court's traditional approach to precedent. First, he misstated the Court's past practice. Perhaps as few as four of the thirty-three opinions cited by the Chief Justice—all four of which he had written himself—involved the Court's overruling of some prior decision(s) on the sole basis of the precedent having been reasoned badly.[194] The remaining twenty-nine opinions, including two authored by then-Justice Rehnquist, appear to ground the overruling on the bases of erroneous reasoning *and* the unworkability or outmoded nature of the overruled precedent or the existence of subsequent, inconsistent case law.

Second, if adopted by a majority of the Court, the Chief Justice's

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(1944). *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 75-77 (1982) (describing how Chief Justice Warren later came to regret the role he had played in the internment of Japanese-Americans); DOUGLAS, *supra* note 93, at 39 (expressing regret for his being part of the *Korematsu* majority). Ironically, none of these disclaimers has ever led the Court to overrule itself on the issues in question. The reason for this is that the critical measure of whether precedents matter in constitutional decisionmaking is the degree to which the persons currently sitting on the Court respect a prior decision.

190. Similarly, the plurality in Webster v. Reproductive Health Services, 492 U.S. 490, 516-19 (1989), pointed to the lessons of experience as demonstrating the unworkability of *Roe*'s framework for measuring the strength of the state's interest in regulating abortions, while Justice O'Connor argued in concurrence that the Court in *Webster* need only decide whether the constitutionality of the specific regulations at issue could be evaluated within *Roe*'s framework. *Id.* at 525-30 (O'Connor, J., concurring in part and concurring in the judgment).

191. 111 S. Ct. 2597 (1991).

192. *Id.* at 2609.

193. *Id.* at 2610 & n.1.

194. Collins v. Youngblood, 110 S. Ct. 2715, 2723 (1990) (overruling Thompson v. Utah, 170 U.S. 343 (1898), and Kring v. Missouri, 107 U.S. 221 (1883)); Daniels v. Williams, 474 U.S. 327, 329-31 (1986) (overruling Parratt v. Taylor, 451 U.S. 527 (1981)); National League of Cities v. Usery, 426 U.S. 833, 852-55 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)); Edelman v. Jordan, 415 U.S. 651, 671 (1974) (overruling in part Shapiro v. Thompson, 394 U.S. 618 (1969)).

criterion of "bad" reasoning clearly would wreak havoc on the legal system because it easily can be manipulated and abused. Given the current Court's lack of ideological balance,[195] it probably would be some time before a majority of the Justices even acknowledged that any argument except for one supporting *their* conservative viewpoint on a constitutional issue was persuasive or that the reasoning of some prior decision is wrong but respectable enough for them to leave it alone. Because it is not hard for intelligent Justices (particularly if they share strong views about how the Constitution should be interpreted) to find some fault with a constitutional precedent, it is likely that if they were to follow the Chief Justice's criterion for overruling, they could overrule numerous precedents.[196]

Third, the argument that 5-4 decisions with vigorous dissents are entitled to less than the usual (low) level of deference given to constitutional precedents is inimical to the rule of law in our society. These decisions state rules of law, no more nor less than any of the other of the Court's decisions. Moreover, many of the Court's 5-4 decisions (for example, *Knox v. Lee*,[197] *Miranda v. Arizona*,[198] *West Virginia Board of Education v. Barnette*[199]) practically are immune to reconsideration or overruling, even though they included vigorous dissents. It would disrupt our legal system severely for anyone on or off the Court to treat a 5-4 vote with a vigorous dissent as a rule of law entitled to less respect from the Court and other government decisionmakers than any of the Court's other constitutional law decisions.[200]

Regardless of the criteria that the Court uses for making overruling decisions, the Court's explanations for those decisions cannot reasonably be expected to be consistent with each other. The reasons given for explicit overrulings may change with the Justices and the kinds of cases heard. The more variables involved in the decisionmaking process, the less likely it is that any clear signal will emerge regarding the Justices' collective attitude about any one factor. Nevertheless, a more complete picture of the role of precedent

195. *See* Cass R. Sunstein, *The Rehnquist Ascendancy: Marshall's Vision—and the End of Court-Led Reform*, WASH. POST, June 30, 1991, at C1 (commenting on the consequences of Justice Marshall's departure as depriving the Court of its only consistently strong voice for social justice); Edwin M. Yoder, *The Rehnquist Ascendancy: The Radical Agenda of a Triumphant Chief Justice*, WASH. POST, June 30, 1991, at C1 (arguing that Justice Marshall's resignation ensures the transformation of the Court from the protector of individual liberties to the guarantor of governmental power).

196. *See supra* note 44 (listing the decisions labeled by Justice Marshall as "endangered" in his dissent in *Payne*).

197. 79 U.S. (12 Wall.) 457 (1871).

198. 384 U.S. 436 (1966).

199. 319 U.S. 624 (1943).

200. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2625-27 (1991) (Stevens, J., dissenting).

in the Court's decisionmaking emerges from Part III's analysis of the Justices' individual attitudes toward precedent.

III. The Justices' Individual Approaches to Precedent

This Part first examines the implications of focusing on the degree to which precedents matter as a source of decision to each Justice. It then describes and critiques the different ways the Justices individually factor precedents into their decisionmaking.

A. The Implications of Focusing on the Justices' Individual Approaches to Precedent

Critics complaining about the Court's inconsistencies in its review of its prior decisions often mistakenly assume that the Court can act as if it were a single person capable of making perfectly coherent and consistent decisions.[201] Although it is beyond the scope of this Article to replicate the ways newly developed interpretive techniques such as public choice theory,[202] chaos theory,[203] or legal pragmatism,[204] can be applied to explain the Court's decisions, it is significant that each of these techniques points to the same result: when institutions make decisions by majority vote, the majority will

201. *See, e.g.*, Fallon, *supra* note 20; Moore, *supra* note 26; Munzer & Nickel, *supra* note 49.

202. Public choice theory has been used mostly to explain congressional decisionmaking. *See* William M. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 908-11 (1987); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 115, 150-60 (1989); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2139-40, 2212-13 (1990). For applications of public choice theory to judicial decisionmaking, see Easterbrook, *supra* note 18, at 425-26; Easterbrook, *supra* note 46, at 811-31; Farago, *supra* note 26, at 229-31. Each of these latter commentaries has shown that multimembered courts produce inconsistent decisions because their members have different orderings of preferences. Moreover, the periodic changes in the composition of the Court exacerbates the inconsistencies, because the new members will introduce into the decisionmaking process different orderings of choices or preferences from those previous members had accepted or acted upon.

203. For a discussion of chaos theory and constitutional decisionmaking, see Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (arguing that the ways chaos theory demonstrates order within the apparent disorder of the universe can also clarify the chaos that seemingly characterizes the Court's constitutional decisionmaking); *cf.* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (suggesting that just as classical constitutional thought was strongly influenced by Newtonian paradigms of clockwork precision, regularity, and objectivity, so modern constitutional thought might gain from an appreciation of certain post-Newtonian concepts).

204. The notions that the Justices bring complex agendas to each case they decide and that their decisions incorporate their attitudes about precedents is consistent with recent work about legal pragmatism. *See, e.g.*, Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990) (critiquing legal pragmatism as an effort to return experience, practice, and common sense to legal thinking); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 117 (1989) (suggesting that pragmatism encourages judges to decide which policies or results will achieve justice); *see also* Daniel A. Farber, *Legal Pragmatism and The Constitution*, 72 MINN. L. REV. 1331, 1343 (1988) (making the case for greater judicial reliance on common sense and legal tradition as opposed to global theories in constitutional analysis).

generate logically inconsistent results unless the voters have very similar preferences. This proposition holds true for the Supreme Court, which over time will produce precedents whose reasoning and/or holdings will be inconsistent with each other.

As an alternative to the traditional efforts to reconcile the Court's rulings on constitutional stare decisis, these techniques suggest that a particularly effective measure of the role of precedent in the Court's decisionmaking is to compare and contrast the degree to which each Justice consistently follows a coherent jurisprudence on constitutional stare decisis. Because each Justice has discretion over her votes and decisions, their performance can be judged on the basis of the tendency of their respective choices to expand or contract precedents.

One can argue, however, that the practice of the Justices to operate as coalitions on the Court makes it difficult, if not impossible, to isolate the expressed or preferred principles of individual Justices.[205] This view posits that these principles become submerged in the inevitable bargaining process that enables the Court to resolve a case. In other words, the real opinions of the Justices may be obscured by the deals made on the Court.

Although it may be true that focusing on the voting patterns of each Justice may not reveal much conclusive evidence about their attitude toward a matter not explicitly discussed in the Court's opinion, that insight does point to something important about the weight of precedents in the Justices' decisionmaking: that precedents can be counterbalanced by other considerations, such as the desire to form coalitions.[206] Of equal importance is the fact that precedents do make a discernible difference, as evidenced by the critical roles they can play behind the scenes in framing the Court's agenda[207] and in the Justices' dialogues about the degree of deference they each should have for the Court's previous constitutional judgments.[208]

If one seriously were interested in increasing the Court's respect for precedents, the solution may not be to have greater candor[209] or

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205. *See* Tushnet, *supra* note 91, at 826-27; *see also* Mark V. Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257, 1263-64 (1984) (showing how Justice Brennan finessed the differences among various Justices to build a coalition in Plyler v. Doe, 457 U.S. 202 (1982)).

206. If Tushnet were right about the impossibility of figuring out the preferred views of each Justice, then his major enterprise, critiquing the Court's constitutional opinions, would be pointless: it never would be possible to isolate the factors that influenced each Justice, because they would have been submerged in the decisionmaking process.

207. *See supra* notes 26-48 and accompanying text (discussing the role of precedent in the certiorari process).

208. *See, e.g., infra* notes 215-27 and accompanying text (discussing how the Justices individually balance certain factors when reviewing precedents).

209. *See, e.g.*, Easterbrook, *supra* note 46, at 811, 832 (acknowledging that each Justice

a criteria for overrulings[210] as some commentators have suggested, because these proposals would complicate rather than clarify the orderings of preferences of the individual decisionmakers. Rather, one might follow the lead of some public choice theorists who have suggested that changes in outcomes are best achieved through structural alterations to the decisionmaking process.[211] For example, the Court could make an internal, structural change requiring a supermajority vote or the passage of a certain amount of time prior to overruling one of its prior rulings.

The reasons such structural changes never would be accepted by the Court provide considerable insight into the Justices' views on constitutional stare decisis.[212] First, these changes might seriously hinder constitutional decisionmaking. They could prevent the Court from fully discharging its constitutional duty to resolve cases or controversies because a minority of the Justices might be able to prevent the Court from resolving an issue as long as there was a potential for its decision to contribute in some way to the weakening of a precedent. Nor could the Court decide controversies if it were prohibited from reviewing the scope of some precedents during a set time period. The Court temporarily would be unable to clarify precedents because clarification might involve narrowing or weakening a prior decision.

Second, these structural modifications might conflict with the Justices' views on their respective roles and prerogatives in constitutional decisionmaking. In particular, they might agree that each Justice should have the complete freedom to balance, as he sees fit, his normative views on constitutional interpretation and the social or institutional values associated with fidelity to precedent.[213]

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could be more open about the reasons for their judgments); Maltz, *supra* note 12, at 483 (urging the Court to explain more fully the principles on which its decisions rest, to refuse to apply reversals retroactively, and to devise holdings no more broadly than necessary); Monaghan, *supra* note 7, at 764-67 (urging the Justices to provide greater candor about the reasoning underlying their decisions); *see also* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 19, 21, 23-25 (1979) (arguing that greater reasoned elaboration on the part of the Court would increase respect for the Court and would clarify the grounds on which certain decisions have been based and may be challenged).

210. BORK, *supra* note 12, at 156-59 (emphasizing whether the precedent conforms to original intent, and the degree of insitutional reliance on the precedent); Monaghan, *supra* note 7, at 756-63 (setting forth criteria for the Court to consider when deciding whether to adhere to a challenged precedent).

211. *See, e.g.*, Farber & Frickey, *supra* note 202, at 903-04 (noting the structural alterations proposed by some public choice theorists to resolve chaotic and paradoxical majority rule); Mashaw, *supra* note 202, at 131-33 (describing the structural changes some public choice theorists have proposed for resolving self-interested governmental decisionmaking).

212. *Cf.* Monaghan, *supra* note 7, at 754-55 (suggesting that how one regards the constitutionality of a congressional statute directing the Court to review precedents in a certain way will say a great deal about one's attitude toward the role of stare decisis in the Court's decisionmaking).

213. In fact, the Justices do seem to agree that they each should have the freedom to conduct such a balance. *See infra* notes 215-27 and accompanying text. Other problems with a stated standard or rule on the precise deference owed to precedents are that some Justices simply may refuse to follow the rule; they may argue that structural prohibitions against correcting the Court's mistakes merely perpetuate those errors and prevent the

Last, requiring a supermajority for overrulings might effectively prevent justifiable overrulings because getting more than five votes to overrule on tough constitutional issues is difficult at best.[214] No matter how compelling the reasons may be for overruling a precedent, no overruling could ever be achieved without the minimum number of votes. If those votes are not forthcoming, then whatever harm that could be perpetuated by preserving the precedent would remain in effect.

B. The Individual Justices' Views on Precedent

Commentators often do not discuss five themes that can be discerned from studying how each Justice factors precedents into their decisionmaking.[215] Most important, whenever the Court reviews its precedents, the standard practice seems to be for the Justices individually to balance their normative views on how the constitutional provision at issue should be interpreted[216] and their perceptions of

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Court from getting back on the right constitutional track. These Justices may argue that waiting to undo a precedent has no virtue because it allows defective precedents to distort our social and governmental structures. Moreover, these structural changes might increase deception in decisionmaking because some Justices may feel compelled to act on their strong feelings to overrule certain precedents by falsely claiming to be clarifying or distinguishing a precedent while actually trying to weaken it. This kind of conduct might increase friction on the Court and could provoke the other Justices to engage in similar behavior to ensure cases are resolved in a manner agreeable to them. The end result could be the substantial lowering of collegiality on, and public respect for, the Court.

214. There are two other difficulties with the supermajority rule. First, it could frustrate the Court's efforts to identify overruled precedents, and such identification is necessarily a critical step in the process of effectuating reversals. Second, there is no principled basis on which to choose the precise number for the supermajority, although it is true that the larger the number required for overrulings the less likely such decisions would ever be made.

215. This section illustrates these five themes by drawing examples primarily, but not exclusively, from the approaches to precedent of the 10 people who have thus far populated the Rehnquist Court, including Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Souter. I address Justice Clarence Thomas' views on precedent in a forthcoming piece. *See supra* note 5. Although some commentators have focused on some aspects of individual decisionmaking in constitutional law, they have not fully explored the consequences or implications of their analysis. *See, e.g.*, Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (1991) (generally distinguishing "institutionalist" Justices, who appreciate the importance of stability and predictability in constitutional decisionmaking, from "individualist" Justices, who are prone to dissent whenever the Court deviates from their personal view of how a case should be decided); Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 277-81 (recounting Justice Harlan's philosophy of constitutional stare decisis); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227 (describing the different grounds on and ways in which various Justices have chosen to dissent).

