TAKING STARE DECISIS SERIOUSLY: A CAUTIONARY TALE FOR A PROGRESSIVE SUPREME COURT

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I. INTRODUCTION

To better understand stare decisis and to normatively explore our constitutional future, this article assumes that President Obama’s election signifies a constitutional shift similar to the one occurring after President Nixon won in 1968. From that contentious, self-righteous era to the present day, all American Presidents selected Supreme Court nominees who were more conservative than the members of the Warren Court majority, much less that aggressively liberal duo, Justices Brennan and Marshall. Justice Stevens, appointed by the moderate Republican President Gerald Ford, is arguably the most liberal member on the Court. At this point, it is impossible to predict Justice Sotomayor’s constitutional jurisprudence, but it is unlikely to be very aggressive. It is impossible to predict how far the country may tack leftward. Nixon’s initial electoral triumph was an uncertain beginning for modern conservatism that hardly satisfied his party’s more militant wing: he was more liberal domestically than any President after Carter (whose own administration began the process of deregulation which eventually degenerated into catastrophic speculative frenzy). It is possible that Obama’s administration will readjust existing norms or fail, suddenly reviving modern conservatism.

If this essay’s prediction is accurate, how should a gradually more “progressive” Court evaluate conservative judicial triumphs over the past forty years? Should an emerging liberal majority overrule most closely contested constitutional decisions—those five-to-four and six-to-three cases won by conservatives that have been the focus of most liberal political and academic ire? Should this new bloc confine those determinations to their facts, thereby stripping

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1 See Jeffrey Rosen, The Dissenter, N.Y. TIMES, Sept. 23, 2007, §6 (Magazine), at 50 (describing Justice Stevens as “the older and arguably most liberal justice” on the United States Supreme Court. See also Symposium: The Jurisprudence of Justice Stevens, 74 FORDHAM L. REV. 1557 (2006).

supporting reasoning of vitality? Or should they let most of these constitutional sleeping dogs lie? The answers to those questions partially reside in one’s attitude toward the doctrine of stare decisis, a doctrine which means, at a minimum, that new Supreme Court Justices should presumptively integrate their constitutional jurisprudence into the existing framework even though they would have decided many prior cases differently had they had been on the Court when those cases were originally argued.

Ultimately, this hypothetical liberal Court should not transform constitutional law by overruling many previously contested cases and/or by construing them narrowly. Nor should it create a wide range of new rights. Aggressive use of both forms of “judicial activism” could undermine our nation’s desperate need to address wealth inequality, environmental problems, energy independence, racism, and sexism. To support that claim, we utilize important disputed cases, won by conservatives, as exemplars of the numerous justifications for a robust conception of stare decisis. For example, the Court should retain New York v. United States, which struck down a federal law requiring States to comply with federal nuclear waste policies by either joining a State compact or taking title to privately generated nuclear waste, because that decision prevents Congress from targeting States. Under New York, Congress can regulate state behavior through general laws affecting the entire populace (such as prohibiting disability

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3 We also are wary of massive expansion of constitutional law outside of existing doctrine—through an aggressive reading of the “Privileges and Immunities” clauses, for instance. But we primarily limit our inquiry to determining what should be retained from the past, not what should be created in the future. Of course, a serious commitment to the past limits future discretion. So our inquiry will shed light on when, where, and how liberals might exercise their creative constitutional itch.

4 505 U.S. 144 (1992). The Court similarly abrogated interim provisions of the Brady Handgun Violence Prevention Act in Printz v. United States, 521 U.S. 898 (1997), holding that Congress had unconstitutionally commandeered the state executive branch by “conscripting” state officers to execute federal law by conducting background checks on firearm purchasers. Id. at 935.
discrimination), but those laws will not be onerous because the burdens fall upon private parties as well as the States. Congress cannot pass the buck to States by forcing them to absorb regulatory costs and/or making them the unwilling face of regulatory power. Thus, New York is an archetypal example of the Supreme Court’s using egalitarian doctrines to protect legitimate, protected parties from being targeted by more powerful interest groups. Furthermore, there is a presumption favoring formal equality (these New York defenses will be developed later in this essay).

Nevertheless, no single factor is determinative under this model of stare decisis. The wide range of justifications favoring stare decisis (as well as countervailing reasons to ignore precedent) necessitates a malleable assessment of different, often conflicting factors, an adjudicatory methodology that should drive anyone seeking a unified theory of constitutional law to despair. Demonstrating the incredible complexity of the decision making process tends to make reason the servant of intuition, intimating wariness of sweeping, syllogistic theories of practical reasoning. In other words, this article is an exploration of the limits of human understanding.

By limiting the inquiry to closely contested cases, itself a major stare decisis factor, this essay partially imagines a more left-leaning constitutional future. A thorough analysis would consider all previous cases. It is easier, however, to design a widely acceptable theory of

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5 New York, 505 U.S. at 160. In New York, Justice O’Connor avoided a direct confrontation with the Court’s prior Tenth Amendment holdings by framing the litigation as one in which “Congress had [not] subjected a State to the same litigation applicable to private parties.” Id.


7 Noam Chomsky recently explored several “mysteries of nature” that human may never fully comprehend: gravity, emergent properties, language, consciousness, causation, the nature of motion, vision, and practical reasoning. Noam Chomsky, The Mysteries of Nature: How Deeply Hidden?, J. of Philosophy (forthcoming; manuscript on file with authors).
constitutional law if the constitutional architect starts with determinations that liberal and conservative Justices, who represent the intelligentsia within each party, initially found acceptable. For instance, all nine Justices rejected Jerry Falwell’s attempt to collect damages against Hustler magazine for publishing a vile, hurtful parody of a liquor ad featuring an obviously invented interview in which Falwell claimed to have had drunken sex in an outhouse with his mother, who had recently died. ⁸ By upholding this repulsive attack, the Court reaffirmed its commitment to protect a wide range of political speech, a commitment most liberal and conservative jurists support, finding common ground through the metaphor of “the marketplace of ideas.” ⁹ Dissent, on and off the Court, enables our legal and political systems to resemble the scientific method: aside from discourse, nothing is permanently settled; everything remains open to criticism and refutation. Political dissent protects the electoral process; public criticism and elections are the defining characteristic of any Open Society ¹⁰. Thus, it would be all but impossible to convince this two essay’s authors to adopt any all-inclusive theory of constitutional interpretation that jettisons the “viewpoint discrimination” doctrine, which protects the core of that most fundamental of rights, free political speech. However, the daunting task of making an overall assessment of the conservative era requires someone as gifted, inspired, and sympathetic as the late John Hart Ely, who eloquently and gracefully reconfigured existing

⁹ Justice Oliver Wendell Holmes introduced the image of the marketplace in his dissent in Abrams v. United States, 250 U.S. 616. Contrary to popular belief, Justice Holmes did not coin the phrase, but rather admonished that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Id. at 629. For an historical and contextual account of Justice Holmes’ metaphor see Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 Sup. Ct. Rev. 1 (2004). The marketplace of ideas metaphor maintains a pervasive role in judicial opinions, including Supreme Court determinations. W. Wat Hopkins, The Supreme Court Defines the Marketplace of Ideas, 40 JOURNALISM & MASS COMM. Q. 40, 42 tbl.1 (1996); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (Oxford, 1989). The contemporary reception by legal scholars, however, has been less sanguine. See, e.g., Paul H. Brietzke, How and Why the Marketplace of Ideas Fails, 31 VAL. U. L. REV. 951 (1997); Christopher T. Wonnell, Truth and the Marketplace of Ideas, 19 U.C. DAVIS L. REV. 669 (1986).
constitutional law to strengthen most Warren Court jurisprudence while undermining such controversial decisions as *Roe v. Wade*.\(^{11}\) Perhaps this less ambitious inquiry, which sifts through the battleground of contentious cases with an often saddened and skeptical eye, will assist anyone attempting to duplicate Ely’s dazzling achievement. And even if most readers across the political spectrum reject our particular normative assessments, we believe we have more precisely described the structure of stare decisis.

II. DESCRIPTIVE FACTORS

This section discusses several traditional stare decisis factors that are easy to determine: the number of Justices initially favoring an opinion, the number of concurring opinions, the form of the doctrine, and subsequent litigation.

A. Initial Distribution of Votes and Concurrences

1. Closely-Contested Cases

Why focus on closely contested cases, the five-to-four and six-to-three opinions won by Justices conventionally considered “conservative?” First, the Supreme Court held that the closeness of the original vote helps determine a case’s continuing validity.\(^{12}\) This factor is relevant. If the Constitution is something of a “mixed constitution,” containing institutions that reflect American society’s democratic, aristocratic, and monarchical forces and needs, then the Supreme Court is the aristocratic component, resembling the House of Lords in England before it

\(^{11}\) JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

lost power in early Twentieth Century. As de Tocqueville explained almost two hundred years ago, lawyers are America’s aristocrats, responsible for suppressing foreseeable excesses of the predominately democratic, egalitarian American culture. Little has changed: the Falwell case demonstrates that few lawyers trust the general populace with free speech rights. Even if one rejects the notion of a “mixed constitution” because all federal officials ultimately derive their power from the electoral process, all Supreme Court Justices are extremely ambitious, successful individuals. They represent the American ruling class in general as well as the political party won the Presidency and obtained enough power in the Senate to ensure their nominations.