216. Each Justice may feel a compulsion to act on their normative views on constitutional interpretation because of the constitutional requirement that each Justice "shall be bound by Oath or Affirmation, . . . to support the Constitution." U.S. CONST. art. VI; *see, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified

the practical needs to submerge those views for the sake of certain social or institutional values such as stability, continuity, or consensus. The Court's decisions are inconsistent because each of the nine Justices tends to strike this balance differently in different cases.[217]

Webster v. Reproductive Health Services[218] illustrates how, in striking this critical balance, the Justices reveal many of their attitudes about constitutional stare decisis. Indeed, the majority splintered over the appropriate point at which to strike the balance. The plurality's answer was, as Justice Scalia described it, to "disassemble[ ] [*Roe*] doorjamb by doorjamb."[219] Rather than declare that there was no foundation for the fundamental right recognized in *Roe,* the plurality (Chief Justice Rehnquist and Justices White and Kennedy) confined its opinion to exposing the internal incoherence of *Roe*'s trimester framework for measuring the strength of the state's interest in regulating abortion.[220] The plurality's argument that *Roe* could be undone by its own internal incoherence as revealed through a series of decisions[221] may have had the effect of dispelling some criticism of the Court for having changed course on abortion rights because of a change in personnel.

Justice Scalia argued that his normative views on how the constitutional issue should be resolved and the social values of overruling *Roe* pointed clearly in favor of his voting to overrule *Roe.* He believed the Court should swiftly and unambiguously overrule *Roe* to undo the damage *Roe* had inflicted on social and governmental institutions.[222] By denouncing the plurality's attempted "judicial statesmanship" in favor of casting the only vote to overrule *Roe* in its entirety,[223] Justice Scalia distanced himself from his colleagues. Nevertheless, he cast a critical vote to uphold Missouri's regulations.

Justice O'Connor also struck a balance that distanced her from

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intrusion upon the democratic process in order that the Court might save face."). Less obviously, some Justices may feel that the oath they have taken requires them to consider such social or institutional values as stability in their constitutional decisionmaking. Some Justices may believe that the Constitution is partly what the precedents say it is and, therefore, deviating from precedents is the functional equivalent of abandoning certain constitutional norms.

217. *See supra* notes 202-04 and accompanying text (explaining how various techniques show the inevitability of inconsistent outcomes or rulings).

218. 492 U.S. 490 (1989). *Webster* raised questions regarding the constitutionality of Missouri regulations that prohibited the use of public facilities or employees to perform abortions, the use of public funding to support abortion counseling, and that required physicians to determine, when possible, whether a fetus at least twenty weeks old is capable of surviving outside the womb.

219. 492 U.S. at 537 (Scalia, J., concurring in part and concurring in the judgment).

220. *Id.* at 516-21.

221. This technique might have the effect of demonstrating how *Roe* could "deconstruct" itself. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory,* 96 YALE L.J. 743, 755 (1987) (using deconstructive techniques to expose the self-contradictions inherent in constitutional analysis). *But see* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction,* 73 GEO. L.J. 89, 99 (1984) (suggesting that because deconstruction reveals the inability of any legal text to constrain due to its inherent self-contradictions, the Court should be held accountable for the substantive results of its decisions).

222. *Webster,* 492 U.S. at 532, 537 (Scalia, J., concurring in part and concurring in the judgment).

223. *Id.* at 532.

her colleagues. Rather than join the plurality and Justice Scalia who approvingly cited her previous criticisms of *Roe*,[224] she spent much of her opinion trying to demonstrate that the Court could uphold the Missouri regulations at issue without disturbing any aspect of *Roe*, including its trimester framework. She stressed that *Webster* was not the appropriate case in which to reconsider *Roe*.[225]

The dissent rested its argument in part on stare decisis. It stressed, inter alia, that the long line of cases affirming *Roe* would be undermined by the plurality's decision and maintained that deviating from those rulings at this juncture would make the Court look as if it were the political instrument of a President and interest groups bent on overturning *Roe*.[226] The dissent struck the balance solely in favor of stability, which meant deciding *Webster* consistently with its previous opinions on abortion rights.[227] Because the dissenters views prevailed more often than not in previous abortion cases, arguing for continuity in the law necessarily meant tracking or following its previously expressed views on how the relevant constitutional provisions should be interpreted.

The two cases decided on the last day of the 1990 Term also show how the Justices each try to balance their underlying views on how the Constitution should be interpreted and the need for the Court

224. *See, e.g., id.* (citing Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting) (criticizing *Roe*'s trimester framework)).

225. *Id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment) ("When the constitutional validity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully.")

226. *See id.* at 538 (Blackmun, J., concurring in part and dissenting in part).

227. *See id.* at 553-54, 558-59. In subsequent cases, a majority of the Justices have continued their efforts to uphold restrictions on public access to abortions. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding federal regulations requiring that family counseling services receiving federal funds avoid mentioning abortion); Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (1990) (upholding an Ohio statute that, with certain exceptions, prohibited any person from performing an abortion on an unmarried, unemancipated minor without giving notice to one of her parents or receiving a court order of approval). *But see* Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (invalidating a provision of a Minnesota statute that prohibited the performance of abortions on women under the age of 18 unless at least 48 hours had elapsed since the time when both parents were notified). Nevertheless, several states have passed laws for the purpose of giving the Court the opportunity to revisit *Roe*. *See, e.g.*, 1991 La. Sess. Law. Serv. 26 (West) (prohibiting physicians from performing abortions at any stage of the mother's preganancy except in cases of incest, rape, and when the abortion is intended to save the life of the mother; 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1983 & Supp. 1991) (prohibiting physicians from performing abortions without obtaining "informed consent," spousal consent, and requiring a 24-hour waiting period). The United States Court of Appeals for the Third Circuit recently upheld the Pennsylvania statutory scheme, but did strike down the spousal consent provisions. Planned Parenthood v. Casey, No. 90-1662, 1991 WL 209106 (3d Cir. Oct. 21, 1991).

to adhere to certain values such as stability and continuity. For example, although *Payne v. Tennessee*[228] overruled two decisions barring victim impact statements from the sentencing phase of capital trials, the six-member majority disagreed on the criteria for overruling those decisions. Speaking for that majority (consisting of himself and Justices White, O'Connor, Scalia, Kennedy, and Souter), Chief Justice Rehnquist argued that the previous decisions, *Booth v. Maryland*[229] and *South Carolina v. Gathers*,[230] should have been given less deference than constitutional decisions usually deserve because *Booth* and *Gathers* had been recent opinions, decided by 5-4 votes with vigorous dissents, and that *Booth* and *Gathers* required overruling because they were both erroneously reasoned.[231] Joined by Justices White and Kennedy, Justice O'Connor followed with a separate concurrence arguing that *Booth* and *Gathers* needed to be overruled because they "were wrongly decided."[232] In another separate concurrence, Justice Scalia, joined by Justices O'Connor and Kennedy, sharply argued that, contrary to the assertions made in Justice Marshall's dissent, the Court did not need to show any "special justification" for overruling *Booth* and *Gathers* and that, in fact, those decisions did far more damage to the notion of stare decisis than the majority's opinion in *Payne* because those decisions violated the "general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts."[233] In yet another separate concurrence, Justice Souter, joined by Justice Kennedy, argued that *Booth* and *Gathers* should be overruled because they were erroneously reasoned and demonstrably unworkable.[234]

Justice Marshall and Justice Stevens wrote separate dissents, both joined by Justice Blackmun, challenging, inter alia, the majority's views on precedent. Justice Marshall argued that: (1) these overrulings could be traced to the sole fact that the Court's personnel had changed;[235] (2) overruling precedents based on their erroneous reasoning and close votes would disrupt constitutional law significantly,[236] and (3) the majority had generally failed to "come forward

228. 111 S. Ct. 2597 (1991), *overruling* South Carolina v. Gathers, 490 U.S. 805 (1989) *and* Booth v. Maryland, 482 U.S. 496 (1987).
229. 482 U.S. 496.
230. 490 U.S. 805.
231. *Payne*, 111 S. Ct. at 2609-11.
232. *Id.* at 2611-12 (O'Connor, J., concurring).
233. *Id.* at 2613-14 (Scalia, J., concurring).
234. *Id.* at 2616 (Souter, J., concurring).
235. *Id.* at 2621 (Marshall, J., dissenting). Justice Marshall argued in dissent that the Court should follow *Rumsey* by showing "special justification" for overruling *Booth* and *Gathers*. *Id.* (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). Justice Scalia rejected Justice Marshall's argument as "[un]fair" and argued that he and the other Justices should have the freedom to vote to overturn *Booth* and *Gathers* solely because these two cases were decided wrongly. *Id.* at 2613 (Scalia, J., concurring).
236. *Id.* at 2619 (Marshall, J., dissenting).

with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents."[237] Justice Marshall maintained that the Chief Justice's argument that 5-4 decisions, with vigorous dissents, deserve less than the usual deference owed to precedents threatened to "destroy" the Court's authority as the final decisionmaker on questions involving individual liberties, because it "invite[d]" state actors to treat certain decisions as nonbinding and instead "to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question."[238] In his dissent, Justice Stevens accused the majority of discarding reasoning and stare decisis because of the " 'hydraulic pressure' of public opinion," and concluded his opinion by lamenting that "[t]oday is a sad day for a great institution."[239]

An equally illuminating debate occurred in *Harmelin v. Michigan*,[240] in which the five-member majority split over the necessity *and* the criteria for overruling *Solem v. Helm*.[241] On behalf of himself and the Chief Justice, Justice Scalia appeared to move away from his and the Chief Justice's previously stated views that overrulings should be based solely on the erroneous reasoning of a precedent. Instead, perhaps because *Solem* had been around a few years more than *Booth* and *Gathers*, Justice Scalia could assert more reasons favoring *Solem*'s overruling; he argued that *Solem* should be overruled because it was erroneously reasoned, articulated an unworkable standard, and was inconsistent with the original understanding of the Eighth Amendment and other case law.[242] Nevertheless, Justices O'Connor and Souter joined Justice Kennedy's concurrence rejecting Justice Scalia's arguments in favor of overruling *Solem*. Instead, Justice Kennedy maintained that even though *Solem* could have been better reasoned and could have articulated a more workable standard, the Court could remedy those problems by narrowing

237. *Id.* at 2621. Justice Marshall explained further that this "extraordinary showing" usually required

> such justifications [as] the advent of 'subsequent changes or development in the law' that undermine a decision's rationale[;] the need 'to bring [a decision] into agreement with experience and with facts newly ascertained'[;] and a showing that a particular precedent has become a detriment to coherence and consistency in the law.

Id. at 2621-22 (citations omitted).

238. *Id.* at 2624.

239. *Id.* at 2631 (Stevens, J., dissenting) (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).

240. 111 S. Ct. 2680 (1991).

241. 463 U.S. 277 (1983).

242. *See Harmelin*, 111 S. Ct. at 2686-96 (pointing out how *Solem* deviated from the original understanding of the Eighth Amendment); *id.* at 2696-99 (demonstrating *Solem*'s unworkability); *id.* at 2699-701 (describing *Solem*'s incompatibility with other case law).

but not overruling *Solem*.[243] In dissent, Justice White (joined by Justices Blackmun and Stevens) found neither the history, nor the case law, regarding the Eighth Amendment supported Justice Scalia's conclusion that the Eighth Amendment contained no proportionality principle or Justice Kennedy's analysis, which Justice White argued, was "contradicted by the language of *Solem* and by our other cases interpreting the Eighth Amendment."[244]

A second theme is that the more areas in which a Justice routinely dissents or deviates from precedents, the less influence she has on the Court and the more likely she becomes a marginalist with more extreme views on stare decisis.[245] Justice Brennan has said that a Justice can dissent routinely in no more than a handful of areas before he has impaired his ability to build coalitions.[246] In his thirty-four years on the Court, he routinely dissented in only a few areas, including, most notably, capital punishment.[247] Similarly, Justice Stewart's reluctance to dissent in every substantive due process case led him to concur in *Roe* on the ground that the right to have an abortion fell clearly within the scope of the right of privacy that had been well established by prior decisions.[248] Unlike Justices Brennan and Stewart, Justice Scalia often has placed himself on the Court's margin by disregarding or directly challenging the Court's precedents in order to enunciate "correct" views in such areas as separation of powers,[249] proportionality of punishment,[250] abortion,[251] the right to die,[252] nude dancing,[253] obscenity,[254] criminal

243. *Id.* at 2703-05 (Kennedy, J., concurring in part and concurring in the judgment).

244. *Id.* at 2709, 2714 (White, J., dissenting).

245. *See generally* Kelman, *supra* note 215, at 248-58 (discussing various Justices who have dissented repeatedly in a number of areas and the modest influence they each exerted over their colleagues).

246. *See* Brennan, *supra* note 48, at 435-37.

247. *Id.* at 432 (noting that he dissented routinely on obscenity, the death penalty, double jeopardy, and the Eleventh Amendment). For the most part, Justice Marshall followed a similar pattern. *See* Kelman, *supra* note 215, at 253 (noting Justice Marshall's persistent dissents on the death penalty and obscenity).

248. Roe v. Wade, 410 U.S. 113, 169-70 (1973) (Stewart, J., concurring). Justice White shows some affinity for a standard not dissimilar from Justice Stewart's adherence to prior decisions when there is a clearly established practice on the part of the Court to follow them. *Compare* Barnes v. Glen Theater, Inc., 111 S. Ct. 2458, 2474 (1991) (White, J., dissenting) (denouncing the majority's upholding of a state's regulation of nude dancing despite "settled doctrine" to the contrary) *and* Arizona v. Fulminante, 111 S. Ct. 1246, 1254 (1991) (White, J., dissenting in part) (harshly criticizing the majority for "overrul[ing a] vast body of precedent without a word and in so doing dislodg[ing] one of the fundamental tenets of our criminal justice system") *with* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (joining Chief Justice Rehnquist's opinion overruling the relatively recent decisions of South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987)). For more on Justice White's approach to precedent, see *supra* notes 282-85 and accompanying text.

249. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (rejecting the Court's methodology in recent separation of powers decisions); Morrison v. Olson, 487 U.S. 654, 710-12 (1988) (Scalia, J., dissenting) (same).

250. *See* Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (joined only by Chief Justice Rehnquist in urging the overruling of Solem v. Helm, 463 U.S. 277 (1983)).

251. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Roe* should be overruled explicitly).

252. *See* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2860 (1990)

jury selection,[255] negative commerce clause,[256] affirmative action,[257] religion,[258] and criminal procedure.[259] In some other areas, Justice Scalia has assembled coalitions by distinguishing rather than directly challenging precedents, even though those distinctions seemingly have narrowed prior decisions to their facts.[260]

Justice Scalia's performance as a Circuit Justice provides a stark illustration of how, when removed from a setting in which consensus is important in order to get things done, he grounds his decisions solely on his views on how the Constitution should be

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(Scalia, J., concurring) (rejecting the reasoning of precedents such as *Roe* and arguing that there is no substantive due process fundamental right to refuse unwanted medical treatment).

253. *See* Barnes v. Glen Theater, Inc., 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring in the judgment) (suggesting, contrary to the Court's precedents, that nude dancing deserves no First Amendment protection).

254. *See* Pope v. Illinois, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (calling for a reconsideration of the Court's test for evaluating the constitutionality of obscenity laws, set forth in Miller v. California, 413 U.S. 15 (1973)).

255. *See* Powers v. Ohio, 111 S. Ct. 1364, 1381 (1991) (Scalia, J., dissenting) (questioning Batson v. Kentucky, 476 U.S. 79 (1986), and Miranda v. Arizona, 384 U.S. 436 (1966)).

256. *See* American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 303-06 (1987) (Scalia, J., dissenting) (challenging the Court's negative Commerce Clause jurisprudence).

257. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) (suggesting that race can never be the basis of legislative classifications, thereby calling into question the validity of Fullilove v. Klutznick, 448 U.S. 448 (1980)).

258. *See* Edwards v. Aguillard, 482 U.S. 578, 611 (1987) (Scalia, J., dissenting) (criticizing the first prong of the Court's test for evaluating Establishment Clause challenges).

259. *See* South Carolina v. Gathers, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting) (urging the overruling of Booth v. Maryland, 482 U.S. 496 (1987)).

As the previously cited cases indicate, *see supra* notes 249-59, Justice Scalia has written separately more often than any other member of the Rehnquist Court. *See* David Stewart, *A Chorus of Voices*, 77 A.B.A. J. 50, 52 (1991) (documenting Justice Scalia's tendency to write separately). Justice Scalia routinely quotes Justice Douglas' views on the importance of correctly deciding cases rather than blindly following precedent. *See, e.g., Gathers*, 490 U.S. at 825 (Scalia, J., dissenting) (quoting Douglas, *supra* note 2, at 736). Ironically, Justice Douglas was a notorious marginalist. *See* G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 42, 65 (1988) (describing Justice Douglas' lack of interest in consensus building).

260. *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (maintaining that the Court had never recognized a free exercise of religion exception to the application of an otherwise valid criminal law by distinguishing several precedents upholding free exercise claims on the ground that they were unique to the employment context); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 94-100 (1991) (criticizing *Smith* for dubiously distinguishing clearly relevant precedents that previously had required the Court to strictly scrutinize laws significantly impairing the free exercise of religion); *see also* Burnham v. Superior Court, 110 S. Ct. 2105, 2116 (1990) (holding that prior contacts with a state were not necessary for a state to exercise transient jurisdiction over a defendant by distinguishing Shaffer v. Heitner, 433 U.S. 186 (1977), and International Shoe Co. v. Washington, 326 U.S. 310 (1945), on the basis that they recognized only a narrow exception to this rule for defendants not in the state at the time of service of process even though they had been cited mostly for the proposition that a state must show minimum contacts whenever it wants to assert jurisdiction over a defendant).

interpreted rather than on the social consequences of deviating from past practice. In his capacity as the Circuit Justice for the Fifth Circuit, Justice Scalia recently declared that he would break from the past practice of Fifth Circuit Justices to grant automatic time extensions in capital cases for defendants needing lawyers.[261] This statement suggests that when Justice Scalia does not have to get consensus to formulate a rule of law of which he approves, he seemingly prefers not to follow prior practice but rather to reach what he regards as the right conclusion, even though, as in this case, the prior practice had increased the opportunities for death row inmates to obtain legal counsel. Because Justice Scalia's decisions as a Circuit Justice are rarely reviewable, he has more freedom as a Circuit Justice to disregard the need to strike a balance.

A third theme emerging from the study of the individual Justices' approaches to stare decisis is that the Justices each seem to have different approaches to weakening or overruling precedents. For example, Chief Justice Rehnquist tends to weaken precedents by citing them for much narrower propositions than the ones they originally had held. For example, in *Wisconsin v. Constantineau*,[262] the Court struck down a law permitting the public posting of the names of persons causing disturbances because of excessive drinking. But later, in *Paul v. Davis*,[263] then-Justice Rehnquist wrote the Court's opinion holding that government-inflicted injury to reputation, without more, does not require due process. He distinguished *Constantineau* on the ground that the public posting in that case had altered the plaintiff's legal right to purchase liquor,[264] even though *Constantineau* originally had based its holding on the idea that whenever government action "stigma[tizes]" a person, impairing the liberty interest she has in her good name, reputation, honor, or integrity, then due process must be afforded.[265]

Justice Scalia rarely equivocates or uses indirect methods to dismantle the precedents he does not like. He is the archetype of the Justice who prefers to challenge directly decisions he regards as erroneously reasoned.[266] Although he shows great deference toward

261. *See* Marcia Coyle & Marianne Lavelle, *Chilling Capital Appeals; Scalia Ruling Makes It Harder To Find Attorneys*, NAT'L L.J., Mar. 11, 1991, at 1.

262. 400 U.S. 433 (1971).

263. 424 U.S. 693 (1976).

264. *Id.* at 709-10.

265. *Constantineau*, 400 U.S. at 437. In another case, Webster v. Reproductive Health Services, 492 U.S. 490, 520 (1989), Chief Justice Rehnquist speculated about the different ways to characterize the fundamental right recognized in *Roe* and settled on the notion of having an abortion as a "liberty interest protected by the Due Process Clause," subjecting state abortion regulations to the rational basis test in federal courts. Obviously, Chief Justice Rehnquist's rephrasing of the right in *Roe*, if adopted in the future, would remove any meaningful federal constitutional protection for abortions.

A variation on this practice is citing precedents for broader or completely different propositions than those for which they originally stood in order to support some present decision. For example, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas cited Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), as recognizing privacy interests under the First Amendment, even though those decisions concerned themselves solely with substantive due process.

266. *See, e.g.*, *supra* note 259.

the States' historical practices as strong evidence of constitutionally permissible traditions,[267] he rarely respects the Court's past practices or traditions simply because they are old: he prefers to correctly decide cases to restore certain constitutional norms (for example, on federalism or separation of powers) rather than perpetuate errors unless the harm of overruling is so great that he finds he has no practical choice but to avoid reexamining an erroneous decision.[268]

Unlike Justice Scalia, Justice Kennedy has tended to decide cases as if he had a strong but rebuttable presumption in favor of prior decisions. He tends to decide cases on the narrowest available grounds, hesitating to overrule or expand a previous ruling, for the sake of affecting settled doctrine as little as possible.[269] More recently, however, in *Payne v. Tennessee*,[270] he joined the majority and two separate opinions that argued for overturning two precedents

267. Justice Scalia frequently defers to what the States have permitted historically. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1047 (1991) (Scalia, J., concurring) (suggesting that it is not possible for punitive damages to violate due process if the States have had discretion concerning them for over 200 years); Burnham v. Superior Court, 110 S. Ct. 2105, 2112-13 (1990) (arguing that the states' historic treatment of transient jurisdiction establishes a tradition that satisfies due process); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (suggesting that if the States have overwhelmingly protected an interest through legislation it would then be permissible for a court to conclude that the interest in question is a "tradition" deserving of constitutional protection under the Due Process Clause).

268. *Cf.* South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (observing that "I had thought that the respect accorded to [precedents] increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity").

269. *See, e.g.*, Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (arguing that the case before the Court could be decided based on prior case law, and therefore finding it unnecessary to overrule the Court's most recent decision on proportionality of punishment); Jones v. Thomas, 491 U.S. 376, 383-84 (1989) (refusing to extend a precedent recognizing that "where one valid alternative provision of the original sentence has been satisfied, the [criminal defendant] is entitled to be freed of further restraint [in compliance with the requirements of the Double Jeopardy Clause]," to the present case "involv[ing] separate sentences imposed for what the sentencing court thought to be separately punishable offenses, one far more serious than the other") (citation omitted); Barnard v. Thorstenn, 489 U.S. 546, 551-58 (1989) (refusing to determine whether the Court's "supervisory power" over lower federal courts could resolve the question before the Court, and instead relying on an interpretation of the Federal Rules of Civil Procedure); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) (declining to join the majority or Justice Scalia's separate concurrence commenting on the scope of Congress' power to adopt legislation designed to remedy past discrimination because the issue was not before the Court). *See generally* Michael J. Gerhardt, *Anthony M. Kennedy, in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (forthcoming Dec. 1991) (describing various cases in which Justice Kennedy avoided expanding or contracting precedent).

270. 111 S. Ct. 2597 (1991), *overruling* South Carolina v. Gathers, 490 U.S. 805 (1989) *and* Booth v. Maryland, 482 U.S. 496 (1987).

regarding victim impact statements on the grounds that those opinions had been erroneously reasoned.[271] In *Payne*, he also joined Justice Souter's separate concurrence arguing that those decisions should be overruled because they were erroneously reasoned and demonstrably unworkable.[272] In *Payne*, he also recently joined opinions narrowing public access to abortions[273] and challenging prior interpretations of the Establishment Clause, which he argues should be construed as prohibiting government from coercing people into believing something they do not believe or from establishing the functional equivalent of state religions.[274]

Like Justice Kennedy, Justice O'Connor seems to treat precedents with a strong presumption of validity. She explained in *Arizona v. Rumsey*,[275] that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."[276] Although Justice O'Connor has not yet personally spelled out the "special justification" that would persuade her to overrule a precedent, she separately concurred in *Payne v. Tennessee*[277] on the ground that *Booth* and *Gathers* should be overruled merely because they were badly reasoned.[278]

Similarly, Justice Souter's views on stare decisis are not entirely clear, although he has shown a tendency to prefer that the Court show something more than erroneous reasoning to justify overruling a precedent. His respect for constitutional precedents can be gleaned primarily from his separate concurrence in *Payne*, in which he argued that the Court had "special justification" for overturning *Booth* and *Gathers* because those precedents were "unworkable" and badly reasoned.[279] In addition, Justice Souter joined Justice Kennedy's separate opinion in *Harmelin v. Michigan*,[280] which argued that the case could be decided without having to overrule precedent.[281]

Despite being on the Court for nearly thirty years, Justice White's views on stare decisis remain unclear. For example, although he

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271. *See id.* at 2601 (opinion of the Court); *id.* at 2611 (joining Justice O'Connor's concurring opinion); *id.* at 2613 (joining relevant part of Justice Scalia's concurring opinion).

272. *Id.* at 2614, 2626 (Souter, J., concurring).

273. *See* Rust v. Sullivan, 111 S. Ct. 1759 (1991) (voting to uphold a federal regulation prohibiting counseling organizations that receive federal funds from talking about abortion); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (voting with Chief Justice Rehnquist and Justice White to dismantle *Roe*'s trimester framework).

274. *See* County of Allegheny v. ACLU, 492 U.S. 573, 655-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

275. 467 U.S. 203 (1984).

276. *Id.* at 212.

277. 111 S. Ct. 2597, 2611 (1991) (O'Connor, J., concurring).

278. *Id.* at 2612 (justifying her willingness to overrule *Booth* and *Gathers* only by stating that she "agree[d] with the Court that [*Booth*] and [*Gathers*] were wrongly decided").

279. *Id.* at 2614, 2616 (Souter, J., concurring).

280. 111 S. Ct. 2680, 2702 (Kennedy, J., concurring in part and concurring in the judgment).

281. *Id.*

joined the Court's opinion in *New York Times v. Sullivan*,[282] he expressly disavowed *Sullivan* in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[283] but did not indicate in his concurring opinions whether his disagreement with the reasoning in *Sullivan* would be sufficient grounds for overruling that precedent.[284] In the abortion context, Justice White has more than once urged the overruling of *Roe* but did not join Justice Scalia's concurrence urging *Roe*'s overruling.[285]

Justice Stevens *has* explained what would satisfy his "special examination [before an overruling]. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law."[286] Justice Stevens, however, apparently did not find any such conditions barring his argument in *United States v. Eichman*[287] for overruling *Texas v. Johnson*, in which the Court recognized First Amendment protection for flag burning.[288]

These different approaches to precedent indicate that even when the Justices might agree that something substantially more than erroneous reasoning should be the basis for an overruling, they might still disagree in particular cases whether the standard has been met. These latter disagreements suggest that an even higher standard of deference for precedents would not necessarily preclude overrulings because many of the Justices may still have strong feelings or judgments about how the Constitution should be interpreted and about the Court's role in our political system that lead them to apply the standards for overrulings differently. In other words, a higher standard of deference to precedents does not guarantee any particular outcome. It is also true, however, that any lower standard for

282. 376 U.S. 254 (1964) (holding that a public official may not recover for libel absent a clear showing of actual malice).

283. 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment).

284. In a similarly confusing vein, Justice White wrote the Court's opinion in Swain v. Alabama, 380 U.S. 202 (1965) (holding that the Equal Protection Clause did not prohibit prosecutors from using peremptory challenges to remove from petit juries members of the defendant's race), but he joined the Court's opinion in Batson v. Kentucky, 476 U.S. 79, 100, 102 (1986) (White, J., concurring), which overruled *Swain*.

285. *Compare* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J., dissenting) (arguing that *Roe* should be overruled, and stating "[t]hat the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it") *with* Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in the judgment).

286. Stevens, *supra* note 46, at 9 (footnote omitted).

287. 110 S. Ct. 2404, 2410 (1990) (Stevens, J., dissenting).

288. 491 U.S. 397 (1989); *see also supra* note 71. In contrast, Justice Stevens argued there were no conditions requiring the overruling of Arkansas v. Sanders, 442 U.S. 753 (1979), in California v. Acevedo, 111 S. Ct. 1982, 1994, 2003 (1991) (Stevens, J., dissenting) (complaining that "[t]he [majority's decision] is . . . not nearly as significant as the Court's willingness to [overrule *Sanders*] without a colorable basis").

overruling a precedent, such as a prior decision's erroneous reasoning standing alone, would be likely (depending, of course, on the kinds of people who apply it) to produce many disagreements, numerous overrulings, and general confusion in constitutional law.[289]

A fourth theme is that the position of Chief Justice may make its occupants less likely to write separate opinions. As "the first among equals,"[290] the Chief Justice is in a unique position to exercise social, intellectual, and policy leadership on the Court.[291] Some Chief Justices have made a greater investment in avoiding or discouraging divisions on the Court than the average Associate Justice,[292] suggesting the possibility that someone who has moved from being an Associate Justice to Chief Justice, such as William Rehnquist, may change his attitudes about the need for consensus after becoming the Chief Justice. Interestingly, as an Associate Justice, Rehnquist frequently wrote separately to denounce precedents, but, as Chief Justice, he has severely limited that practice.[293] As Chief Justice, he has also moderated several earlier positions in order to build coalitions to weaken some precedents[294] and to bolster others.[295]

Perhaps emboldened by the Court's decisive ideological shift to the right during the 1990 Term, however, Chief Justice Rehnquist

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289. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2619, 2621-22 (1991) (Marshall, J., dissenting).

290. ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 10 (1986).

291. *See generally* STEPHEN L. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 188 (2d ed. 1984) (describing the various leadership roles a Chief Justice can perform).

292. Chief Justices sometimes have voted against their beliefs in the interest of solidarity. *See* Kelman, *supra* note 215, at 241-42 n.50; *see also* STEAMER, *supra* note 290, at 24-32 (describing the practice of Chief Justices to submerge their personal opinions on some issues to build coalitions).

293. *See, e.g.*, Bennett, *supra* note 215, at 255 n.1 (showing that in the year before becoming Chief Justice, then-Justice Rehnquist had been the Court's fifth most prolific dissenter, but, in his first year after becoming the Chief Justice, he became the least prolific dissenter, a position he held again during the 1990 Term); *see also* Stewart, *supra* note 259, at 50 (comparing then-Associate Justice Rehnquist's writing 12 separate concurrences in the October Term 1978 with his writing only three concurring opinions in the 1989 and 1990 Terms as Chief Justice).

Interestingly, Edward D. White, who served as Chief Justice from 1910-21 after having served as an Associate Justice, also moderated some of his previous positions after becoming Chief Justice. BENNO C. SCHMIDT, 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921 (PART II), at 745 (1984) (noting Chief Justice White's moderations of his previous positions on segregation); *see also* WASBY, *supra* note 291, at 189 (noting that Chief Justice White ranked relatively high among Chief Justices in avoiding conflict during his tenure as Chief Justice). Harlan Fiske Stone, however, who served as Chief Justice from 1941-46 after having served as an Associate Justice, achieved little success in coalition building despite his stated desire to do otherwise. *See* ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 574-75 (1956); *see also* WASBY, *supra* note 291, at 188 (noting that Chief Justice Stone "dissented in a larger proportion of non-unanimous cases than did any other Chief Justice").

294. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 492 (1989) (not following Justice Scalia's call to overrule *Roe* based on arguments derived from previous dissents joined by then-Justice Rehnquist); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (joining Justice O'Connor's majority opinion and, in so doing, softening his absolute rejection of affirmative action indicated by his joining Justice Stewart's dissent in Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)).

295. For example, Chief Justice Rehnquist's opinion in Hustler Magazine v. Falwell,

ventured to explain in a speech before the Fourth Circuit Judicial Conference what he perceived as the basis for the Court's decision in *Payne v. Tennessee*[296] to overrule two precedents prohibiting the admission of victim impact statements in the sentencing phase of capital trials.[297] Going beyond the actual reasons given in the majority's opinion in *Payne,* he maintained that constitutional precedents carry little weight in and of themselves in decisionmaking, but they usually carry even less weight than usual in criminal procedure cases.[298] He explained further that with decisions involving property or contracts, parties have a "reliance interest" in desiring stability from the Court but that " '[a] criminal defendant has no reliance interest at all' . . . [given] that few criminals would base their decisions to commit a crime on whether *Booth* and *Gathers* were still in place."[299]

If Chief Justice Rehnquist's point is that people's expectations regarding their social, economic, and political interests are more settled with respect to property and contracts cases than with criminal procedure precedents, he may be right, but he has yet to produce empirical support for his proposition. More importantly, if the Chief Justice's point is that criminal defendants have less legitimate interests in preserving the precedents that favor them than do the parties in property or contract decisions, then he is seriously mistaken. The fact remains that many of the people interested in the outcome of these different precedents, including criminal defendants, are asserting constitutional rights that the Court has recognized and enforced in the past. Thus, it is the Court itself that has legitimated the claims of (and any reliance by) all these parties. When economic interests, liberty, or, more importantly, life itself, turn on the Court's reasons for abandoning previously recognized rights, the Court is the institution best situated to bear the burden and the responsibility of showing why the social costs of withdrawing constitutional protections are different with respect to the people, rights, and situations involved.

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485 U.S. 46 (1988) (holding that public plaintiffs cannot recover for intentional infliction of emotional distress without a showing that the publication complained of contained a false statement of fact published with actual malice), surprised many of his critics, because it strengthened New York Times v. Sullivan, 376 U.S. 254 (1964), rather than follow his criticisms of that decision made before he became Chief Justice. *See, e.g.,* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166-68 (1979) (refusing to apply *Sullivan* automatically to someone who had engaged in criminal conduct); Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (restricting *Sullivan* to apply to voluntary public figures and declining to apply it at all to reports of judicial proceedings).

296. 111 S. Ct. 2597 (1991).

297. *See* Tony Mauro, *Courtside: Marshall: Scant Mementos, Scattered Clerks,* LEGAL TIMES, July 15, 1991, at 8.

298. *Id.* at 9.

299. *Id.*

Finally, the current and recent Justices rarely take contradictory stances on constitutional stare decisis. For example, despite charges to the contrary,[300] Chief Justice Rehnquist has shown remarkable consistency in demonstrating respect for precedents only when he agrees with the values underlying them.[301] Similarly, Justice Blackmun abandoned *National League of Cities v. Usery*[302] as demonstrably unworkable in his majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,[303] but provided a vigorous defense of *Roe* on the basis of stare decisis in his *Webster* dissent because he believed *Roe* had proved to offer workable standards for reviewing abortion regulations.[304]

The general reluctance of the Justices to state a theory of stare decisis conforms to their general practice of confining their rhetoric to the present case to avoid painting themselves into a corner in future decisions.[305] Ironically, this selective disclosure preserves the Justices' flexibility for future dialogues regarding the sanctity of particular precedents.

A number of constitutional experts, including Dean Guido Calabresi of the Yale Law School, testified during the confirmation proceedings for Justice Thomas, however, that the Court lacks

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300. *See, e.g.*, Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 371 n.16, 374 n.28 (1988) (criticizing then-Justice Rehnquist's lack of respect for, and inconsistent posturings regarding, precedent).

301. *Compare* City of Philadelphia v. New Jersey, 437 U.S. 617, 631-32 (1978) (Rehnquist, J., dissenting) (expressing dismay at the Court's deviation from precedents upholding the states' power to prohibit importation of diseased items, and to enact quarantine laws) *with* National League of Cities v. Usery, 426 U.S. 833, 855 (1976) (suggesting that Maryland v. Wirtz, 392 U.S. 183 (1968), must be overruled, given its incompatibility with the standard he had just set forth for limiting congressional power under the Commerce Clause); *see also supra* note 168. *But see Hearings Before the Comm. on the Judiciary, United States Senate, On the Nomination of William H. Rehnquist to be an Associate Justice of the United States*, 117 CONG. REC. 39765 (1971) (statement of William H. Rehnquist) ("I feel that great weight should be given to precedent.").

302. 426 U.S. 833 (1976).

303. 469 U.S. 528, 531, 548-58 (1985).

304. Webster v. Reproductive Health Servs., 492 U.S. 490, 537, 553-60 (1989) (Blackmun, J., concurring in part and dissenting in part).

305. The perception that many Justices do not speak more fully about precedents is, of course, a source of the view that precedents do not matter to the Court. *See supra* note 24 and accompanying text. This Article has tried to show, however, that this view is overstated because the Justices do seem to consider precedents in the certiorari process seriously, *see supra* notes 27-48 and accompanying text, and because it is possible for the Justices to achieve a suitable balance between their reasoned elaboration on the merits of precedents and their efforts to promote stability or achieve consensus. *See supra* notes 215-27 and *infra* notes 356 & 384 and accompanying text.

Interestingly, when Justices have tried to state a complete theory of stare decisis, they sometimes have found themselves on the margin of the Court, as demonstrated by Justices Scalia and Douglas' routine disregard of precedent in order to do what each thought was right, and by Justice John Marshall Harlan, who frequently found himself alone when offering his complex view that a "precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change, let alone incapable of being demonstrated wrong." Williams v. Florida, 399 U.S. 78, 128-29 (1970) (Harlan, J., dissenting); *see also* Bourguignon, *supra* note 215, at 277-81 (describing Harlan's unique practice of dissenting from a particular decision for the duration of the Term in which it was issued and thereafter considering himself bound by the precedent while expressing his dissatisfaction with it); Kelman, *supra* note 215, at 274-83 (describing Justice Harlan's handling of precedents whose holdings he opposed).

ideological balance and is, therefore, not likely to be interested in preserving or pursuing a dialogue about how the Constitution should be interpreted.[306] Although the preceding survey suggests that the current conservative Justices do not yet seem to share a consensus on the appropriate criteria for overruling precedents, it is likely that, for their part, Chief Justice Rehnquist and Justice Scalia will continue to press the other Justices to adopt the practice of overruling precedents deemed erroneously reasoned. This scenario raises a serious question as to what the consequences for precedent would be if a majority of the Justices were dogmatists set on overturning or abandoning any principles that deviate from the overarching, single, or unifying principle by which they believe the Constitution should be interpreted. Part IV explores the consequences for precedent posed by a Court dominated by such a single normative viewpoint with regard to constitutional interpretation.

IV. Constitutional Theory and the Problem of Nonconforming Precedents

This Part describes the incompatibility between unitary constitutional theories, which aim to restrict constitutional interpretation and adjudication to one overarching or unifying principle, and precedents whose reasoning or holdings do not conform to that principle or vision. This analysis not only provides additional insights into the role of precedents in constitutional decisionmaking but also shows the practical failure of unitary constitutional theory. This Part concludes with a normative proposal for reconciling constitutional theory with nonconforming precedents.

A. The Tension Between Unitary Theory and Precedent

My focus in this section is narrow but significant. I am addressing so-called unitary theories that favor one unifying or overarching principle for organizing, explaining, or guiding constitutional interpretation.[307] Unitary theories have been criticized for being logically inconsistent and incoherent and for being generally incapable of achieving their stated objectives.[308] They also can be criticized

306. *See* Kurt Shillinger, *What Was Learned from Senate Hearings*, THE CHRISTIAN SCIENCE MONITOR, Sept. 24, 1991, at 6.

307. *See generally* MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 1, 3, 181 (1988) (defining "grand" or "unitary" theories as normative attempts to justify judicial review in a democracy in terms of a single unifying or overarching principle).

308. *Id.* at 179, 313 (arguing that no unitary theory is immune to internal incoherence, or to the problem of not being able fully to achieve its stated objective).

for not containing any mechanism by which they can be implemented without doing serious damage to many of the settled governmental, social, and personal expectations and practices built up around precedents.

So much constitutional doctrine is premised on the rejection of any one view of theory and so much unitary theory is premised on the idea that most precedents have been decided wrongly that, as a practical matter, the Court would face an inescapable dilemma if it were to rigidly or dogmatically adhere to a single unifying principle of constitutional interpretation. The Court would have to choose between rejecting most of its precedents, thereby precipitating constitutional turmoil, or rejecting or seriously modifying the proposed unitary theory to ensure stability or continuity in constitutional decisionmaking.

The conflict between a unitary theory and precedents derives from their fundamentally different purposes. Precedents perform various roles in the Court's decisionmaking and for society, virtually all of which are ignored by a unitary theory. Perhaps most important, the Court's review of its decisions comprises a dialogue among the Justices on the need to decide cases narrowly and move incrementally to avoid constitutional error *and* on whether to perpetuate certain values the Court previously has approved for guiding the operation of government. A unitary theory purports either to end this dialogue or to explore the implications of only one constitutional vision, not the process of mediating among different visions.[309] A unitary theory attempts to provide strict guidelines for the Justices to correct or avoid many of the Court's past errors. Consequently, a dogmatic application of such a theory is at odds with most precedents because the Court's fidelity to a unitary theory would cause substantial social and political disruption, and because no unitary theorist has incorporated into her approach standards for dealing with nonconforming precedent and the actual process by which the Justices interpret or apply precedents.

Moreover, the practical value of a unitary theory is seriously threatened by its failure to comprehensively and coherently confront all of the questions precedents pose for constitutional decisionmaking and theory. Precedents can, for example, force theorists in general to make judgments about which precedents are worth keeping. Although skeptics can emphasize a unitary theory's lack of responsiveness to precedents, proponents of such approaches have yet to respond to this criticism. Precedents also can provide theorists with an escape clause in the sense that they may avoid problems with their theory by claiming the need to preserve precedents for the sake of constitutional stability; however, unitary theorists have rarely used precedents in this manner, nor is it clear

309. For a general discussion of theories that restrict constitutional interpretation to certain unifying concepts, see William A. Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and A Guide to the Future*, 42 RUTGERS L.J. 983 (1990). For a criticism of these theories, see Fallon, *supra* note 20, at 1248.

which escape routes different unitary theorists would prefer. Last, precedents impose a disorder on constitutional law that necessitates a comprehensive theory of constitutional interpretation that accommodates precedent.[310] In short, a theorist bent on restricting constitutional interpretation to one unifying principle but who cares about the practical value of her theory and prefers stability to constitutional turmoil[311] must find a principled solution to nonconforming precedents.

Nevertheless, some unitary theories imply less respect for precedents than others. The unitary theory that probably implies the least respect for precedents is original understanding.[312] Indeed, the failure to reconcile originalism with constitutional doctrine is a prime example of the dilemma that nonconforming precedents can pose for theory. So many Supreme Court precedents have been based on a rejection of original understanding[313] that faithful adherents to original understanding face an inescapable dilemma.[314] They either can strive to overrule the better part of constitutional

310. *See* Monaghan, *supra* note 7, at 747 (arguing that "one needs a general theory of constitutional interpretation that includes some account of precedent" to justify the Court overruling precedents in some areas but not others).

311. A number of theorists may not defer much to precedent because they may desire some kind of revolution precipitated by the Court's overturning of all of the precedents they regard as wrongly decided. *See, e.g.*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29-31 (1985) (advocating a level of judicial intervention with respect to eminent domain far greater than any precedents in existence would support); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 213 (1987) (arguing that the Court's obscenity and pornography decisions contribute to the enslavement of women and, therefore, need to be overturned); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318-22 (1980) (setting forth five reasons for the Court to overrule its decisions abandoning strict scrutiny of governmental regulations of economic activities); TUSHNET, *supra* note 307, at 15, 275, 314 (indicating that a social and political revolution is necessary to bring about the kind of legal system that would satisfy him); *see also* Frank I. Michelman, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577, 583, 590-92 (1982) (acknowledging a number of precedents inconsistent with the results his mode of judicial decisionmaking—public values—would produce).

312. For a brief summary of this theory, see BORK, *supra* note 12, at 143-60 (1989) (maintaining that the most effective way that judges can restrain their tyrannical tendencies is if they confine themselves to discovering, and consequently respecting, what each constitutional provision objectively meant to its framers and ratifiers—leaving to the majoritarian legislative process any matter on which the Constitution, or the original understanding of its framers and ratifiers, is silent or ambiguous).

313. *See* Monaghan, *supra* note 7, at 739 ("[N]o acceptable version of original understanding theory can [explain] the major features of our 'Bicentennial Constitution': nontextual guarantees of civil liberties; a powerfully presidentially centered national government; a huge administrative apparatus; and national responsibility for what has long been considered of either as local responsibilities or as not the responsibility of government at all.").

314. For discussions of this dilemma, see MICHAEL J. PERRY, THE CONSTITUTION, HUMAN RIGHTS, AND THE COURTS 64-67 (1982); Monaghan, *supra* note 7, at 723-24; Gerhardt, *supra* note 104, at 1383-85. Prominent originalists that have tried to resolve this problem include RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 178-92 (1987); ROBERT BORK, *supra* note 12, at 155-59; and Cooper, *supra* note 12, at 404, 406,

doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law.[315]

When originalists have acknowledged the need to reconcile their respective theories of constitutional interpretation with nonoriginalist precedents, they have suggested approaches to stare decisis so riddled with exceptions as to be meaningless restraints on judicial activism. Originalists tend to propose some variation of the following three principles as guides to stare decisis: (1) lower courts should respect precedents more rigorously than the Court itself;[316] (2) the Court should never overrule any decision unless the Court has found that it was wrongly decided;[317] and (3) the Court should not overrule prior, erroneous decisions when it would create serious upheaval of established governmental operations.[318]

None of these principles of stare decisis produces any meaningful deference to nonoriginalist precedents. First, originalists tend to focus only on the Supreme Court rather than lower courts, so there is insufficient data to discern just how closely these originalists would expect lower courts to adhere to precedent.[319] Second, requiring a case to be decided wrongly before it can be overruled is hardly a barrier to overruling, as demonstrated by the large number of decisions criticized and rejected by many originalists.[320] Third, it is a mistake to believe that once a constitutional issue can be resolved correctly in terms of original understanding the decision will be immune to overruling because it is not likely there will be consensus on the Court that originalism is the preferred mode of constitutional decisionmaking or can be read in only one way.[321] Lastly, originalists' approaches to nonconforming precedents do not derive from

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408, 410. *But see* Kay, *supra* note 118 (responding to three objections to original understanding but not mentioning, much less addressing, the dilemma posed by the tension between precedents and original intent).

315. *See, e.g.*, Henry P. Monaghan, What Is The Constitution? 9-12 (unpublished manuscript on file with the author) (continuing to adhere to his position that the incompatibility between originalism and precedents is so profound that he can conceive of no justification for advocating a return to the former); Gerhardt, *supra* note 104, at 1383-85 (discussing the magnitude of the tension between original intent and precedents by demonstrating the few instances that the Court has tried to follow original intent).

316. *See, e.g.*, BORK, *supra* note 12, at 157-59.