Supreme Court consensus tends to reflect widespread agreement among the elite in general, which always should consider popular will. There is a perpetual tension between the elite and the masses in this society, as in every other; American leaders risk a severe backlash if their actions deviate too far from overall public opinion. Once again, de Tocqueville acutely described the limits of legal authority in the United States: “The majority [of the people in the United States], therefore, exercise a prodigious actual authority, and a moral influence which is scarcely less preponderant; no obstacles exist which can impede, or so much as retard its progress, or which can induce it heed the complaints of those whom it crushes upon its path.”

13 See William Blackstone, Commentaries on the Laws of England 57 (2001) (identifying the House of Lords as the “supreme court of judicature in the kingdom.”) More recently, the British parliament has moved to abrogate the judicial powers of the House of Lords and to create an independent Supreme Court for the United Kingdom. Constitutional Reform Act, 2005 (Eng.). While the presiding Law Lords will populate the new Supreme Court when it opens in October 2009, an “independent” judiciary will presumably be part of the Parliamentary process.


15 De Tocqueville, supra note __ at 301. Abraham Lincoln was fully attuned to the ultimate power of the masses and sought to harness the capriciousness public to his advantage. In his first debate with Stephen A. Douglas, Mr. Lincoln pithily proclaimed, “[P]ublic sentiment is everything. With public sentiment nothing can fail; without it, nothing can succeed. Consequently he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions.” Abraham Lincoln, Complete Works of Abraham Lincoln 298 (John George Nicolay & John Hay eds.) (1907).
Return to *Falwell v. Hustler Magazine* for a moment. Pragmatists are satisfied if there are one or two “good reasons” supporting a particular outcome. Only time will tell if the Court’s reasons are “good” enough. There was not a widespread public outcry after the Court refused to compensate the Reverend for his injury. Nor has the case generated significant academic and/or political controversy.\(^{16}\) *Falwell* is not on many people’s short list of improper examples of “judicial activism.” But this jurisprudential tranquility remains historically contingent: it is hard to imagine earlier Supreme Courts protecting *Hustler* magazine.\(^{17}\)

The process of constitutional adjudication is permeated with discretion—with dozens, if not hundreds of choices in every case. Every Justice begins with the relevant constitutional text, the underlying constitutional Scale of Justice, but they weigh the factors (including stare decisis) very differently. Indeed, they disagree about which factors belong on the textual Scales.\(^{18}\) They also vary weights and measures depending upon the particular text and the particular issue. All of this interpretive balancing interacts with the Justice’s pre-existing ideological inclinations. Thus, disagreement at this high level among professionals who have already been deeply


\(^{17}\) *See* *NY Times*, 376 U.S. at 256 (“We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.”) (emphasis added).

\(^{18}\) Some Originalist justices ostensibly place only one factor on the scale. Nonetheless, most Supreme Court justices evince a nuanced approach to constitutional adjudication. On one extreme there are “faint-hearted” originalists such as Justice Antonin Scalia. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”). Within the province of conservative justices, there is also room for a multifactor pragmatism (e.g., Justice O’Connor’s treatment of stare decisis in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)). Justice Stevens’ jurisprudence has been characterized under the rubric “pragmatic populism.” Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens’s Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201 (2006). Finally, the current Court is constituted by a number of “instrumentalist” justices (e.g., Justices Ginsburg and Breyer) who emphasize purpose and policy in adjudication. *See* CHARLES D. KELSO & R. RANDALL KELSO, *THE PATH OF CONSTITUTIONAL LAW* (2007).
influenced by similar ambitions, backgrounds, training, and experience usually reflects broader political differences. One beauty of democracy is that it divides the elite to some degree, requiring would-be leaders to curry favor amongst the masses. Both political parties all but promise supporters that they will appoint Supreme Court Justices who will issue favorable rulings in contested areas. Every four years, Americans don’t just elect a President; they also help determine the Court’s future. Democrats protect abortion\(^{19}\) and gay rights.\(^{20}\) They want to continue keeping prayer out of public schools.\(^{21}\) Republicans promise their Justices will defend the traditional family\(^{22}\) and severely limit the rights of criminal defendants and suspected terrorists.\(^{23}\)

This essay seeks to avoid facile reductionism: many decisions cannot be explained in terms of partisan politics or immediate ideological preferences. Indeed, one of the stare decisis’s virtues is that its commitment to consistency can trump those impulses. The process of adjudication, like all forms of practical reason, cannot be reduced to one or two variables. Some cases are “hard” because there is a basic lack of agreement among the Justices about what should be done. Others are “hard” because Justices are caught in a constitutional crossfire: various factors pull in opposing directions. Indeed, the doctrine of stare decisis remains murky and

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\(^{19}\) See Charles Krauthammer, *Abortion debate is needlessly muddled*, CHI. TRIBUNE, May 14, 2007, at 19 (“Democrats are pro-choice and have an abortion litmus test for judges they would nominate to the Supreme Court.”).


\(^{21}\) Chris Mondics, *Foes on right, left await Spector’s vote on federal judge*, PHILADELPHIA INQUIRER, July 21, 2003, at A03 (reporting Democratic opposition to an Eleventh Circuit Court of Appeals candidate as a result of the candidates “outspoken defense of school prayer”).


erratic in application because it asks a Justice to allow the cluster of considerations supporting
continuity to trump the other reasons leading the Justice to believe an opinion was initially
misguided. And such tensions, which create malleable uncertainty, are desirable. One virtue
of stare decisis is that it pulls a Justice away from the immediate political world and requires him
or her to consider existing jurisprudential traditions. To the degree that a tradition is strong,
validated by longevity and/or an initial decision that cut across the existing, albeit forever
shifting conservative/liberal divide, the new Justice should be more willing to abide.

2. Concurring Opinions

Along with close votes, another indicator of doctrinal vulnerability is a plethora of
concurring opinions or mixed opinions in which some Justices only adopt parts of the majority or
plurality decisions. While most five-to-four opinions raises the straightforward question of
whether or not one agrees with the decision, the multiple-decision case is often hard to
decipher. The lack of guidance weakens these cases.

24 In fact, this is the heart of stare decisis: “What defines the doctrine of stare decisis as a judicial practice – which
gives the doctrine any punch at all – is adherence to what a court, by hypothesis, otherwise would regard as an
erroneous exposition of law.” Michael Stokes Paulsen, Does the Supreme Court’s Current Doctrine of Stare Decisis

25 These “plurality decisions” have been succinctly defined as “those in which a majority of the Court agrees upon
the judgment but not upon a single rationale to support the result.” Linda Novak, Note, The Precedential Value of
Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756, n.1 (1980). The number of plurality decisions has
increased substantially over time. From 1800-1956, the United States Supreme Court handed down forty-five
plurality decisions. Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. CHI. L.

26 The Court has adopted a singular approach for determining the “holding” of a plurality decision. “When a
fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the
holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the
n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)) For a discussion of various views on the Marks doctrine
and alternative approaches proffered by lower courts, scholars and individual Supreme Court justices see Joseph M.
Cacace, Note, Plurality Decisions in the Supreme Court of the United States: A Reexamination of the Marks

27 The paucity of guidance is underscored by several Supreme Court majority decisions (accompanied by
concurrences) following which lower courts have differed in application of the Court’s putative holding by latching
onto the majority or concurring opinions. Examples include: United States v. Container Corp. of America, 393 U.S.
Conversely, they are easier to retain than more clearly polarized outcomes, because future Justices can seize upon language in a concurrence to alter the doctrine. It is far easier to reconstruct doctrine or apply it in novel situations when the rule was initially unclear. Except during the Civil Rights era, federalism has been of more interest to the intelligentsia than the average citizen. For conservative lawyers, it has been a rallying point: they named their most influential and famous organization *The Federalist Society*. Supreme Court Justices Rehnquist, Kennedy, O’Connor, Scalia, and Thomas have often protected States from the federal government and individual litigants. Putting that norm into practice has not always been easy. *United States v. Lopez* attempted to shift much power from the federal government to the States by limiting Congressional power under the Commerce Clause. In that five-to-four decision, conservatives invalidated a federal law criminalizing bringing firearms into public schools.

However, the conservatives failed to speak with a unified voice. In his majority opinion, Chief Justice Rehnquist found that the federal government overreached for several reasons: (1) Congress failed to demonstrate that guns in schools had a substantial effect on interstate commerce; (2) Congress failed to require the prosecution to provide adequate proof that it had jurisdiction; (3) the defendant had not engaged in any economic transaction; (4) States had

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30 *Lopez*, 514 U.S. at 551.