317. *Id.*

318. BERGER, *supra* note 12, at 79-80 (suggesting that in the rare case where practicalities argue against reversal, the Court can refuse to expand or to apply the mistaken decision in the future); Cooper, *supra* note 12, at 410 (following Bork in accepting the need to follow precedents whose reversal "would pitch the country into the abyss").

319. Indeed, for one originalist, Robert Bork, this admonition to lower courts is purely hortatory and glosses over the complex ways in which lower federal courts may bypass, tamper with, or even challenge Supreme Court precedent. *See* BORK, *supra* note 12, at 156; *see also* Gerhardt, *supra* note 104, at 1384.

320. *See, e.g.*, BERGER, *supra* note 12 (suggesting that much of the Court's Fourteenth Amendment jurisprudence is inconsistent with original intent); BORK, *supra* note 12, at 19-32, 133-266, 323-36 (interspersing critique of particular decisions with his originalist views); Berger, *supra* note 82, at 755-66 & 774-83 (critiquing the Court's federalism jurisprudence as inconsistent with original intent); Cooper, *supra* note 12, at 410 (suggesting that certain unnamed precedents would survive a judicial return to original intent).

321. *See* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1371, 1382

original understanding but rather from their consideration of certain social values such as the need for stability and continuity in constitutional law; however, for some originalists, taking the perceived social impact of a decision into account is more akin to legislating from the bench than interpreting the law.[322]

A unitary theory that is only slightly more deferential to precedents is neutral principles, which posits that the judicial process is at its most legitimate when it rests its decisions and each step of its reasoning on grounds of appropriate neutrality and generality.[323] This approach requires overruling many precedents, including *Brown v. Board of Education*,[324] for the approach's chief adherent has noted that judges should "stand with the long tradition of the Court that previous decisions must be subject to reexamination when a case against their reasoning is made."[325]

Adopting theories aimed at critiquing decisions in terms of moral reasoning also pose problems for precedents. For example, Professor David Richards has argued that judicial review is at its most legitimate when judges are guided by moral principles of justice. He has explained that "[m]ajority rule is not the basic moral principle of the constitutional order. The basic moral principles are the principles of justice, including the principle of greatest equal liberty. Majority rule is justified only to the extent that it is compatible with this deeper moral principle."[326] Professor Richards has elaborated on the theory of human rights underlying this principle, the fundamental assumptions of which are "the belief that every person has a capacity for autonomy, and . . . the principle that every person has the right to equal concern and respect in pursuit of his autonomy."[327] For Professor Richards, this theory leads to the recognition of constitutional protection for a significant realm of personal autonomy, including "the principle of love as a civil liberty," a right

(1990) (suggesting that neither the authority of, nor the public's approval of, the Court depends on its adherence to originalism).

322. *See, e.g.*, BORK, *supra* note 12, at 187-221 (critiquing any contemporary theorist's reliance on anything but original understanding as a source of judicial decision).

323. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961).

324. 347 U.S. 483 (1954).

325. *See* Wechsler, *supra* note 87, at 19, 31-32, 34 (criticizing *Brown* for lack of neutral principles supporting it). More recently, Professor Maltz has argued that "the most important institutional constraint on the Court's action [is] the requirement that the Court reach its results by a rational, consistent application of 'neutral' principles." Maltz, *supra* note 12, at 467. Even though Professor Maltz is a conservative constitutional scholar who has expressed dismay over the Court's seemingly increasing disregard for precedent, *id.*, he has identified as the most important *constraint* on the Court's review of precedent a theoretical approach to interpretation that includes no mechanism for deferring to precedent.

326. DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW 50-51 (1977).

327. David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 964 (1979).

to die, consensual homosexual conduct and possibly such "basic life choices" as dress and hair length, or perhaps even "soft drug use."[328] While it seems as if Professor Richards' theoretical view of constitutional law is at odds with existing constitutional doctrine, he has yet to clarify as a general matter the principles by which he would determine which precedents to preserve or overrule.

Professor John Hart Ely's representation-reinforcing approach is yet another unitary theoretical approach that has been constructed without incorporating any concept on the respect due to nonconforming precedent, even though his approach purports to explain or justify more precedents than perhaps any other unitary theory.[329] He argues that judicial interference with majoritarian decisionmaking is justified when certain people have been formally or structurally denied the opportunity to participate equally in the political process.[330] Although Professor Ely identifies decisions that do not conform to his approach, such as *Griswold v. Connecticut*[331] and *Roe v. Wade*,[332] he does not suggest the degree of deference representation-reinforcing judges should have for such precedents.[333]

The theoretical approach that is most deferential to precedents is antiformalism. Antiformalists accept the Court's aversion to unitary theory as a principled decision rather than an exercise in judicial tyranny. Antiformalists characterize judicial review as an integral, indispensable, and inevitably value-laden component of our constitutional government.[334] Although many antiformalists do not discuss the criteria by which an antiformalist judge should review

328. *Id.* at 1005, 1015 n.245; *cf.* PERRY, *supra* note 155, at 150-51 (arguing that each Justice should routinely consult precedents in order to test her own beliefs in a "dialog[ic] encounter with the wisdom of the past," but adding that no Justice should accord any precedent "determinative status"). Although Professor Perry does not elaborate on the factors the Justices should take into account when deciding whether to overrule precedents, he obviously understands the relationship between constitutional theory and practice: that constitutional theory and practice are interdependent, given our general "rel[iance] . . . on historical and predictive claims and on moral judgments about the consequences of the style/role at issue—as a part of our constitutional—theoretical enterprise." Perry, *supra* note 17, at 249.

329. *See* ELY, *supra* note 114, at 73-75, 87-104 (attempting to reconcile interprevist techniques with many Warren Court decisions).

330. *Id.*

331. 381 U.S. 479 (1965).

332. 410 U.S. 113 (1973).

333. *See, e.g.*, ELY, *supra* note 114, at 221 n.4; Ely, *supra* note 155, at 928-30.

334. For antiformalists, constitutional adjudication is described in positive, nonthreatening terms such as (1) a dialogue among governmental actors and the citizenry using the framework and language of the Constitution as the medium and subject of discourse; *see infra* note 355; (2) government decisionmakers' search for the public values that underly the Constitution and that provide the guidelines for legislation, *see, e.g.*, Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 508-09 (1979); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 165 (maintaining that constitutional interpretation should be understood as the process by which judges try to define the "public value" that underlies the concepts embodied in the Constitution); (3) the balancing of the competing constitutional claims of individuals and the government, *see, e.g.*, Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972) (praising Justice Harlan's balancing in First Amendment cases); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251-53 (1983) (defending

nonconforming precedents,[335] I consider in the next section the arguments of some of those antiformalists who do discuss precedent as a source of decision.

B. The Challenge of Reconciling Standards for Reviewing Precedents and Interpreting the Constitution

There are two misunderstood aspects of reconciling standards for reviewing precedents with nonunitary theories of constitutional interpretation. First, the choices of such standards often turn on a theorist's preferences to preserve only certain precedents. Second, the more precedents that accumulate on a certain constitutional issue, the more difficult it becomes to consider the affected area without taking the relevant precedents into account. Both aspects underscore the need for theorists to grapple more with precedent.

1. Explaining Theories of Precedent

The effort to reconcile standards for interpreting the Constitution and reviewing precedent often turns on the degree to which such standards derive from theorists' preferences on how they would strike the critical balance as Justices between their views on how the Consitution should be interpreted and the practical needs to submerge those views for the sake of consensus or stability.[336] Theorists also need to explain more fully which effects they intend for their proposals to have in order to clarify the reach and scope of their proposed standards for guiding constitutional interpretation and reviewing precedents.[337]

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balancing methodology in First Amendment cases); and (4) the allocation of different theories to specific areas of constitutional law. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (suggesting that Article III authorizes a dialogue between the courts and the political branches over the proper scope of federal jurisdiction); Gerhardt, *supra* note 63, at 41-43, 103-04 (suggesting the impeachment clauses make sense only if they are interpreted on their own terms rather than those of a "grand" theory).

335. *See, e.g.*, Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Shiffrin, *supra* note 334.

336. *See* Monaghan, *supra* note 7, at 741-43, 748-50, 753, 757-58, 760, 762-64 (suggesting that commentators generally have failed to appreciate the degree to which their own normative views on constitutional interpretation tend to influence their review of precedents by making them more skeptical of certain kinds of decisions and, therefore, more disposed to devise a rule for review that allows the precedents they each prefer to survive).

337. For example, there are problems with Professor Maltz's proposal, *supra* note 12, at 483 (suggesting that the Court more fully explain the principles on which its decisions rest and not apply its overrulings retroactively nor issue holdings more broadly than necessary). First, if his rules were voluntary, then they would be of use only as long as all of the Justices were inclined to accept them. Second, the constraining power of the rule, even if mandatory, is limited because they are subject to manipulation through different interpretations. Third, it is not clear at what point a precedent would deviate from his preferred mode of decisionmaking such that he would then be concerned.

For example, many commentators have recommended increased candor among the Justices in constitutional cases but have not fully considered or discussed two possible effects of this proposal.[338] First, this proposal could have the effect of making consensus more difficult on the Court. More particularly, greater candor on the Court might complicate or hinder coalition building, and thereby inhibit and weaken the Court's ability to issue rulings more quickly, or possibly at all, on such politically divisive or contentious subjects as abortion or economic regulations.[339] Consequently, the theorists making this proposal need to address more fully the degree to which Justices need to compromise their normative views when reviewing precedent or in generally deciding a case.[340]

Second, a proposal for greater candor might have the effect of increasing respect for the Court by providing an outlet for the reasoned differences among the Justices. This suggestion, however, can overlook that respect for the Court might just as easily depend on the Justices' submergence of their personal views, even as to the important reasons for overruling precedents, for the sake of consensus or stability.[341]

Of course, the effects of different proposals for reconciling the standards for interpreting the Constitution and reviewing precedents may be only some of the factors theorists take into account in making choices between different proposals. The choices may also turn on the reasons or goals underlying the proposal and on certain political or moral judgments of the kind of Court and society the Justices or theorists prefer.[342] It is long overdue for Justices and theorists to disclose the extent to which they rely on the latter kind of judgments in making their choices on their approaches to precedent.

Such disclosures might clarify the seeming impropriety of liberals tending toward those theories that do not conform to conservative precedents, while conservatives may tend toward those theories that are incompatible with liberal precedents. Until now, neither liberals nor conservatives have been much inclined to defend their choices in terms of the political or moral judgments underlying their preferences because doing so might brand them as biased.[343]

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338. *See supra* note 209.

339. *See, e.g.*, Easterbrook, *supra* note 46, at 805-07, 832 (suggesting greater reasoned elaboration on the part of each Justice but accepting the inevitable conflict that this would produce on the Court).

340. Professor Monaghan's suggestion that the reasoned elaboration of principle should be the goal for each Justice, *see supra* note 7, at 764-67, strikes a balance that would preserve certain kinds of constitutional precedents and secure a specific role for the Court under the Constitution.

341. Another proposal suggests that to increase stability, predictability, and impartiality in the Court's decisionmaking each Justice should try to emphasize the institutional considerations of each decision more than her normative views on constitutional interpretation. *See* Bennett, *supra* note 215, at 258-60.

342. *See, e.g.*, LAURENCE TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 15 (1991); Richard Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187, 204, 206 (1981); Perry, *supra* note 95, at 718-19.

343. *See supra* note 342.

Fuller disclosure of a theorist's political or moral judgments about the good society might also clarify to some extent the problem that Professor Jack Balkin calls "ideological drift," by which positions identified at a particular moment in history with a given political stance, come at a later point to be identified with quite different positions.[344] For example, many liberals are beginning to discover the virtues of judicial restraint and stare decisis,[345] while many conservatives have begun to differ on the merits of a more active judiciary for the sake of restoring certain basic principles of constitutional law, or on whether the very existence of a body of precedent is a conservative, stabilizing force in adjudication.[346]

2. *Critiquing Constitutional Hierarchies*

As a practical matter, it is no longer true that the Constitution is the sole "touchstone" of constitutional decisionmaking.[347] Instead, the Justices tend to consider, weigh, and arrange differently a variety of sources of decision, including precedent, in resolving any constitutional matter brought before them.[348] The gloss added to the Constitution in the form of precedents is an integral part of most dialogues among the Justices about the Constitution.

The more difficult, and perhaps impossible, question to answer is whether one can determine precedent's precise influence as source of decision for each of the Justices. In one of the more comprehensive efforts to resolve this question, Professor Richard Fallon argues that

> most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument: arguments from the plain, necessary or historical meaning of the constitutional

344. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383.

345. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

346. *Compare* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that the original understanding supports interpreting the takings clause to invalidate a wide range of economic regulation) *and* BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980) (arguing for a resurgence in economic substantive due process) *and* Earl Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 668 (1990) (suggesting that "the emergence of conservative activism may ultimately be the best hope for a general resurgence of the philosophy of judicial restraint") *with* Monaghan, *supra* note 7, at 752 (suggesting that "[a] practice of judicial adherence to this body of precedent will further conservative values") (citation omitted). Professor Monaghan explains that his latter statement reflects "an avowedly conservative conception of the judicial office—conservative in a Burkean, not libertarian sense. There is an important and wide difference between the two." *Id.* at 752 n.165.

347. Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

348. *See, e.g.*, Monaghan, *supra* note 315, at 14-17 (expressing concern that the text is only one factor among many in contemporary constitutional decisionmaking).

> text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy.[349]

According to Professor Fallon, the Court's objective should be to reconcile its decisions with respect to each of the five kinds of constitutional argument.

My quarrel with Professor Fallon's suggestion about how constitutional disputes should be resolved is that it would produce more conflict than consensus because the Justices may have significant differences of opinion about how each of the five kinds of constitutional arguments apply in a given case. Nor does his analysis account for legitimate differences among the Justices concerning the ranking and content of the different sources of argument. Moreover, Fallon discounts the practical reality that each Justice might have good reason to defer to a single source that points to a clear result in a particular case. For example, in separation of powers cases, Justice White might be inclined to place precedent more toward the forefront of the sources that he consults in light of the Court's settled practice to defer to Congress' innovations;[350] however, in this same area, Justice Scalia seems to place comparatively more weight on the text and history than he places on the relevant precedents in order to protect individual liberty from congressional deviations from constitutional structure.[351]

In addition, it is interesting to note that, even though he has yet to participate in deciding any cases, Justice Thomas repeatedly testified in his confirmation proceedings that in approaching constitutional issues he would consult the relevant precedents or case law as his first step in making a decision on the Court.[352] Although Justice Thomas' statements may have been designed to alleviate some Senators' concerns about his intentions to help undo many liberal precedents, his stated position conflicts with Professor Fallon's ranking of the different sources of decision and demonstrates the degree to which the Justices each have the discretion, flexibility, and need to arrange the sources of decision as they see fit.

C. Toward a Reconciliation of Theory and Precedent

If Justices or theorists were seriously interested in accommodating precedent in their work product, then they should try to do two things. First, they should formulate criteria for overruling decisions

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349. Fallon, *supra* note 20, at 1189-90.

350. *See* INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting).