31 Id. at 561.

32 Id. at 561-62.

33 Id. at 561.
primary responsibility for running school systems;\textsuperscript{34} and (5) Congress cannot easily expand the scope of federal criminal law.\textsuperscript{35} Justice Thomas’ concurrence was far more ambitious, doubting the constitutionality of much Congressional legislation since the New Deal: “I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. * * * If anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.”\textsuperscript{36} In their concurrence, Justices O’Connor and Kennedy repudiated Thomas’s vision: “Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.”\textsuperscript{37} These concurrences represent a major ideological split among judicial conservatives. Only Thomas mused of constitutionalizing economist Milton Friedman’s vision of federal deregulation, which accurately predicts that most States will gut regulations to keep and attract capital.\textsuperscript{38} The four liberals found the entire exercise inappropriate: States had ample power to protect their own interests through the political process.\textsuperscript{39} While some conservatives foresaw a constitutional revolution,\textsuperscript{40} many liberal critics believed that the Court would apply Rehnquist’s criteria in a haphazard, result-oriented way of

\textsuperscript{34} Id. at 564-66.

\textsuperscript{35} Id. at 562-67.

\textsuperscript{36} Id. at 596, 599.

\textsuperscript{37} Id. at 574.


\textsuperscript{40} See, e.g., Marcia Coyle, Washington Gets Amendment Fever, NAT’L.J., June 5, 1995, at A1 (quoting Professor Bernstein of New York Law School stating “We’re seeing the most remarkable shift in public thinking about government and where governmental responsibilities should be placed since FDR.”).
little importance. The main beneficiaries would be lawyers and legal theorists, who would argue endlessly about Rehnquist’s factors, which had replaced the prior bright line rule deferring to Congressional use of the commerce clause power in social and economic situations. The Kennedy/O’Connor approach prevailed, which came as little surprise because O’Connor and Kennedy have been the crucial swing votes in most closely contested cases. There has been no wholesale assault on regulatory capitalism at the constitutional level. The conservatives have struck down a few laws, most notably Congress’s attempt to provide more protection to women by criminalizing gender-motivated violence in United States v. Morrison. But majorities erratically applied the malleable factors in Lopez in ways that can best be explained by the ideological preferences of the Justices (it is harder to determine the viewpoints of Justices who uphold laws, because one cannot know if they liked the law or just found it a valid exercise of legislative power). According to fluctuating majorities on the Court, Congress could protect the privacy of state drivers’ licenses from intrusive questioning and prohibit the use of freely

41 See, e.g., Barry C. Toone & Bradley J. Wiskirchen, Great Expectations: The Illusion of Federalism After United States v. Lopez, 22 J. LEGIS. 241, 264 (1996) (“When its own history is recorded, Lopez will be ‘seen as only a misstep,’ without a marked effect on the Commerce Clause”) (quoting Lopez, 514 U.S. 615 (Souter, J., dissenting)); Chris Marks, supra note ___ at 542 (“[Lopez] will ultimately have little effects on the current regulatory state.”); Julian Espeit, Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases, 34 HARV. J. ON LEGIS. 525, 555 (“[T]he Lopez decision is unlikely to result in any watershed change in congressional authority. .”).


43 See Ruth Colker, Justice Sandra Day O’Connor’s Friends, 68 OHIO ST. L.J. 517, n.56 (2007) (citing Harvard Law Review report statistics evincing O’Connor’s role as the key swing voter); see also RUPAL Doshi, SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW 2, Georgetown Univ. Law Center, Supreme Ct. Institute (2007) (“Justice Kennedy has more than fully assumed Justice O’Connor’s role as the swing vote in the Court’s 5-4 decisions; he has surpassed it.”).

44 529 U.S. 598 (2000).

distributed medical marijuana even though there was no commercial transaction.\textsuperscript{46} There has been no cataclysm, merely erratic confusion.\textsuperscript{47}

What should be done with this potpourri of cases and doctrines? A liberal majority would never join Justice Thomas’s crusade against the New Deal. However, they should not overrule \textit{Lopez}. First, the decision has not done much damage. The States can and do punish those who carry guns into schools and commit sexually motivated assaults on women.\textsuperscript{48} The existence or nonexistence of the law in \textit{Morrison} would have little, if any deterrent effect on would-be rapists.\textsuperscript{49} Second, it is easy to apply the doctrine less rigorously. Congress can establish relatively trivial jurisdictional requirements, such as requiring that the Justice Department prove that any gun brought into a school contains parts manufactured outside the state.\textsuperscript{50} If the liberals wish to overrule \textit{Morrison} without overruling \textit{Lopez}, they can easily manipulate the degree of deference to Congressional “findings,” stating that Congress provided sufficient evidence to justify additional protection of women. There is no objective way to infer when a legislature has proven the “need” to do something after considering a wide range of

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  \item \textsuperscript{46} \textit{Gonzales v. Raich}, 545 U.S. 1 (2005).
  \item \textsuperscript{48} \textit{Lopez}, 514 U.S. at 581 (“Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.”).
  \item \textsuperscript{49} \textit{See} Owen D. Jones, \textit{Sex, Culture, \& the Biology of Rape: Toward Explanation \& Prevention}, 87 CAL. L. REV. 827, 924 (1999) ([T]he biobehavioral perspective on sexual aggression may suggest that the VAWA [Violence Against Women Act struck down in \textit{Morrison}] is unlikely to be as effective a remedial and deterrent mechanism as its proponents hoped.”)
  \item \textsuperscript{50} \textit{See Lopez}, 514 U.S. at 561-62 (implicitly providing for a jurisdictional hook which would render a commerce clause quandary moot); \textit{Morrison}, 529 U.S. at 611-12.
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studies, listening to testimony, and gathering anecdotes. \(^{51}\) Behind every legal inference lurks a complex jurisprudence. Furthermore, there is hardly any judicial adjective more malleable than “substantial” and any judicial noun pliable than the casual notion of “effects.” \(^{52}\) Justices more sympathetic to Congress can find a “substantial” number of problems that allegedly influence interstate commerce. For example, unlike their conservative colleagues in *SWANCC* \(^{53}\), they could conclude that Congress can prevent a private party from destroying a pond because that the destruction of many such ponds would have a substantial/aggregate adverse effect on interstate commerce due to effects on migratory animals, water and wetlands conservation, and global warming.

A future progressive Court might want to consider keeping *Lopez* alive, if not totally ambulatory. One major mixed blessing of *Lopez* is that it makes it more difficult for Congress to plunge into the cultural wars that have divided and distracted this country for decades. If Congress cannot pass a law protecting women from sexual assault when the States have been enforcing such laws for centuries, Congress may not be able to punish adultery, overconsumption of junk food, teenage drinking, homosexuality, and flag burning. Admittedly, 

\(^{51}\) Indeed, Justice Breyer’s “rational basis” test in *Lopez* merely asks whether Congress *could* “rationally have found that ‘violent crime in school zones’ through its effects on the ‘quality of education,’ significantly (or substantially affects ‘interstate’ or ‘foreign commerce’?” 514 U.S. at 618. Such a formulation of the rational basis test does not even require Congressional findings.

\(^{52}\) See *Gonzales*, 545 U.S. at 67 (Thomas, J., dissenting) (“[T]he ‘substantial effects' test is a ‘rootless and malleable standard’ at odds with the constitutional design.”) (quoting  *Morrison*, 529 U.S. at 627 (Thomas, J., concurring)). While Justice Thomas has bombastically overstated the incompatibility of the substantial effects test with the Constitution, his point about malleability is well taken.

\(^{53}\) See *Solid Waste Agency of Northern Cook County[SWANCC] v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In *SWANCC*, the Court declined to reach the constitutional, commerce clause issue of whether the Army Corp. could regulate “isolated” wetlands under an aggregate, substantial effects test. *Id.* at 174. Instead, to avoid a possible constitutional issue if the statute were construed the way the government wished, the Court held Army Corp. had exceeded its Congressionally-delegated statutory authority in regulating wetland activity pursuant to the Migratory Bird Act. *Id.* at 170-72. Five years later, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court further constrained agency action pursuant to the Clean Water Act by narrowly construing the definition of “navigable waters” under the CWA.
the Court has protected some of these activities under other textual provisions,\textsuperscript{54} but there is no harm in having two constitutional bulwarks against injustice instead of one. Of course, it is hard to draw any principled, easily applicable constitutional line in terms of the commerce power. Most of us want the federal government to prosecute kidnappers and terrorists, even when they are uninterested in money. Nor can liberals easily protect medical use of marijuana: the federal government should be able to outlaw any drug it believes is dangerous, whether purchased or not.

Because legal reasoning resembles a simultaneous equation containing numerous variables, this article’s choice of a contested case or doctrinal area to exemplify separate stare decisis considerations can be misleading. All the discussed factors influence or should influence any reconsideration (of course, our list of factors is also contestable in terms of inclusion, omission, and exclusion). In other words, there are other, more important reasons why \textit{Lopez} should or should not be retained than the fact that the winning side spoke in three voices. \textit{Lopez} demonstrates why multiple opinions are relevant to the stare decisis calculus, not why they are determinative. Indeed, Justices should look at all the factors before reaching a decision.