351. *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

352. *See, e.g.*, Bruce Fein, *Adding up the Supreme Quiz Score; Flawed but Passing*, WASH. TIMES, Sept. 17, 1991, at F1; Walter V. Robinson, *Thomas Self-Portrait: Rightist, Not Activist*, BOST. GLOBE, Sept. 18, 1991, at 1; David G. Savage, *Thomas Backs Precedent as Testimony Ends*, L.A. TIMES, Sept. 17, 1991, at 1.

that provide (1) real protection for most precedents and (2) sufficient flexibility for the Justices to act conscientiously to undo decisions when they believe there are important reasons to do so. The appropriate criteria that seem to meet these objectives already have been proposed in effect by several Justices and by Professors Monaghan and Israel: the demonstration of a precedent's erroneous reasoning *and* some other substantial or important consideration, such as the precedent's proven unworkability or inconsistency with substantial case law.[353]

Second, theorists and the Justices should recognize that the most effective way to implement the criteria proposed above is through the Justices' pressuring each other in the decisionmaking process. The criteria are the common ground that the Justices should be trying to influence each other to occupy. In other words, the current Justices need to send the message to each other and to future Justices (in the form of precedents) that the former will overrule decisions only if they find those decisions were erroneously reasoned and are otherwise substantially problematic in some demonstrable way. As a practical matter, the most likely way that the Justices can pressure each other to follow certain criteria for overrulings is for them to adopt a practice under which they each are expected at some point in the deliberative process to give their reasons for finding that the criteria for overrulings have been met or not met in a given case.

The antiformalist concept of dialogue is the theoretical approach to interpretation and adjudication that best seems to accommodate the criteria that I have proposed above; it allows the Justices to pressure each other through the disclosure of their respective reasons for finding that the criteria have been met or not met. Indeed, American law exalts dialogue. Much recent theoretical writing has focused on the degree to which a meaningful exchange of ideas should be at the center of governmental decisionmaking authorized by the Constitution,[354] and the Court's review of its precedents essentially has involved a colloquy among the Justices on the criteria

353. *See* Israel, *supra* note 25, at 219-26; Monaghan, *supra* note 7, at 758.

354. A growing number of theorists have sought to revive a "republican" system of government in which "dialogue" figures prominently as the critical device by which consensus on the public good is achieved in legislative decisionmaking. *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 117, 173 (1984); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1529-37 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1493, 1580-81 (1988). These scholars offer their conception of the legislative process as an alternative to the classical liberal view, which maintains that as long as all relevant groups have equal access to the democratic process, they should be allowed to battle among themselves for whatever benefits they can get from the state. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 132 (1956); ELY, *supra* note 114, at 135; M. MARGOLIS, VIABLE DEMOCRACY 99 (1979); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107,

for evaluating the need to disrupt previously settled constitutional doctrine.[355]

As a normative matter, there are five reasons that a dialogic approach insisting on greater reasoned elaboration of the Justices' grounds for finding a heightened standard for overruling decisions has been met is superior to the status quo. In reviewing these reasons, however, one should keep in mind that, in practice, they may not guarantee any particular outcome because the Justices can argue conscientiously that strong reasons point in favor of overruling.

Nevertheless, reasoned elaboration discloses to present and future generations and Courts the Justices' grounds for following heightened criteria for overruling decisions and for having applied them in a certain way in a particular case.[356] Reasoned elaboration can provide guidance to litigants and Justices on how to argue against previous Courts' choices and in favor of different choices on overruling precedents.

Second, reasoned elaboration on whether heightened criteria have been met can demonstrate the Justices' careful consideration of each litigant's arguments for overruling.[357] Indeed, constitutional adjudication is at its most legitimate when the Court deliberates carefully about the constitutional visions of different segments

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150-51 (1976). For an excellent survey and critique of both the "liberal" and "republican" views of the legislative process, see Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581 (1991). For commentators focusing on the degree to which constitutional adjudication is a form of dialogue, see *infra* note 355.

355. For the notion of constitutional adjudication as a form of dialogue requiring reasoned elaboration on the principles or values underlying particular decisions, see Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984) (arguing that the legitimacy of the Court's adjudication ultimately depends on an underlying alliance between opponents); Chemerinsky, *supra* note 14, at 90, 95, 99-100 (emphasizing the importance of disclosure and discussion of values pertinent to the constitutional issue at hand); Farber, *supra* note 204, at 1343 (claiming that pragmatism increases the possibility of dialogue between the Court and society by showing the Justices how to balance competing social values through legal reasoning and experience); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10-15 (1979) (construing the judicial function as an attempt to reveal or elaborate the meaning of constitutional values through the dialogue of adjudication); *see also* Richard H. Fallon, *What Is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1697, 1735 (1989) (providing a liberal critique of two modern republican conceptions of constitutional decisionmaking as dialogue); *cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 86-87 (1985) (arguing that constitutional adjudication should be a dialogic process in which the judiciary prevents interest groups from manipulating governmental power against the "common good" by closely scrutinizing legislation to ensure that it accurately reflects citizens' preferences).

Of course, reasoned elaboration does not take place in a vacuum; it occurs within a multimembered Court in which each member should take into account the need to compromise for the sake of such social institutional values as stability and consensus. *See supra* notes 215-27 and accompanying text and *infra* note 363 and accompanying text (discussing the factors individual Justices might be inclined to consider when reviewing precedents).

356. *See supra* note 355; *see also* Terrence Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033, 1048, 1051, 1067-68 (1981).

357. But too much discussion can result in unclear holdings. *See supra* note 99; *see also* Monaghan, *supra* note 7, at 755 n.184 (arguing that the individual Justices have an institutional obligation to harmonize their views). The appropriate equilibrium between discussion of precedents and clarity in the Court's decisionmaking is an indispensable

of society and the values that it might endorse (or perpetuate) for the operation of government.[358] When the Justices explain their refusal to overrule a precedent under heightened criteria, the Justices show that they have taken seriously the arguments for upsetting the status quo, including settled expectations, while reviewing the precedent reveals the Justices' willingness to look at new ways of dealing with old ideas.

Third, reasoned elaboration in the Court's opinion writing on whether heightened criteria have been met is a necessary precondition for a genuine dialogue on which values should continue to guide the Court's decisionmaking in a particular area. There can be no meaningful exchange of ideas among the Justices on the question of continued adherence to precedent unless they each disclose their reasons for the positions they have taken and the values they believe should continue to guide the Court's decisionmaking on the particular issue under reconsideration.

Fourth, reasoned elaboration on whether the criteria have been met can sharpen the Justices' thinking about whether continued adherence to a particular doctrine is worthwhile. The Justices' deliberations about the values they are thinking about substituting for other values previously endorsed by the Court for the operation of government will be clarified if they each know they must include in their opinions the reasons for finding that the criteria for overrulings have been satisfied or not.

Last, criticism of the Court's overruling of precedents may actually be a complaint about the Court's departure from a common law mentality in constitutional decisionmaking.[359] The common law approach, which feeds off reasoned elaboration, seeks to preserve a variety of values, including the legitimation of judicial review itself as an impartial decisionmaking process distinguishable from the heated partisanship of the legislative process. If the Justices have important reasons for abandoning a previously formulated rule of law, then it is more likely that their decision to overrule will appear to be impartial rather than meanly political.

But even if they were using a tougher standard for overruling precedents, many Justices still might conscientiously find good reason for overruling or severely narrowing many precedents. Each Justice still may have different views on the plausibility and strength

element of the more general decisionmaking process in which the Justices balance their normative views on constitutional interpretation and the need to submerge those views for the sake of certain institutional values such as stability or consensus. *See supra* notes 215-27 and accompanying text.

358. *See* Monaghan, *supra* note 7, at 752-53.

359. *See supra* notes 11 & 111; *see also* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 329-49 (1988) (describing the tradition of the common-law Constitution).

of the reasons being put forward for overruling or reaffirming certain precedents. Consequently, it is not surprising to find, for example, that in *Payne v. Tennessee*[360] the conservative majority split on the criteria for overrulings, but not on whether the criteria that each of the Justices each chose to follow were met in that case.

Without doubt, the Court's ideological shift to the right will have an inevitable impact on precedent because, depending on the area involved, many of the Justices may not rank precedent very high in their calculations and, as such, find other compelling reasons for overruling, or at least weakening, certain precedents. For instance, even though in *Harmelin v. Michigan*[361] Justices O'Connor, Kennedy, and Souter refused to find that Justice Scalia's criteria for overruling *Solem v. Helm*[362] had been met, those same three Justices favored severely narrowing *Solem* in part because *their* reading of the text and history of the Eighth Amendment and other case law suggested to them that *Solem* was problematic. Given the ideological makeup of these latter Justices, it will not be hard for critics to charge that the reasoning of those three Justices in *Harmelin* was bad, partisan, or could have been better; however, this kind of criticism is almost always applicable in constitutional law because there are so many respectable and defensible angles from which to view constitutional problems and the sources of decision with which to resolve those issues.[363] In the final analysis, even though we might insist that each Justice should seriously consider and even try, when possible, to defer to certain values, such as the need for stability or continuity in constitutional law, this insistence will not and cannot guarantee any particular outcome or result in a particular case.

Regarding constitutional adjudication as a form of dialogue between the Justices and different segments of society using the Constitution as the required medium of discourse concedes that the power that enabled the Justices to reject *Plessy* can also be used to abandon *Brown.*[364] This idea is disturbing because it acknowledges that, as a practical matter, precedents can last only as long as a majority of the Court wishes to preserve them. Hard-fought victories, such as *Roe,* can erode over time. But this insight is also instructive because it underscores the need for the Justices and the citizenry to defend the precedents about which they care most. *Brown* has achieved permanency precisely because subsequent generations (on

360. 111 S. Ct. 2597 (1991).
361. 111 S. Ct. 2680 (1991).
362. 463 U.S. 277 (1983).
363. Indeed, as the hearings on Robert Bork's nomination to be an Associate Justice illustrated, the public exhibits no preference for finding a single theory to resolve the countermajoritarian difficulty. *See* Posner, *supra* note 321, at 1382. In large part, the people's respect for the Court may be premised on their perception of each Justice's willingness to factor into his or her decisionmaking such institutional values as stability and consensus, and of the Court's flexibility preserved through its steadfast refusal to endorse one overarching methodology or set of values directing constitutional interpretation. Thus, respect for the Court seems to turn more on the Court's aversion to, rather than attraction for, *one* theoretical view of constitutional decisionmaking.
364. *See* WELLINGTON, *supra* note 11, at 152, 158; Sandalow, *supra* note 356, at 1068-72; Stone, *supra* note 8, at 72-73.

the Court and in the political process, including confirmation proceedings) have been willing to endorse the value of ending segregation chosen by the Warren Court to displace the value of segregation previously embraced by the *Plessy* Court. The values or criteria that the Justices use in reviewing precedents cannot be taken for granted by the citizenry, who can voice their concerns in the judicial nomination and confirmation processes, their choices of the President who nominates Justices, and the kinds of arguments they make in the adjudicative and legislative processes.

Conclusion

Given that the present Supreme Court is as ideologically unbalanced as it has ever been in this century, many people fear it will overrule or severely narrow numerous precedents about which they care. This Article has tried to relieve this anxiety to some extent. It has argued that, in constitutional decisionmaking, it is inevitable for the Justices to come into contact and conflict with many precedents with whose reasoning, holdings, and/or constitutional visions and values they disagree. This Article has also argued that the Court's review of its precedents is, for the most part, a dynamic process in which the Justices individually balance their views on how the Constitution should be interpreted and the social or institutional consequences of no longer preserving particular values previously endorsed by the Court for the operation of government.

This Article argues further that once we shift our focus from trying to figure out whether the Court has crafted a coherent doctrine on precedent to the particular ways in which the individual Justices approach precedent, we can expect that in the forseeable future the Justices will probably be debating which one of two standards they should use for resolving their conflicts over precedents. First, some may prefer to overrule precedents that they have deemed erroneously reasoned. This approach has the virtue of preserving the Justices' flexibility in making decisions and of sharpening the reasoning of the Court's opinions. It has the obvious drawback of ultimately producing chaos or uncertainty over the longevity of various principles in constitutional law by providing later Justices (with their unique perspectives) with a rule of law on which to rely in overruling precedents that they deem erroneously reasoned.

A second approach is for the Justices to demand something more than erroneous reasoning as a basis on which to overrule a precedent. Indeed, in one form or another, most Justices throughout history have favored overruling precedents on the grounds of erroneous reasoning and some other serious flaw justifying overruling, including unworkability and inconsistencies with case law. The

benefit of this second approach is that, like the common law approach to constitutional adjudication, it ultimately may not prevent overrulings but rather, if followed, might slow down the overrulings because it justifies overruling precedents only if after the passage of some time a decision has proved to be defective in some serious way. This approach would not guarantee any particular outcomes, however, because the Justices still can state conscientiously their reasons for overrulings in sufficiently strong terms to satisfy even a heightened standard of review for precedents. Although adherents to this second approach may split on whether the criteria have been met in a particular case, it has the additional advantage of paying more explicit attention to the traditional values associated with fidelity to precedent, including the neutral, consistent, and predictable application of the rule of law as well as the legitimation of judicial review itself.

Because neither of the approaches the Justices are likely to follow in determining whether to overrule precedents would provide much lasting protection for precedents, people interested in safeguarding precedents from being overruled might also look to the political process. If it chose, the Senate could insist, inter alia, that nominees to the Supreme Court express a clear liking for the values associated with fidelity to precedent, and detail the circumstances under which they would vote to overrule precedents. Or, the Senate could investigate further into the moral or political judgments of the nominees regarding the Court's role in our political system and the kind of society we should have, with the hope of finding people who share the Senators' views on either the appropriate criteria for overruling, or the cases that should not be overruled. Yet another solution is for the Congress to take more decisive action in passing legislation to restore the liberties that the Supreme Court may restrict.[365]

For their part, theorists need to accommodate precedent (and the values associated with its preservation) in their proposals for constitutional interpretation and adjudication. In this regard, they, like the Justices and the Senate, should pay more explicit attention to their respective moral or political judgments about the Court's role and the kind of society we should have that may be the starting points for their constitutional analysis.

In the final analysis, the difficult thing is, of course, to identify precisely precedent's place among the sources of constitutional decisionmaking, including the text, history, and theory. Perhaps the most that safely can ever be said is that precedent *has* a pervasive role in constitutional decisionmaking, *and* that it *is* an integral part of the more general dialogue in which each Justice considers the reasons for preserving or rejecting the values his predecessors have previously endorsed for guiding the operation of government. In

365. *See generally* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (arguing in part that Congress effectively could overrule Supreme Court decisions failing to recognize individual liberties by passing legislation that provides protections for such liberties).

my opinion, no analysis of the Court's review of precedent is complete, nor could any proposal for improving that process work, without taking into account that there is a point at which, in reviewing precedents, each Justice tends to balance his views on how the Constitution should be interpreted, and perceptions of the need for the Court to defer to the social or institutional values of stability and continuity in constitutional law.

As long as it is likely that the Court will not adopt a standard of review for precedent that will guarantee a particular outcome, then the most that one can expect, or demand, from the Court is for a heightened degree of discussion regarding the reasons for restricting or overruling a precedent. In the long run, the Court's most important mission is to preserve this dialogue. Candid and reasoned elaboration of the criteria for overruling precedents is indispensable to constitutional adjudication because it provides a basis for present and future generations to understand, and to respond to, the reasons underlying each Justice's choices on the values to perpetuate for guiding governmental operation, *and* because it demonstrates that the Court has fully and seriously considered the arguments in favor of preserving precedent. Consequently, the more openly and fully the Justices discuss the reasons or criteria for adhering to or rejecting precedent, the more confident the people can be that the Court is taking seriously the values associated with precedent, and that the rumors of its demise have been greatly exaggerated.

*Appendix**

Any list of explicit overrulings is idiosyncratic. In this Appendix, I offer my list of those cases in which the Supreme Court made unmistakably clear its intent to overrule some prior decision(s). The Appendix does not include precedents involving statutory interpretation.