\textbf{B. The Form of the Doctrine}

For quite some time, there has been a debate about the comparative value of “bright line” rules versus “balancing tests.”\textsuperscript{55} Justice Scalia asserted in a law review article that the “rule of law” should consist of the “law of rules,” i.e., bright lines.\textsuperscript{56} On the Court, he frequently

\textsuperscript{54} See, e.g., \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) (striking down Texas anti-sodomy statute); \textit{Texas v. Johnson}, 491 U.S. 397 (1989) (providing First Amendment protection to flag burning as expressive conduct);


castigated his colleagues for employing balancing tests, for acting like “Mr. Fix-it.” Justice Scalia is overreacting: just as it is useful to regulate traffic with posted speed limits, which are rigid rules, it is also desirable to supplement those laws with the more indeterminate standard of “reckless driving,” even though that standard gives police discretion that they may abuse. Consequently, this section considers how the Court’s chosen form of doctrine interacts with stare decisis without concluding that either form is innately preferable. Rules and standards have different costs and benefits, different effects. To the degree that a doctrine is a formal rule requiring little or no discretion in application, it is difficult to distinguish or dilute. Whenever a party can prove the relevant, straightforward facts, that party wins. Defendants lose if they are arrested for driving sixty miles an hour in a fifteen mile-an-hour school zone. The court applies the universal, numerical speed limit (the ultimate bright line rule) to the particular relevant fact (which is also easily measurable) and finds the defendant guilty in the absence of extraordinary equitable circumstances (suppose the defendant were driving a terrorist’s car bomb away from the school).

1. Bright Line Rules

The Supreme Court has created many bright lines in constitutional law. For example, in *Loretto v. Teleprompter Manhattan CATV Corporation* the Court held that a city ordinance had “taken” a landlord’s property by requiring installation of cable facilities. Although the “permanent physical invasion” of the building was trivial, the government must compensate the

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59 Id. at 58.

60 458 U.S. 419 (1982).
owner. This bright line rule protects two of the most important rights in real property’s bundle of rights: the rights of exclusion and personal use. Future plaintiffs simply prove “permanent physical invasion,” the occupation of their land for a long time. There will be few evidentiary or inferential problems (unlike determining if taking a gun into school adversely and substantially affects interstate commerce). It will be hard for future courts to persuasively distinguish Loretto in similar situations, such as a governmental requirement that property owners permit cellular phone towers without payment. Admittedly, there will be squabbling at the margin over the meaning of the adjective “permanent,” but the rule is quite predictable because it is relatively easy to apply to similar situations. The rule should not generate a great deal of litigation; cases will be easily and quickly settled whenever a governmental entity violates the rule. Indeed, the Supreme Court has only applied Loretto in one other case.

61 Id. at 434-35.
63 Loretto, 458 U.S. at 436.
64 Id. at 437-38; In applying Loretto’s holding, there has been stark divergence by appellate courts. See Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 93 (2d Cir. 1992) (“The Loretto Court explained that a permanent physical occupation occurs when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose. This entails that “the government action must ‘forever den[y] the owner any power to control the use of the property,’ such that he ‘can make no nonpossessory use’ of it.” (quoting Loretto, 458 U.S. at 436)); contra Hendler v. United States (Hendler III), 952 F.2d 1364, 1376 (Fed. Cir. 1991) (concluding that in the context of permanent physical invasions, “‘permanent’ does not mean forever, or anything like it.”).
65 See Loretto, 458 U.S. at 436 n.12. At the District Court level, litigation has ensued over whether prohibiting property owners from imposing a ban on firearms stored in a parking lot constituted a “permanent physical invasion.” See ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1310 (N.D. Okla. 2007) (holding that state statute did not “force any permanent ‘physical structure’ on Plaintiffs’ property”); Within the Federal Circuit there has been internal tension over how to interpret the phrase “permanent.” Compare Hendler III, 952 F.2d at 1376 (“‘[P]ermanent’ does not mean forever, or anything like it.”), and Boise Cascade Corp. v. United States, 296 F.3d 1339, 1356 (Fed. Cir. 2002) (refusing to apply Hendler’s language literally, asserting that the Hendler court “merely meant to focus attention on the character of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration.”) We don’t think it will be difficult for the Court to create reasonably clear guidance to the meaning of “permanence.”
66 See Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (ultimately concluding that Petitioner was not owed any compensation because their pecuniary loss was zero whenever Washington’s IOLTA statute was
Loretto should remain on the books. Holmes observed that there is no better reason for a law than its resonation with deep human instincts. People do not like other people putting things on their property without permission. Many years ago, many Americans destroyed telephone poles that suddenly sprung up on their property when the new technology spread across the land.

The Court created another bright line in takings jurisprudence in Lucas v. South Carolina Coastal Council\textsuperscript{70} by holding that a State could not pass laws that strip a piece of property of all value. When people buy land, it is a reasonably foreseeable risk that the government may pass future laws that will diminish the value of their land (zoning is most obvious), but nobody would like to buy land knowing that the government can legislate the land’s value out of existence by precluding any development. According to the Court, that loss is constitutionally unacceptable. Zoning laws may diminish, but do not destroy the value of any one piece of property, while possibly increasing overall neighborhood value. Investors would pay less for

\textsuperscript{67} Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897) (“The law can ask no better justification than the deepest instincts of man.”).


\textsuperscript{69} Eula Bliss, The War on Telephone Poles, HARPER’S MAG., Feb. 2009 at 19. See also War on Telephone Poles, N.Y. TIMES, Feb. 6, 1889 at 1.

\textsuperscript{70} 505 U.S. 1003 (1992)

\textsuperscript{71} See Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.”).

\textsuperscript{72} Moreover, even if an individual has purchased land with full knowledge and notice of a regulation depriving the parcel of economic use, he is not barred from making a Lucas claim. See Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001).

\textsuperscript{73} Lucas, 505 U.S. at 1019.

\textsuperscript{74} See Bradley C. Karrkkainen, Zoning: A Reply to the Critics, 10 J. LAND USE & ENV. LAW 45 (1994) (defending the community benefits of zoning); see also John M. Quigley & Larry A. Rosenthal, The Effects of Land Use
real property (particularly wetlands) if they knew they assumed a risk that the government could wipe them out. There are extreme cases that cry for judicial intervention. Imagine the Army Corps of Engineers building a dam that floods private property or a law precluding owners from occupying their land because the owners disturb an endangered species: the only thing the owners retain is title and tax liability. While there will be few situations when a government has totally deprived someone of their land’s value, the bright line rule creates a bulwark against governmental bad faith, of expropriation via regulation. Both Loretto and Lucas remind legislators that they cannot confiscate property without paying for it. If the government wants to create a wildlife park, pay for it. Of course, the narrow rule does not account for the most common recurring land use problems. It does not explain how much regulation is permissible short of total devastation of value. Governments can still require developers to set aside some of their land for environmental, aesthetic, or safety purposes. They can still use nuisance law’s balancing test to prevent the landowners from abusing their rights. Any future Court would be

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75 This is exactly what occurred to property owners in Jacobs v. United States, 290 U.S. 13 (1933).

76 The “denominator problem,” the inconsistent and fluctuating application of the definition of the relevant parcel for takings purposes, has consumed the attention of the Court and scholars. Compare Lucas, 505 U.S. at 1015 n.7 (describing the uncertainty of how to confront the denominator problem where “a regulation requires a developer to leave 90% of a rural tracts in its natural states), and Penn. Central Trans. Co. v. New York, 438 U.S. 104, 130-31 (“‘Taking’ jurisprudence does not divide a single parcel into discrete segments and try to determine which rights in a particular segment have been entirely abrogated…this Court focuses rather both on the… the parcel as a whole…”). For scholarly examinations of this issue see Jill S. Gelineau, How Much is Too Much? The Relevant Parcel Problem, 2007 A.L.I.-A.B.A. CONTINUING LEGAL EDUCATION 193; Patrick Wiseman, May the Market Do What Taking Jurisprudence Does Not: Divide a Single Parcel Into Discrete Segments?, 19 TUL. ENVTL. L.J. 269 (2006); Danaya C. Wright, A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis, 34 ENVTL. L. 175 (2004).

77 See generally Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Dolan v. City of Tigard, 512 U.S. 374 (1994) (permitting set-asides where there exists (1) a nexus between the exaction and a legitimate government interest and (2) the exaction is “roughly proportional” to the harm caused by the development).

under great pressure to explain how and why it chose to alter these clear cut rules. Could Justices claim with a straight face that they were complying with *Loretto* after a lower court had found that the government placed a fixture on the plaintiff’s property or had occupied part of the plaintiff’s land for two years while building a sewage system? Consequently, bright line rules resist change more than factor tests, which require Courts to consider different variables having little or no commensurability, or balancing tests that usually include a conclusory adjective. Current Justices can better embed their fears and aspirations in rules. Because a bright line is harder to dilute or distinguish, an unsympathetic majority must accept the rule and its applications, replace it with a different doctrine, or overrule it. Unless a Court wants to disrupt massive amounts of constitutional law, it will leave many of these rules alone.