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (8-1)	*The Thomas Jefferson*, 23 U.S. (10 Wheat.) 173 (1825); *The Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837)	"if we follow [*Thomas Jefferson*], we follow an erroneous decision." 53 U.S. at 456.	maritime jurisdiction; art. III, § 2, cl. 1
Knox v. Lee, (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871) (5-4)	*Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870)	"overrule." 79 U.S. at 553.	impairment of contracts; art. I, § 2, cl. 1

* Laura Dalton, Class of 1991, deserves special mention for her creative and diligent work in helping to construct this Appendix.

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
Kilbourn v. Thompson, 103 U.S. 168 (1880) (7-0)	*Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)	"notwithstanding what is said in the case of *Anderson v. Dunn*" 103 U.S. at 199-200.	power of Congress to punish witness for contempt; art. I, § 5
Philadelphia and S. Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887) (8-0)	*State Tax on Ry. v. Gross Receipts*, 82 U.S. (15 Wall.) 284 (1872)	"the first ground on which the decision in *State Tax* . . . was placed is not tenable." 122 U.S. at 342.	state taxation in violation of Commerce Clause; art. I, § 8, cl. 3
In re Ayers, 123 U.S. 443 (1887) (8-0)	*Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824)	decision distinguished at 123 U.S. at 488.	sovereign immunity; amend. XI
LeLoup v. Port of Mobile, 127 U.S. 640 (1888) (9-0)	*Osborne v. Mobile*, 83 U.S. (16 Wall.) 479 (1872)	"an ordinance [of the type in *Osborne*] would now be regarded as repugnant to the power conferred upon Congress." 127 U.S. at 647.	state taxation in violation of Commerce Clause; art. I, § 8, cl. 3
Lessy v. Hardin, 135 U.S. 100 (1890) (6-3)	*Pierce v. New Hampshire*, 46 U.S. (5 How.) 504 (1847)	"*Pierce v. New Hampshire* . . . must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to." 135 U.S. at 118.	interpretation of Congressional silence concerning interstate commerce; art. I, § 8, cl. 3
Garland v. Washington, 232 U.S. 642 (1914) (9-0)	*Crain v. United States*, 162 U.S. 625 (1896)	"overruled." 232 U.S. at 647.	criminal procedure and due process; Amend. XIV
United States v. Nice, 241 U.S. 591 (1916) (9-0)	*Matter of Heff*, 197 U.S. 488 (1905)	"overruled." 241 U.S. at 601.	commerce with Indian tribes; art. I, § 8, cl. 3
Pennsylvania R.R. v. Towers, 245 U.S. 6 (1917) (9-0)	*Lake Shore Ry. v. Smith*, 173 U.S. 684 (1899)	"overruled." 245 U.S. at 17.	rate fixing and due process; Amend. XIV
Terral v. Burke Constr. Co., 257 U.S. 529 (1922) (9-0)	*Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876); *Security Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)	"overruled." 257 U.S. at 533.	right to resort to federal courts; art. III
Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925) (8-1)	*Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)	"definitely disapproved." 268 U.S. at 218.	state taxation in conflict with the Commerce Clause; art. I, § 8, cl. 3
Farmer's Loan and Trust Co. v. Minnesota, 280 U.S. 204 (1930) (7-2)	*Blackstone v. Miller*, 188 U.S. 189 (1903)	"definitely overruled." 280 U.S. at 209.	due process concerning inheritance tax; Amend. XIV
East Ohio Gas Co. v. Tax Comm'n, 283 U.S. 465 (1931) (9-0)	*Pennsylvania Gas Co. v. Public Serv. Comm'n*, 252 U.S. 23 (1920)	"disapproved to the extent it is in conflict with our decision here." 283 U.S. at 472.	state taxation under the Commerce Clause; art. I, § 8, cl. 3
Chicago & E. Ill. R.R. v. Industrial Comm'n, 284 U.S. 296 (1932) (9-0)	*Erie R.R. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. v. Szary*, 253 U.S. 8 (1920)	"definitely overruled." 284 U.S. at 299.	FELA and the Commerce Clause; art. I, § 8, cl. 3
Fox Film Corp. v. Doyal, 286 U.S. 123 (1932) (9-0)	*Long v. Rockwood*, 277 U.S. 142 (1928)	"definitely overruled." 286 U.S. at 131.	immunity from state taxation of federal instrumentalities under Supremacy Clause; art. VI, cl. 2

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (5-4)	*Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)	"overruled." 300 U.S. at 400.	due process concerning minimum wage law; amend. XIV
Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938) (5-2)	*Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393 (1932); *Gillispie v. Oklahoma*, 257 U.S. 501 (1922)	"overruled." 303 U.S. at 387.	immunity of state instrumentality from federal tax; amend. X
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (8-0)	*Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)	"In disapproving [the *Swift*] doctrine" 304 U.S. at 79-80.	rights reserved to the states; amend. X
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) (7-2)	*Dobbins v. Erie County*, 41 U.S. (16 Pet.) 435 (1842); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870); *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioner*, 300 U.S. 352 (1937)	"overruled." 306 U.S. at 486.	immunity of federal and state officers from income taxes; amend. X
O'Malley v. Woodrough, 307 U.S. 277 (1939) (7-1)	*Evans v. Gore*, 253 U.S. 245 (1920); *Miles v. Graham*, 268 U.S. 501 (1925)	"to the extent that what the Court now says is inconsistent . . . [*Miles*] cannot survive." 307 U.S. at 282-83.	diminution of judges' salaries through taxation; art. III, § 1.
Madden v. Kentucky, 309 U.S. 83 (1940) (7-2)	*Colgate v. Harvey*, 296 U.S. 404 (1935)	"overruled." 309 U.S. at 93.	right to engage in certain incidents of business and the Privileges and Immunities Clause; amend. XIV
Helvering v. Hallock, 309 U.S. 106 (1940) (7-2)	*Becker v. St. Louis Union Trust Co.*, 296 U.S. 48 (1935); *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39 (1935)	"We therefore reject as untenable the diversities taken in the *St. Louis Trust Cases* in applying the *Klein* doctrine. . . ." 309 U.S. at 122.	value of remainder interest is part of decedent's gross estate under the Revenue Act of 1926.
Tigner v. Texas, 310 U.S. 141 (1940) (8-1)	*Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)	"*Connolly's* case . . . is no longer controlling." 310 U.S. at 147.	equal protection of various industries under criminal laws to deter monopolies; amend. XIV
United States v. Darby, 312 U.S. 100 (1941) (9-0)	*Hammer v. Dagenhart*, 247 U.S. 251 (1918)	"overruled." 312 U.S. at 116-17.	fair labor standards within the Commerce Clause; amends. V, X
United States v. Chicago, Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592 (1941) (9-0)	*United States v. Heyward*, 250 U.S. 633 (1919); *United States v. Lynah*, 188 U.S. 445 (1903)	"[S]o far as [*Lynah* and *Heyward*] sanction[ ] such a principle, it is in irreconcilable conflict with our later decisions and cannot be considered as expressing the law." 312 U.S. at 598.	authorized takings and just compensation; amend. V

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
California v. Thompson, 313 U.S. 109 (1941) (9-0)	*DiSanto v. Pennsylvania*, 273 U.S. 34 (1927)	"overruled." 313 U.S. at 116.	licensing criteria for free agents under the Commerce Clause; art. I, § 8, cl. 3
Olsen v. Nebraska, 313 U.S. 236 (1941) (9-0)	*Ribnik v. McBride*, 277 U.S. 350 (1928)	"The drift away from [*Ribnik*] has been so great that it can no longer be deemed a controlling authority." 313 U.S. at 244.	due process concerns of business affected with a public interest; amend. XIV
Alabama v. King & Boozer, 314 U.S. 1 (1941) (9-0)	*Panhandle Oil Co. v. Knox*, 277 U.S. 218 (1928); *Graves v. Texas Co.*, 298 U.S. 393 (1936)	"[S]o far as a different view has prevailed [in *Panhandle* and *Graves*], we think it no longer tenable." 314 U.S. at 9.	immunity of federal government from state taxation under the Supremacy Clause; art. VI, § 2
State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942) (7-2)	*First Nat'l Bank v. Maine*, 284 U.S. 312 (1932)	"overrule." 316 U.S. at 181.	due process and death tax; amend. XIV
Williams v. North Carolina, 317 U.S. 287 (1942) (7-2)	*Haddock v. Haddock*, 201 U.S. 562 (1906)	"overruled." 317 U.S. at 304.	full faith and credit concerning divorce decree; art. IV, § 1
Jones v. Opelika, 319 U.S. 103 (1943) (per curiam); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (5-4)	*Jones v. Opelika*, 316 U.S. 584 (1942)	"The judgment in *Jones v. Opelika* has this day been vacated." 319 U.S. at 117.	license tax imposed on religious colporteurs; amend. I
Oklahoma Tax Comm'n v. U.S., 319 U.S. 598 (1943) (5-4)	*Childers v. Beaver*, 270 U.S. 555 (1926)	"*Childers* . . . was in effect overruled by the *Mountain Producers* decision." 319 U.S. at 604.	state estate taxes imposed on federally restricted Indian property under the Supremacy Clause; art. VI, § 2
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (6-3)	*Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)	"overruled." 319 U.S. at 1187.	freedom of religion and due process; amends. I, XIV
Smith v. Allwright, 321 U.S. 649 (1944) (8-1)	*Grovey v. Townsend*, 295 U.S. 45 (1935)	"overruled." 321 U.S. at 666.	right to vote; amend. XV
Girouard v. United States, 328 U.S. 61 (1946) (5-3)	*United States v. Schwimmer*, 279 U.S. 644 (1929); *United States v. Macintosh*, 283 U.S. 605 (1931); *United States v. Bland*, 283 U.S. 636 (1931)	"We conclude that the *Schwimmer*, *Macintosh*, and *Bland* cases do not state the correct rule of law." 328 U.S. at 69.	construction of the Naturalization Act in light of freedom of religion guarantee; amend. I
Angel v. Bullington, 330 U.S. 183 (1947) (6-3)	*Lupton's Sons Co. v. Automobile Club*, 225 U.S. 489 (1912)	"Cases like *Lupton's* . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie*." 330 U.S. at 192.	diversity jurisdiction; art. III, § 2
Lincoln Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1948) (9-0)	*Adair v. United States*, 208 U.S. 161 (1907); *Coppage v. Kansas*, 236 U.S. 1 (1914)	"This Court has steadily rejected the due process philosophy enunciated in the *Adair - Coppage* line of cases." 335 U.S. at 536.	state legislation prohibiting injurious business practices and due process; amend. XIV

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) (9-0)	*Choctaw, Okla. & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1917); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Refineries*, 296 U.S. 521 (1936)	"overruled." 336 U.S. at 365.	non-Indian leases of restricted Indian lands are subject to state production and excise taxes; amend. X
United States v. Rabinowitz, 339 U.S. 56 (1950) (5-3)	*Trupiano v. United States*, 334 U.S. 699 (1948)	"overruled." 339 U.S. at 66.	reasonableness goes to the search, not the procurement of a warrant; amend. IV
Burstyn v. Wilson, 343 U.S. 495 (1952) (9-0)	*Mutual Film Co. v. Industrial Comm'n*, 236 U.S. 230 (1915)	"overruled." 343 U.S. at 502.	freedom of speech and press; amend. I
Elkins v. United States, 364 U.S. 206 (1960) (5-4)	*Weeks v. United States*, 232 U.S. 383 (1914)	"reason and experience . . . point to the rejection of [the *Weeks*] doctrine." 364 U.S. at 222.	admissibility of evidence obtained by state search in federal court; amend. IV
Mapp v. Ohio, 367 U.S. 643 (1961) (5-4)	*Wolf v. Colorado*, 338 U.S. 25 (1949)	"[w]e can no longer permit that right [to be secure against invasions of privacy by state officers] to remain an empty promise." 367 U.S. at 660.	admissibility of evidence obtained in an illegal federal search in state court; amend. IV
Gideon v. Wainwright, 372 U.S. 335 (1963) (9-0)	*Betts v. Brady*, 316 U.S. 455 (1942)	Amici "argue that *Betts* should now be overruled. We agree." 372 U.S. at 345.	applicability of constitutional right to counsel in state court; amends. VI, XIV
Ferguson v. Skrupa, 372 U.S. 725 (1963) (8-1)	*Adams v. Tanner*, 244 U.S. 590 (1917)	"[R]eliance on [*Adams*] is as mistaken as would be adherence to [*Adkins* . . . overruled by *West Coast Hotel*]." 372 U.S. at 731.	state restrictions on operation of certain businesses and due process; amend. XIV
Malloy v. Hogan, 378 U.S. 1 (1964) (5-4)	*Twining v. New Jersey*, 211 U.S. 78 (1908); *Adamson v. California*, 332 U.S. 46 (1947)	"Decisions of the Court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases." 378 U.S. at 6.	privilege against self-incrimination is applicable to state actions; amends. V, XIV
Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (7-2)	*Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)	"The Court today rejected [the rule of the aforementioned cases], and with it, all the earlier cases resting on that rule." 378 U.S. at 77.	use of federally compelled evidence to incriminate at state level; amends. V, XIV

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
Jackson v. Denno, 378 U.S. 368 (1964) (5-4)	*Stein v. New York*, 346 U.S. 156 (1953)	"overruled." 378 U.S. at 391.	determination of voluntariness of a confession and due process; amend. XIV
Escobedo v. Illinois, 378 U.S. 478 (1964) (5-4)	*Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)	"[T]o the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling." 378 U.S. at 492.	statements made prior to reading of rights when investigation is focused on one individual are inadmissible; amends. VI, XIV
Pointer v. Texas, 380 U.S. 400 (1965) (7-2)	*West v. Louisiana*, 194 U.S. 258 (1904)	"In the light of *Gideon* . . . the statements made in *West* . . . can no longer be regarded as the law." 380 U.S. at 406.	right to confrontation applicable in state court; amends. VI, XIV
Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (6-3)	*Breedlove v. Shuttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)	*Breedlove* "overruled." 383 U.S. at 669. The *Butler* decision is only mentioned in dissent, but stands for the same overruled proposition.	state conditioning of right to vote is violation of equal protection; amend. XIV
Spevack v. Klein, 385 U.S. 511 (1967) (5-4)	*Cohen v. Hurley*, 366 U.S. 117 (1961)	"overruled." 385 U.S. at 514.	equal protection of lawyers asserting right against self-incrimination; amends. V, XIV
Keyishian v. Board of Regents, 385 U.S. 589 (1967) (5-4)	*Adler v. Board of Educ.*, 342 U.S. 485 (1952)	"[C]onstitutional doctrine which has emerged since that decision has rejected [*Adler's*] major premise." 385 U.S. at 605.	public employment conditioned upon surrender of constitutional rights; amend. I
Afroyim v. Rusk, 387 U.S. 253 (1967) (5-4)	*Perez v. Brownell*, 356 U.S. 44 (1958)	"overruled." 387 U.S. at 268.	state's attempt to revoke citizenship violative of Citizenship Clause; amend. XIV
Camara v. Municipal Court, 387 U.S. 523 (1967) (6-3)	*Frank v. Maryland*, 359 U.S. 360 (1959)	"overruled." 387 U.S. at 528.	warrantless searches by municipal health inspector; amend. IV
Katz v. United States, 389 U.S. 347 (1967) (7-1)	*Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 114 (1942)	"We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353.	recordation of oral statements unaccompanied by actual trespass; amend. IV
Bruton v. United States, 391 U.S. 123 (1968) (6-2)	*Delli Paoli v. United States*, 352 U.S. 232 (1957)	"overruled." 391 U.S. at 126.	co-defendant confession at joint trial; amend. VI
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (7-2)	*Hodges v. United States*, 203 U.S. 1 (1906)	"overruled." 392 U.S. at 441 n.78.	congressional power to decide what are incidents of slavery and enact legislation; amend. XIII