2. Balancing Tests

It is hard to take Justice Scalia’s dichotomy too gravely because he has frequently joined conservative majorities that replaced bright lines with balancing tests, as in *Lopez*, and has created his own pliable doctrines. In *Nolan v. California Coastal Commission*, he held that the Commission acted unconstitutionally by not permitting beachfront property owners to rebuild without providing public access to the beach. He claimed that the “nexus” between the end (increasing public access) and the means (regulating home construction) was so tenuous that California engaged in “a plan of out-and-out extortion.” There is no objective way to “fit” ends and means. Nor is there any easy way to determine when the government is not engaging in legitimate use of power but is invoking that power as a “pretext,” which in this context is

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79 This should be distinguished from moratoria on development, which last two-three years. These temporary takings do not fall within the ambit of the categorical rule of *Lucas*. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

80 *See Forms of Doctrine, supra note __, at 806, 819.*


82 *Id.* at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).
“extortion.” Courts determine the quality of the fit between claimed ends and means by looking at evidence,\(^{83}\) relying upon “common sense,”\(^{84}\) assessing alternatives for both sides,\(^{85}\) and evaluating the means’ impact. The Supreme Court infers bad intentions to governments when they conclude governments have gone “too far.”\(^{86}\) In addition, the doctrinal field of “unconstitutional conditions” is remarkably resistant to grand theory.\(^{87}\) There is a legal consensus on and off the Court that the government has more constitutional discretion when determining how to spend its own money than when regulating others.\(^{88}\) But in both situations, the Justice’s conclusion reflects the depth of their sympathies for the competing rights and powers. For instance, there is virtual unanimity in the legal profession that States cannot impose racist conditions on the benefit to attend public school: *Brown v. Board of Education*\(^{89}\) is a constitutional given. But it is more difficult to determine how much the government should regulate its employees’ speech.\(^{90}\)

There is also a consensus that the State can impose health, safety, aesthetic, and environmental conditions on building permits. The problem is one of degree, not of kind, as

\(^{83}\) **Dolan**, 512 U.S. at 392-96.


\(^{86}\) **Mahon**, 260 U.S. at 415 (“While property may be regulated to a certain extent, if regulation goes too far it will be recognized at a taking.”); *see also Vieth v. Jubelirer*, 541 U.S. 267, 335 (2004) (Stevens, J., dissenting) (“[W]hen race is elevated to paramount status – when it is the be-all and end-all of the redistricting process – the legislature has gone too far.”).


\(^{89}\) 347 U.S. 483 (1954).

\(^{90}\) *See*, e.g., *Garrett v. Ceballos*, 547 U.S. 410, 417-20 (summarizing the development of professional employee speech case law); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).
reflected in Scalia’s slippery “nexus” test. Justice Scalia joined Chief Justice Rehnquist’s subsequent opinion, *Dolan v. City of Tigard*, which added a balancing requirement to Scalia’s inferential “nexus” test. The City would not allow to a businesswoman to expand her store unless she also dedicated part of her undeveloped land to flood control and a public bike path. The Chief Justice found that the conditions “fit” in the sense that dedicating land to flood control limited the risk of flooding, unlike the situation in *Nolan* where there was no obvious relationship between rebuilding a home and public access to a beach. But he asserted that there was a disproportionate relationship between the impact of the future development on the environment and the impact of the condition on the owner. “Proportionality” tests are classic balancing tests. One tipping factor was the City’s interference with the plaintiff’s right to exclude others, “one of the most essential sticks in the bundle of right,” by demanding a public path. But no bright line exists. Future Courts must compare the size and expense of the development with the costs and benefits of legal requirements.

*Nolan* and *Dolan* present a future liberal Court with several choices: (1) should they jettison the doctrines either by overruling them or replacing them with a different approach? (2) Should they reverse the particular outcomes while limiting the doctrines’ future impact? or (3) should they extend the standards to other situations? The doctrines protect *Loretto’s* core rights. It would be very troubling if a City could “condition” a landlord’s application for a building or

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91 512 U.S. at 388-91.
92 *Id.* at 379-80.
93 *Id.* at 377-78.
94 *Id.* at 394-96.
96 *Dolan*, 512 U.S. at 393.
health permit upon allowing the government to permanently invade the property with cable
devices and the like. At some point, the government has gone “too far,” unless one believes
that the government has unlimited power to condition permits. Although Dolan and Nolan
remain debatable—as the five-to-four opinions indicate—they provide guidance and some
obscure limits reducing likely governmental abuse of the permitting power. At the least, the
Court will be skeptical of efforts to force landowners to admit more people on their property
(whether along a beach or on a bike path). They have not spawned a massive amount of
litigation strangling the government’s ability to regulate development.

How should these cases be applied in the future? It is hard to say: it depends upon the condition.

These examples demonstrate how rules are stronger and weaker than balancing tests. Rigid
rules’ strengths of clarity, ease of application, predictability, and durability are also weaknesses
because they give future Justices less maneuvering room. Almost ironically, rules need the
doctrine of stare decisis more than balancing tests. Balancing tests bend but need not break, while bright lines force the Court into an “all-or-nothing” position. Balancing tests are more
durable, while bright lines are more impregnable. Yet the very rigidity of the bright line gives it
a different form of durability: the Court may leave the entire area alone rather than explicitly
reverse the opinion.

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98 For a summary of the body of law that has developed on mandatory cable access see Norman M. Sinel et al.,
Recent Developments in Cable Law, 889 P.L.I. PATENT, COPYRIGHT, TRADEMARKS, AND LITERARY PROPERTY

99 Apparently, some scholars have reached this conclusion, at least in limited doctrinal categories. See Cass R.

100 Cf. Carlos A. Ball & Lawie Reynolds, Exactions & Burden Distribution in Takings Law, 47 WM. & MARY L.
REV. 1513, 1559-60 nn.219-221 (2006) (collecting cases and summarizing the differences in the way lower courts
have applied the Nollan-Dolan test to legislative exactions, adjudicative exactions and impact fees).

101 Sullivan, supra note __, at 66-67.
When Courts invalidate a rule, they need a doctrinal replacement. After all, they have not just tossed out a rule, but also its existing and likely applications. However, some of the situations covered under the existing rule might warrant continuing protection. The inability to come up with better alternative doctrine is another reason to maintain the status quo. For instance, the Court usually creates a bright line for a powerful reason—it perceives the particular factual issue to exemplify a “core right,” “core interest,” or “core power” that could and should be easily and aggressively protected.\textsuperscript{102} Such cases usually involve relatively clear-cut facts invoking strong reactions. Wittgenstein explained that one of the major ways to determine the function of a word is to apply it to a particularly compelling example.\textsuperscript{103} Bright lines prevent further incursion. To the degree that many people instinctively believe the Court initially handled the core, triggering example properly, it is harder for future Justices to dismiss the doctrine and future applications. Thus, any liberals who want to get rid of Loretto, Nolan, and Dolan must create new doctrine, which is likely to be more imprecise, that still prevents some of the problems identified in those cases.

\textbf{C. Formal Equality}

When invalidating a state law levying a special operations tax on a national bank in \textit{McCulloch v. Maryland},\textsuperscript{104} Chief Justice Marshall utilized numerous constitutional arguments that would frame future constitutional analysis. He first stated that the Court should be deferential when assessing the fit between Congress’s chosen means, a national bank, and its

\textsuperscript{102} See, e.g., \textit{R.A.V. v. St. Paul}, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . .”).

\textsuperscript{103} \textsc{Ludwig Wittgenstein}, \textsc{Philosophical Investigations} 6e, 109e, Aphorisms 11, 340 (Trans. G.E.M. Anscombe 1997) (1945).

\textsuperscript{104} 17 U.S. (4 Wheat.) 316 (1819).
constitutionally authorized ends, which included financing the military an army.\textsuperscript{105} Courts cannot easily determine the degree of “necessity.”\textsuperscript{106} Marshall next all but declared the state tax to be pretextual, designed to destroy the bank instead of to raise revenue.\textsuperscript{107} Marshall condemned the tax’s focusing on bank operations.\textsuperscript{108} He conceded that the State retained power to tax federal entities in the same fashion that it taxed its citizenry.\textsuperscript{109} In other words, States could pass a generally applicable tax on wages or land that would apply to the national bank.\textsuperscript{110} Universality, by its very nature, reduced the risk of abuse; voters would not support representatives who pass taxes that punish them as well an unpopular national bank.\textsuperscript{111} Furthermore, the targeted entity was tempting; states could reap a profit. They would collect revenues from people living outside their jurisdiction who had paid federal taxes supporting national bank.\textsuperscript{112} In effect, there would be taxation without representation.\textsuperscript{113} Finally, Marshall was well aware of the political controversy surrounding the bank.\textsuperscript{114} Indeed, he would come to its rescue again.\textsuperscript{115}

Marshall created a doctrine of formal equality that simultaneously authorized and limited governmental power. Formal equality is constitutionally attractive for many reasons.