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
Moore v. Ogilvie, 394 U.S. 814 (1969) (7-2)	*MacDougall v. Green*, 335 U.S. 281 (1948)	"overruled." 394 U.S. at 819.	residency requirements for political parties and due process; amend. XIV
Brandenburg v. Ohio, 395 U.S. 444 (1969) (8-0)	*Whitney v. California*, 274 U.S. 357 (1927)	"overruled." 395 U.S. at 449.	freedom of speech; amend. I
Chimel v. California, 395 U.S. 752 (1969) (6-2)	*Harris v. United States*, 331 U.S. 145 (1947); *United States v. Rabinowitz*, 339 U.S. 56 (1950)	"It is time . . . to hold that . . . insofar as the principles [that *Harris* and *Rabinowitz*] stand for are inconsistent with those that we have endorsed today, they are no longer to be followed." 395 U.S. at 768.	searches at the time of arrest must be limited to the person and the area within his reach; amend. IV
Benton v. Maryland, 395 U.S. 784 (1969) (7-2)	*Palko v. Connecticut*, 302 U.S. 319 (1937)	"overruled." 395 U.S. at 794.	Double jeopardy prohibition is applicable to the states; amends. V, XIV
Ashe v. Swenson, 397 U.S. 436 (1970) (7-1)	*Hoag v. New Jersey*, 356 U.S. 464 (1958)	The Court compared the virtually identical facts of *Hoag* and *Ashe* finding that more recent decisions changed the Court's perspective on the applicability of collateral estoppel. *Hoag* is implicitly overruled since the Court reaches the opposite result on nearly the same facts. 397 U.S. at 445.	guarantee against double jeopardy includes collateral estoppel as a constitutional requirement; amend. V
Price v. Georgia, 398 U.S. 323 (1970) (8-0)	*Brantley v. Georgia*, 217 U.S. 284 (1910)	"overruled." 398 U.S. at 330 n.9.	new trial for defendant convicted of lesser offense limited to that lesser charge; amends. V, XIV
Williams v. Florida, 399 U.S. 78 (1970) (6-2)	*Thompson v. Utah*, 170 U.S. 343 (1898); *Rassmussen v. United States*, 197 U.S. 516 (1905)	The overruled cases are cited as authority for a twelve-man jury, 399 U.S. at 91-92, and are implicitly overruled by the announcement of the new rule allowing six-man juries. *Id.* at 103-04.	six-person jury is not violative of defendant's Sixth Amendment right; amends. VI, XIV
Perez v. Campbell, 402 U.S. 637 (1971) (5-4)	*Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962)	"We can no longer adhere to the aberrational doctrine of *Kesler*." 402 U.S. at 651.	state legislation that frustrates full effectiveness of federal law is invalid under Supremacy Clause even if supported by legitimate state purpose; art. VI, § 2

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
Dunn v. Blumstein, 405 U.S. 330 (1972) (5-2)	*Pope v. Williams*, 193 U.S. 621 (1904)	"To the extent that dicta in [*Pope*] are inconsistent with the test we apply or the result we reach today, those dicta are rejected." 405 U.S. at 337 n.7. "[T]he Court today really overrules the holding in *Pope v. Williams* and does not restrict itself, as footnote 7 says, to rejecting what it says are mere dicta." *Id.* at 362 (Blackmun, J., concurring).	one year residency requirement to voting violates Equal Protection Clause; amend. XIV
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (9-0)	*Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928)	"overruled." 410 U.S. at 366.	state law requiring payment of ad valorum taxes on corporations but not individuals does not violate Equal Protection Clause; amend. XIV
Miller v. California, 413 U.S. 15 (1973) (5-4)	*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966)	"*Memoirs* test has been abandoned as unworkable by its author, and no Member of the Court today supports the *Memoirs* formulation." 413 U.S. at 23.	obscenity test; amend. I
North Dakota Pharmacy Bd. v. Snyder's Drug Stores, 414 U.S. 156 (1973) (9-0)	*Liggett Co. v. Baldridge*, 278 U.S. 105 (1929)	"overruled." 414 U.S. at 167.	state law requiring pharmacists to be registered, or majority of stock to be owned by pharmacists in good standing not violative of equal protection; amend. XIV
Edelman v. Jordan, 415 U.S 651 (1974) (5-4)	*Shapiro v. Thompson*, 394 U.S. 618 (1969); *State Dep't of Health and Rehab. Serv. v. Zarate*, 407 U.S. 918 (1972); *Serrett v. Mothers' and Childrens' Rights Org.*, 409 U.S. 809 (1973)	"we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today." 415 U.S. at 671.	retroactive payment of benefits under AABD programs which were withheld wrongfully by state officials prohibited; amend. XI
Taylor v. Louisiana, 419 U.S. 522 (1975) (8-1)	*Hoyt v. Florida*, 368 U.S. 57 (1971)	"we cannot follow the contrary implications of the prior cases, including *Hoyt v. Florida*." 419 U.S. at 537.	automatic exemptions cannot be used to exclude women from jury to obtain male venire; amend. VI
Michelin Tire Corp. v. Wages, 423 U.S 276 (1976) (7-1)	*Low v. Austin*, 80 U.S. (13 Wall.) 29 (1968)	"overruled." 423 U.S. at 301.	state may assess non-discriminatory ad valorem tax on imported items; art. I, § 10, cl. 2

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
Hudgens v. NLRB, 424 U.S. 507 (1976) (5-3)	*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968)	"[W]e make it clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." 424 U.S. at 518.	picketing is not protected speech on private shopping center property; amends. I, XIV
Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (7-1)	*Valentine v. Chrestensen*, 316 U.S. 52 (1942)	Overruling is implicit in the discussion of *Valentine* and the following contrary holding. 425 U.S. at 760-62.	purely commercial speech is protected speech but is subject to regulation; amend. I
National League of Cities v. Usery, 426 U.S. 833 (1976) (5-4)	*Maryland v. Wirtz*, 392 U.S. 183 (1968)	"overruled." 426 U.S. at 855.	Congress cannot force states to make certain choices in the guise of regulating interstate commerce; art. I, § 8, cl. 3
City of New Orleans v. Dukes, 427 U.S. 297 (1976) (8-0)	*Morey v. Doud*, 354 U.S. 457 (1957)	"overruled." 427 U.S. at 317.	purely economic legislation given deferential treatment; amend. XIV
Craig v. Boren, 429 U.S. 190 (1976)	*Goesaert v. Cleary*, 335 U.S. 464 (1948)	"Insofar as *Goesaert* . . . may be inconsistent, that decision is disapproved. Undoubtedly reflecting the view that *Goesaert*'s equal protection analysis no longer obtains, the District Court made no reference to that decision in upholding Oklahoma's statute." 429 U.S. at 210 n.23.	gender discrimination; amend. XIV
Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (6-3)	*Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)	"*Bonelli*'s application of federal common law to cases such as this must be overruled." 429 U.S. at 382.	disputed ownership of riverbed lands must be determined as a matter of state law
Complete Auto Transit v. Brady, 430 U.S. 274 (1977) (9-0)	*Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951)	"overruled." 430 U.S. at 289.	state tax levied for the privilege of doing business is not per se unconstitutional; art. I, § 8, cl. 3
Shaffer v. Heitner, 433 U.S. 186 (1977) (8-0)	*Pennoyer v. Neff*, 95 U.S. 714 (1878)	The jurisdictional framework of *Pennoyer* is implicitly rejected in the Court's discussion. 433 U.S. at 197-206.	due process and personal jurisdiction; amend. XIV

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978) (8-0)	*Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947)	"overruled." 435 U.S. at 750.	business and occupation tax does not violate Commerce Clause when applied to the commercial activity of stevedoring; art. I, § 8, cl. 3
United States v. Scott, 437 U.S. 82 (1978) (5-4)	*United States v. Jenkins*, 420 U.S. 358 (1975)	"overruled." 437 U.S. at 87.	Double Jeopardy Clause is not violated when a state appeals from a decision in favor of defendant when defendant sought termination of proceeding on a basis other than guilt/ innocence; amend. V
Hughes v. Oklahoma, 441 U.S. 322 (1979) (7-2)	*Geer v. Connecticut*, 161 U.S. 519 (1896)	"overruled." 441 U.S. at 335.	state regulation of wildlife is to be analyzed by same rules in respect to Commerce Clause as other natural resources; art. I, § 8, cl. 3
United States v. Salvucci, 448 U.S. 83 (1980) (7-2)	*Jones v. United States*, 362 U.S. 257 (1960)	"We are convinced that the automatic standing rule of *Jones* has outlived its usefulness in this Court's Fourth Amendment jurisprudence." 448 U.S. at 95.	defendants charged with possession may only claim benefits of exclusionary rule if their own Fourth Amendment rights have been violated; amend. IV
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (6-3)	*Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922)	"Any contrary statements in *Heisler* and its progeny are disapproved." 453 U.S. at 617.	state tax is not protected from Commerce Clause scrutiny by a claim that the tax is imposed on goods before they enter the stream of commerce; art. I, § 8, cl. 3
United States v. Ross, 456 U.S. 798 (1982) (6-3)	*Robbins v. California*, 453 U.S. 420 (1981)	"[W]e reject the precise holding of *Robbins*." 456 U.S. at 824.	scope of search in automobile not limited to the container, but by the object of the search and probable cause giving rise to the search; amend. IV
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (7-2)	*Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)	Court explains that *Hudson* was based on *Geer* which was expressly overruled previously. 458 U.S. at 950-51.	ground water is an article of commerce and is subject to Commerce Clause regulation; art. I, § 8, cl. 3
Illinois v. Gates, 462 U.S. 213 (1983) (6-3)	*Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969)	The Court discussed the tests contained in *Aguilar* and *Spinelli* and concludes that "it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*." 462 U.S. at 238 (footnote omitted).	"totality of the circumstances" determines probable cause questions; amend. IV

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (5-4)	*Rolston v. Missouri Fund Comm'rs*, 120 U.S. 390 (1887); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909); *Atchinson T. & S.F. Ry. v. O'Connor*, 223 U.S. 280 (1912); *Greene v. Louisville & Interurban R.R.*, 244 U.S. 499 (1917); *Johnson v. Lankford*, 245 U.S. 541 (1918); 28 additional cases listed at 465 U.S. 89, 109 nn.17-21, 165-68 nn.50 & 52, and accompanying text	"In sum, contrary to the view implicit in decisions such as *Greene*, . . . , neither pendent jurisdiction, nor any other basis of jurisdiction may override the Eleventh Amendment." 465 U.S. at 121.	rule that claim against state officials is a claim against the state and is barred by the 11th Amendment also applies to state claims in federal court under pendent jurisdiction; amend. XI
United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (9-0)	*Coffey v. United States*, 116 U.S. 436 (1886)	"[W]e reject today the contrary rationale of *Coffey v. United States*." 465 U.S. at 366.	remedial forfeiture proceeding following an acquittal on related criminal charges is not barred under the Double Jeopardy Clause; amend. V
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) (9-0)	*Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)	"*Hooven I*, to the extent it espouses the [original package] doctrine, is not to be regarded as authority and is overruled." 466 U.S. at 361.	focus on validity of ad valorem tax on imports should be on whether the tax is an "impost" or a "duty"; art. I, § 10, cl. 2
Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985) (5-4)	*National League of Cities v. Usery*, 426 U.S. 833 (1976)	"overruled." 469 U.S. at 557.	determination of state immunity does not turn on whether the government function is traditional or integral; art. I, § 8, cl. 3
United States v. Miller, 471 U.S. 130 (1985) (8-0)	*Ex parte Bain*, 121 U.S. 1 (1887)	"to the extent that *Bain* stands for the proposition . . . to avoid further confusion, we now explicitly reject that proposition." 471 U.S. at 144.	to drop allegations unnecessary to an offense that is clearly contained within an indictment is not an unconstitutional amendment; amend. V
Daniels v. Williams, 474 U.S. 327 (1986) (9-0)	*Parratt v. Taylor*, 451 U.S. 527 (1981)	"overruled." 474 U.S. at 330.	lack of due care by state official which amounts to negligence does not "deprive" a person of life or liberty and therefore does not implicate Due Process Clause; amend. XIV

Overruling Case Vote of the Court	Overruled Case(s)	Overturning Language	Subject Matter
Batson v. Kentucky, 476 U.S. 79 (1986) (7-2)	*Swain v. Alabama*, 380 U.S. 202 (1965)	"For the reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have developed since *Swain*." 476 U.S. at 93.	defendant may present a prima facie case of discriminatory selection of venire based solely on prosecutorial conduct in his case, which gives rise to an inference of unconstitutional behavior; amend. XIV
Puerto Rico v. Branstad, 483 U.S. 219 (1987) (9-0)	*Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)	"*Kentucky v. Dennison* is the product of another time . . . We conclude that it may stand no longer." 483 U.S. at 230.	federal courts have authority to compel performance by asylum state to deliver fugitive upon proper demand; art. IV, § 2, cl. 2
Solorio v. United States, 483 U.S. 435 (1987) (6-3)	*O'Callahan v. Parker*, 395 U.S. 258 (1969)	"overruled." 483 U.S. at 436.	jurisdiction of court martial depends upon status as a member of the military and not on the relationship between the offense and service; art. I, § 8, cl. 14
Welch v. Texas Dep't. of Highways and Pub. Transp., 483 U.S. 468 (1987) (5-4)	*Parden v. Terminal Ry.*, 377 U.S. 184 (1964)	"overruled." 483 U.S. at 478.	if Congress intends to abrogate the Eleventh Amendment in exercising the Commerce Clause power, it may do so expressly in the statute; amend. XI
South Carolina v. Baker, 485 U.S. 505 (1988) (6-2)	*Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)	"We thus confirm that subsequent case law has overruled the holding in *Pollock*." 485 U.S. at 524.	state bond interest is not immune from nondiscriminatory federal tax; amend. XVI
Alabama v. Smith, 490 U.S. 794 (1989) (8-1)	*Simpson v. Rice*, 395 U.S. 711 (1969)	"Believing, as we do, that there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty pleas, we overrule *Simpson v. Rice* . . . to that extent." 490 U.S. at 803.	sentencing
Healy v. Beer Inst. Inc., 491 U.S. 324 (1989) (6-3)	*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)	"to the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law." 491 U.S. at 343.	Commerce Clause; art. I, § 8, cl. 3
Thornburgh v. Abbott, 490 U.S. 401 (1989) (6-3)	*Procunier v. Martinez*, 416 U.S. 396 (1974)	"overrule." 490 U.S. at 413.	distinction between correspondence from prisoners or nonprisoners in prison regulations

OVERRULING CASE VOTE OF THE COURT	OVERRULED CASE(S)	OVERTURNING LANGUAGE	SUBJECT MATTER
Collins v. Youngblood, 110 S. Ct. 2715 (1990) (9-0)	*Kring v. Missouri*, 107 U.S. 221 (1883); *Thompson v. Utah*, 170 U.S. 343 (1898)	"overrule." 110 S. Ct. at 2723-24.	Ex Post Facto Clause; art. I, § 10, cl. 1
California v. Acevedo, 111 S. Ct. 1982 (1991) (6-3)	*Arkansas v. Sanders*, 442 U.S. 753 (1979)	"We conclude that is is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*." 111 S. Ct. at 1991.	search and seizure; amend. IV
Payne v. Tennessee, 111 S. Ct. 2597 (1991) (5-4)	*South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987)	"Reconsidering these decisions now, we conclude for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled."	admissibility of victim impact evidence; amend. VII