\textsuperscript{105} Id. at 408-410, 421-423.
\textsuperscript{106} Id. at 421.
\textsuperscript{107} Id. at 431.
\textsuperscript{108} Id. at 436-37.
\textsuperscript{109} Id. at 436.
\textsuperscript{110} Ultimately, the Court later concluded that federal employee salaries are not immune from taxation by the states. See Graves v. O’Keefe, 306 U.S. 466 (1939). However, it does not appear that the states can tax federal land. See Van Bronklin v. Tennessee, 117 U.S. 151, 156-57, 175 (1886).
\textsuperscript{111} McCulloch, 17 U.S. (3 Wheat.) at 428.
\textsuperscript{112} Id. at 435.
\textsuperscript{113} Id. at 431.
Governments lose the presumption of constitutionality when focusing on constitutionally protected interests. Maryland had failed to create “common laws,” laws common to all, at the expense of constitutional interests. Also, formal equality often generates bright line rules, providing the benefits and costs that come with such rules, particularly ease of enforcement. Such rules make the Court appear more judicial: the higher the level of generality, the greater the appearance of impartiality. Finally, formally equal rules are very powerful. Some interest groups cannot overtly impose their unconstitutional preferences. For example, *Brown v. Board of Education*’s prohibition of racist public school systems prevented the racist interest group from using this despicable tool of oppression. It was easy to extend *Brown* to other forms of public segregation, undermining Southern apartheid. Of course, the racists hardly went away, continuing to play havoc in ways that were less effective and less degrading than explicit segregation. *Brown* mobilized white resistance that has lingered to the present day, but was the right thing to do.

*New York v. United States*\(^\text{116}\) mirrors Marshall’s approach. Justice O’Connor invalidated a federal law targeting States by requiring them to take title to undesirably expensive nuclear waste generated by private parties whenever States refused to participate in the federal disposal program.\(^\text{117}\) At the same time, she allowed Congress to pass formally neutral laws that equally burdened States and private parties.\(^\text{118}\) Thus, Congress could prohibit States from discriminating on the basis of age,\(^\text{119}\) disability,\(^\text{120}\) or race\(^\text{121}\) and could impose broad environmental laws.\(^\text{122}\)

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\(^\text{117}\) *Id.* at 149.

\(^\text{118}\) *Id.* at 160. Justice O’Connor cites several cases in which the Court had previously upheld generally applicable laws, including *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).


Just as Marshall’s opinion prevented Maryland from destroying the bank, so New York made it much harder for Congress to evade administrative and financial responsibilities by imposing unique obligations on the States and/or requiring State officials (aside from State judges) to enforce laws they did not make. If New York had gone the other way, corporations would have an attractive way to obtain state subsidies without public support. The tactics were not just coercive, but also a usurpation of State legislative power. Imagine a federal law requiring States to assume toxic bank assets if they didn’t implement a particular regulatory regime. Or even worse, a federal law transferring private toxic debts to the States. After New York, the corporations and the States could form alliances against general federal legislation. The “political safeguards of federalism” work much better when the States have private power as an ally instead of as a predator.

Formal equality does not solve all constitutional problems: it can exacerbate underlying social problems that legislatures should be able to address. The Court usually can choose between competing conceptions of formal equality, just as it can choose between competing conceptions of “rights.” Brown’s prohibition of segregation was as “formally equal” as Plessy v. Ferguson’s “separate but equal” doctrine, the rule that Brown explicitly overruled. Plessy arguably did not “discriminate” on the basis of race because it required (in theory but not in

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123 Nevertheless, the Court allowed the Federal government to enable and even encourage internecine conflict amongst the states by upholding the Act’s second set of incentives, which would permit states adhering to federal regulations to deny access to private waste generators from other states. For a discussion see Anthony B. Ching, Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment, 29 L.OY. L.A. L. REV. 99, 118-121 (1995).
124 Wilson, supra note __, at 1693-94.
125 New York, 505 U.S. at 176 (asserting that the federal action would “commandeer state governments into the service of federal regulatory purpose”).
126 163 U.S. 537 (1896).
practice)\textsuperscript{127} that States provide equal educational resources to all children.\textsuperscript{128} Moral philosophers from Aristotle to Thomas Nagel have observed that most political disputes can be framed in terms of competing conceptions of equality for which there is no self-evident ranking.\textsuperscript{129} Another group of political analysts have criticized formal equality’s outcomes. In his \textit{Second Discourse}, Rousseau did not describe the formation of the social contract as an agreement among equals.\textsuperscript{130} Rather, the rich and the poor were in such a state of perpetual conflict that the rich agreed to give up some of their power by adopting a system of formal equality, a system that would not destroy their existing wealth and power.\textsuperscript{131} The result, to paraphrase Anatole France, is that the rich and the poor have an equal right to live in their car after foreclosure.\textsuperscript{132} John C. Calhoun warned the North that its formally equal tariffs economically discriminated against the South by driving up the cost of imports and strengthening Northern manufacturing.\textsuperscript{133} He warned that the Constitution was not well designed to combat this unconstitutional sectional economic warfare--real violence was likely.\textsuperscript{134} 

\textit{Lochner v. New}  

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\textsuperscript{127} See \textsc{Anthony Lewis}, \textsc{Portrait of a Decade: The Second American Revolution} 20 (1964) (describing the disparity in 1915 where South Carolina spend $23.76 per white pupil and only $2.91 on the average African-American child).
\textsuperscript{128} This contention has indirectly informed part of the debate over which formally equal principle, anticlassification or antisubordination, was operative in Chief Justice Warren’s repudiation of \textit{Plessy} in \textit{Brown}. For an historical treatment of the competing principles since \textit{Brown} see Reva B. Siegel, \textit{Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown}, 117 Harv. L. Rev. 1470 (2004).
\textsuperscript{129} \textsc{Aristotle}, \textsc{Politics}, Book III, Part XII; \textsc{Thomas Nagel}, \textsc{Mortal Questions} 106-127 (Cambridge Univ. Press 1995) (1979).
\textsuperscript{130} \textsc{Jean-Jacques Rousseau}, \textsc{On the Origin of Inequality} (Trans. G.D.H. Cole, Cosimo 2006) (1754).
\textsuperscript{131} \textit{Id.} at 78-79.
\textsuperscript{132} See \textsc{Anatole France}, \textsc{The Red Lily} 95 (Trans. Winifred Stephens, John Lane 1910) (“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”).
\textsuperscript{133} \textsc{John C. Calhoun}, \textsc{South Carolina Exposition and Protest} (1828) (decrying the effect of the Tariff system in which “its burdens are exclusively on [the South] and its benefits on [the North]).
\textsuperscript{134} \textit{Id.}
York, another major case that the Court eventually overruled, was criticized for constitutionalized the common law’s formally equal rules of contract that assume equality of bargaining power. More recently, Derrick Bell and many other liberals disagreed that the Constitution must be “colorblind,” an aspiration found in Justice Harlan’s Plessy dissent in Plessy, because that standard threatens affirmative action. By ignoring a long history of legal, cultural, and economic inequality, colorblindness perpetuates those injustices’ effects. The affirmative action controversy is a classic example of interest group politics playing out at the constitutional level, a confirmation of de Tocqueville’s famous observation that in America all political issues eventually become legal disputes. In an ideal world, the Constitution should be interpreted as completely “color blind,” hostile to all laws using race as a category. Nevertheless, affirmative action may be a necessary evil, arguably justified by past injustices and future necessities (such as having a fully integrated officer corps to effectively lead our troops), but it will always remains under a constitutional cloud due to its incompatibility with the more universal rule. So what should be done about the Supreme Court’s current affirmative action doctrine, which has eliminated the tool except for higher education in Bakke? Future progressives will be tempted to permit States and the federal government to use affirmative action in hiring and contracting at all levels, but such a judicial counterattack will alienate many citizens. Thus, liberal Justices should seriously consider retaining Parents Involved in

135 198 U.S. 45 (1905).
137 See Cass R. Sunstein, Lochner’s Legacy, 87 COLUM. L. REV. 873, 882 (1987) (positing that the problem with the Lochner was the Court’s “decision to take market ordering under the substantive standards of the common law as the baseline from which to decide constitutional cases”).
139 Id. at 126-35.
Community Schools v. Seattle School District, which struck down plans to desegregate public schools by considering race, because that case did not involve higher education. Conversely, conservatives should be wary of overruling Bakke, which would alienate Hispanic voters and galvanize the Democratic Party. The divisive issue should be left in doctrinal limbo. The current doctrine targets talented minorities with assistance, not perpetual subordination. It provides access for the most talented members of all racial groups, diffusing racial tensions, facilitating diversity within the military, the academy, business, and politics. Nor was Aaffirmative action a big issue during recent elections or the Roberts and Alito confirmation hearings.

D. Subsequent litigation

After counting votes, reading supporting opinions, placing a rule along the bright line/balancing test continuum, and determining the degree of universality, a lawyer next makes a more contestable inference: how have future Courts and litigants responded to the rule? There are at least four ways to use subsequent litigation to measure doctrinal strength: (1) Does the rule generate numerous cases?; (2) Are the later disputes over application of the rule to new facts?; (3) Is the Supreme Court still disputing the wording of the rule?; and (4) Is the scope of the

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143 During Justice Alito’s confirmation hearings, Senator Kennedy and other Democrats pressed Alito on his relationship with a Princeton alumni group that published articles criticizing the University for its affirmative action policy. Ultimately, the issue had little effect on Alito’s confirmation. See Adam NaGourney & Neil A. Lewis, Court in Transition: The Overview, N.Y. TIMES, Jan 13, 2006 at A19.
144 In Casey, the Court seems to augment these four questions in its “prudential and pragmatic considerations.” 505 U.S. at 854-55. One such consideration is whether the rule defies practical workability. Id. at 854. Doctrine that is elusive in application evinces a tenuousness that may or may not be exhibited in increased litigation over its
rule growing, shrinking, or relatively stable? This internal, opinion-focused inquiry does not fully measure a decision’s impact, because it fails to measure deterrence and other social consequences.

1. Abandoned Doctrine

The absence of additional cases may indicate that a doctrine has been “abandoned.”\textsuperscript{145} In \textit{Casey}, the plurality would not give such “zombie doctrines” stare decisis protection.\textsuperscript{146} It is not easy to diagnose abandonment. For instance, in the past few decades, the Supreme Court has only held twice that States have unconstitutionally impaired contracts between private parties.\textsuperscript{147} In \textit{Allied Structural Steel v. Spannaus},\textsuperscript{148} the Court concluded that the State could not impose “severe” new pension obligations upon a Corporation for a group of workers who had previously worked for the company for ten years. Writing for a five Justice majority in a five-to-three case, Justice Stewart assessed the law for its “reasonableness” and “necessity.”\textsuperscript{149} This case could have revived laissez-faire constitutionalism.\textsuperscript{150} However, two subsequent decisions\textsuperscript{151} indicated that the Court was not going to apply the balancing test in \textit{Spannaus} very aggressively; as a result, the case is currently a footnote in most constitutional law textbooks, a bit of a constitutional meaning. Nevertheless, inconsistency approaching incoherence in the practical application of a doctrine is the touchstone of an unworkable rule. \textit{See, e.g., Garcia v. San Antonio Metro. Transit Authority}, 469 U.S. 528, 538, 546 (1985); \textit{Swift & Co.}, 382 U.S. 111, 116 (1965).

\textsuperscript{145} The doctrine of stare decisis is at its nadir when the rule in question has been effectively abandoned by the erosion of time, rendering its rationale obsolete. \textit{Casey}, 505 U.S. at 857; \textit{see also Patterson v. McLean Credit Union}, 491 U.S. 164, 173 (1989) (collecting cases), superseded by statute. Thus, a doctrine’s strength is severely vitiates by the expansion of competing constitutional concepts and rules. \textit{Id.}

\textsuperscript{146} \textit{Casey}, 505 U.S. at 857.


\textsuperscript{148} 438 U.S. 234 (1978).

\textsuperscript{149} \textit{Id.} at 242, 247.


sport, significantly limited to its facts and factors. Although not directly on point because it involved the federal government, *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.* demonstrated that the degree of retroactivity is the most important constitutional variable in these situations.

Despite their narrow scope and their potential for future disruption, these cases should be retained. There is a general presumption against retroactivity in the Constitution, a presumption that serves many of the same purposes as statutes of limitations. Private parties should not be penalized for something they did that was legal when they did it. They relied upon existing law to determine the scope of risks and liabilities. Retroactive legislation is often a tool of tyranny. Judging from the subsequent litigation history, these cases have not spawned

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152 467 U.S. 717 (1984). In *R.A. Gray*, the Court upheld the retroactive application federal legislation that deterred employers from terminating pension plans insured by a wholly-owned federal corporation. The Court held that Congress had acted rationally in determining that retroactive application was necessary to prevent employers from avoiding the statute’s force by terminating pension plans while the statute was being considered in Congress. The Court similarly accentuated the degree of retroactive obligations in *Spannaus*, “This legislation, impos[ed] a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees.” 438 U.S. at 249. *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 501 (1998) (“Retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions.”).

153 One need not look any further than the Constitution’s proscription of ex post facto laws for evidence of the Constitution’s general repudiation of retroactive laws. *See* U.S. Cons. art. 1, § 9, cl. 3. This presumption against retroactivity is further enshrined in the Contract Clause of Art. 1, §10, the Fifth Amendment’s Takings Clause and in the fair notice mandates of the Due Process Clause. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). In toto, “the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

154 *See*, e.g., Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) (“A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”); For a detailed discussion of the policies bolstering statutes of limitation *see* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997).

155 *See United States Trust Co.*, 431 U.S. at 19 n.17 (“C]ontracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached”); *Spannaus*, 438 U.S. at 245 (“Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.”)
serious impediments to regulation of business, while possibly deterring governments from passing oppressively retroactive laws. Of course, that deterrent benefit (assuming it is a benefit) is impossible to measure. Advocates of Spannaus will claim the lack of litigation demonstrates the doctrine’s popularity and effectiveness, while opponents will consider the case trivial and/or dangerous. Finally, liberals who fear a cataclysmic revival of Lochner-like jurisprudence from such cases should be less concerned if their representatives control a future Court.

2. Subsequent Litigation

Balancing tests tend to generate the most subsequent litigation. There will be arguments over applications of the standard(s) and/or over the terms of the test. In National League of Cities v. Usery, then-Justice Rehnquist created a multiple factor balancing test to determine when Congress could regulate the “State as State.” Congress could not interfere with “integral governmental functions” that States have “traditionally afforded their citizens,” because that would impair the State’s “ability to function” particularly when Congress displaces the States’ freedom to “structure integral operations.” States attacked numerous federal laws and regulations. The lower courts tried to determine if State were

156 See G. Richard Shell, Contracts in the Modern Court, 81 CAL. L. REV. 433, 436 (discussing the Court’s reticence to use the Contracts Clause, yet ultimately concluding that “[w]hen viewed as a single line of cases and placed in historical perspective . . . the modern Court's approach to contract emerges as a well-integrated, even radical, aspect of its pro-market jurisprudence”)

157 While there is an absence of empirical studies on the matter, many scholars support this supposition. See, e.g., A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation, 77 N.C. L. Rev. 409, 495 n.368 (1999); Richard C. Ausness, Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information, 46 SYRACUSE L. REV. 1185, 1236 (1996).


159 Id. at 842, 854.

160 Id. at 855.

161 Id. at 851.

162 Id. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 (1975).

163 Id.
engaging in a “traditional” function.\textsuperscript{164} Things did not get any clearer after Justice Marshall added another balancing test in a subsequent case: Congress had to threaten an “attribute” of State sovereignty\textsuperscript{165} (It is easier for the Court to add or delete a factor from factor tests than to formally repudiate the doctrine\textsuperscript{166}). After a few years, the lower courts generated such a hodgepodge of outcomes that Justice Blackmun, who had originally concurred in \textit{Usery}, overturned \textit{Usery} in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\textsuperscript{167} He believed the resulting doctrinal chaos demonstrated that the Court could not create judicially manageable standards to protect the States. \textit{New York v. United States} would be the first of several cases proving him wrong; conservatives could find workable doctrine. Of course, one can reject “workable” doctrine for other reasons. A few years later, the \textit{Casey} discerned a viable standard in \textit{Roe v. Wade},\textsuperscript{168} but that finding hardly mollified the dissenting conservatives.\textsuperscript{169}

Bright line tests present similar interpretive problems of subsequent events/nonevents. The lack of subsequent litigation may indicate that a clear-cut rule is working very well: bright


\textsuperscript{166} This point is lucidly exemplified by conservatives attempt to eliminate “divisiveness” from the \textit{Lemon} test in its Establishment Clause jurisprudence. By limiting the application of “divisiveness” to “direct subsidy to church-sponsored schools or colleges, or other religious institutions” the Court narrowed the factor into obscurity. \textit{See Lynch v. Donnelly}, 465 U.S. 668, 684 (1984). Justice Scalia famously observed that \textit{Lemon} should be completely discarded because it is a “zombie doctrine;” “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, \textit{Lemon} stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”) \textit{Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.}, 508 U.S. 384, 398 (Scalia, J., dissenting). Scalia seemed to be attacking \textit{Lemon} more for its resilience than for its irrelevance. Thus there may be two kinds of zombie doctrines wandering about, the unloved and the insignificant. Justice Breyer has recently revived the divisiveness doctrine. \textit{See Van Orden v. Perry}, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

\textsuperscript{167} 469 U.S. 528 (1985).

\textsuperscript{168} 410 U.S. 113 (1973).

\textsuperscript{169} 505 U.S. at 855 (Although \textit{Roe} has engendered opposition, it has in no sense proven ‘unworkable,’ . . .”)
line’s predictability reduces future litigation.\(^\text{170}\) Once the Court extended the rule in *New York v. United States* to the state executive branch in *Printz v. United States*\(^\text{171}\), Congress stopped imposing unfunded mandates on the States.\(^\text{172}\) On the other hand, constitutional doctrine may evolve from a dynamic, indeterminate balancing test into a narrow, rigid rule designed to preclude future growth. For example, when advocates for the poor convinced a majority to require states to waive court fees in divorce cases in *Boddie v. Connecticut*\(^\text{173}\), a future conservative majority, in *Kras v. United States*, limited *Boddie* to its facts.\(^\text{174}\) The Justices concluded that divorce, unlike bankruptcy, is a unique civil law remedy and is an aspect of the right to marry, which is protected by substantive due process.\(^\text{175}\) Thus, the Court did not extend *Boddie*’s generosity to the rest of the civil domain.\(^\text{176}\) *Kras* was just one of many cases eradicating the hope that the Supreme Court would create a wide range of positive rights assisting the indigent.\(^\text{177}\) There was one exception: a bare majority held that children of illegal

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\(^\text{170}\) See, e.g., *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (establishing a bright-line rule for warrantless arrests in public “rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like”); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (describing one benefit of a bright-line rule as “reduc[ing] litigation”).


\(^\text{172}\) Even before the Court rendered its decision in *Printz*, Congress evinced an interest in restraining unfunded mandates. See Unfunded Mandates Reform Act of 1995, 2 U.S.C §§ 1501 et seq. The No Child Left Behind of 2001, 20 U.S.C. §§ 6301 et seq. (2006), however, is a notorious, if only partial, exception. Although the federal government provides some funds, thus manifestly obviating the “unfunded” moniker, politicians and scholars have decried the egregious insufficiency of federal funding. See Diana Jean Schemo, *Kennedy Demands Full Funding for School Bill*, N.Y. TIMES, Apr. 4, 2004, at B9; see also Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193 (2008).


\(^\text{175}\) Id. at 443-45.

\(^\text{176}\) Id. at 450.

\(^\text{177}\) See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (rejecting an Equal Protection challenge to a Maryland welfare program, stating “the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court”); *Lindsey v. Normet*, 405 U.S. 56 (1972) (disclaiming a fundamental interest in decent shelter and peaceful possession of one’s home); *San Antonio...
immigrants had a right to minimal, equal public education. But later cases did not extend that right to provide either free textbooks or transportation.

For this essay’s authors, this is the saddest area of constitutional law. We believe the nation’s treatment of the poor and the working class has been deplorable. Yet the Court cannot easily use constitutional law to solve most problems in our political economy, much less the basic question of distributive justice. There are similar problems in constitutionalizing a contemporary conservative interpretation of Adam Smith through *Lochner* or *Spannaus*. Unelected judges should not run economies or wage wars; they do not have the “power of the purse” and “the power of the sword.” On the most basic level, the Court takes core power from Congress by dramatically increasing expenditures without representation. Such moves entangle the Court in partisan politics and inevitably generate peculiar results, such as permitting States to regulate miners’ hours but not bakers’ hours in *Lochner*. More technically, it is hard to see how a Court could determine the amount and quality of health care. Finally, State Courts have not been very effective when they intervened: the Supreme Court of Ohio found a state school funding plan to be unconstitutional in 1997, but that decision, much heralded at the time, has sporadically influenced subsequent allocation of educational resources. What, ultimately, can

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178 *Plyler v. Doe*, 457 U.S. 202 (1982). Justice Brennan did, however, attempt to conform to prior Court precedent by couching his opinion in the interstitial space between a fundamental right and governmental benefit. *Id.* at 221 (“Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”) (citations omitted).


181 *DeRolph v. Ohio*, 678 N.E.2d 866 (Ohio 1997).

the Ohio Supreme Court do? Hold the legislators in contempt if they fail to implement a particular funding scheme that the Court divines out of general constitutional text?

Justices face a dilemma that perpetually undermines their attempt to create enduring constitutional law. To justify any opinion, they must provide reasons and supporting facts. Yet every reason can become a requirement, and every fact can limit a decision’s impact. Rehnquist’s reasons in *Usery* became factors in subsequent cases, eventually leading to doctrinal chaos (according to Justice Blackmun). More recently, Justice O’Connor held that the Ohio could create a voucher system in the dysfunctional Cleveland public school system, partially because a pre-existing charter school system provided parents and students with many options. Are these facts constitutionally required? Can vouchers be used in healthy school districts without alternatives? In a similar fashion, Chief Justice Roberts refused to permit a city to use race to allocate students for integration purposes, noting that the program had not been used very often. Would this make a heavily utilized program constitutional? Thus, fact-rich and reason-rich opinions resemble balancing tests, providing future Courts with alternative ways to distinguish or limit their authority. Perhaps that is another appeal of originalism: all the relevant facts happened in a frozen past.

III. NORMATIVE, ADHESIVE FACTORS

There are several normative reasons, applicable in all situations, why lawyers and Justices believe stare decisis is an important constitutional consideration, even though the Court has concluded that stare decisis does not carry as much weight in constitutional cases as in statutory cases because the Court alone can change constitutional law (except through the cumbersome
amendment process). The doctrine promotes “the rule of law,” stabilizes the culture, and contains the norm of temporal equality.

A. Enhancing “The Rule of Law”

Until now, this article has have emphasized the “internals” of a doctrine, factors gleaned from the face of judicial opinions rather than their content. It is time to address the underlying normative question that has been somewhat begged: why take stare decisis seriously, especially when it compromises one’s preferred conception of rights that also cry out to be taken seriously? Why not encourage Justices to quickly change constitutional law, because there is no other way for the law to evolve aside from the extraordinarily cumbersome, supermajoritarian Amendment process? Why concede that the Court should continue to permit governments to leave the poor in destitution while agreeing with John Rawls that every citizen should get basic necessities?183

Believing that stare decisis can trump rights forces one to discard Ronald Dworkin’s vividly inspiring, but flawed metaphor of “rights as trumps.”184 If rights are trumps, then the lowliest right (which could be the constitutional equivalent of the “two of clubs” in terms of value) must prevail over all other interests (unless we consider some of those competing considerations to also be trumps, which ruins the analogy).185

This section reviews several enduring defenses of stare decisis that generate widespread support across the American political/legal spectrum. The most important is that stare decisis

183 This point is essentially captured in Rawls’ “difference principle,” which ensures access to necessities, even in the presence of inequalities in the distribution of goods. See John Rawls, A THEORY OF JUSTICE 137-40 (Harvard Univ. Press 1999) (1971) (“The least advantaged are not, if all goes well, the unfortunate and unlucky—objects of our charity and compassion, much less our pity—but those to whom reciprocity is owed as a matter of basic justice.”); see also John Rawls, JUSTICE AS FAIRNESS 42-43 (Erin Kelly ed., Harvard Univ. Press) (2001).

184 Ronald Dworkin, Rights as Trumps, in THEORIES OF RIGHTS 152, 153 (Jeremy Waldron ed., Oxford Univ. Press) (1984) (“[R]ights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole”).

promotes the American conception of the “rule of law.”

Although some believe the notion of “the rule of law” is silly, vacuous, or misleading propaganda, it is a vital adhesives. The incomparable philosopher David Hume observed that the greatest human failing is our tendency to think in the short term. Relying upon force and persuasion, the legal system is the primary social institution for imposing a broader, lengthier perspective. Not only does it punish many forms of instant gratification (such as murder, fraud, or certain forms of drug addiction), but it also creates a cadre of professionals who benefit from enforcing the society’s perceived long-term values. As is so frequently the case, Aristotle first articulated the enduring dilemma when he rejected Plato’s ideal of a static legal culture. We do not want a totally rigid legal system that is unresponsive to change and correction, but we must also prevent an overly fluid system. Excessive legal change disorients the citizenry and undermines the habit of legal obedience. Just as the Court should apply a presumption of constitutionality to every law, every citizen should presumptively obey every legal mandate. Stare decisis reinforces these

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190 *Id.* at 481-83.

191 “Even when laws have been written down, they ought not always to remain unaltered . . . Hence we infer that sometimes and in certain cases laws may be changed . . .” ARTISTOLE, POLITICS, Book II, Part VIII.

192 *Id.* (“For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left; the citizen will not gain so much by making the change as he will lose by the habit of disobedience.”); see also THOMAS AQUINAS, *SUMMA THEOLOGICA*, Question 97 “Of Change in Laws” (1274).
norms at the judicial level by applying a presumption of continuing validity to pre-existing decisions, creating a “habit of obedience” for Justices. While the Jeffersonian “rights” to revolution, \(^{193}\) riot, and civil disobedience always remain as alternatives and threats to the status quo, they are desperate and dangerous tools.\(^{194}\)

Constitutional law plays an unusually large role in American law, politics, and culture for several reasons. The Constitution is the populace’s primary symbolic source of allegiance, their legal Grundnorm.\(^{195}\) The Constitution also provides a collection of “secondary rules” establishing basic rule-generating and rule-enforcing procedures and institutions.\(^{196}\) Finally, the Supreme Court has applied the Constitution to a vast range of issues; constitutional law has often been the vehicle by which the American legal system has continually verified de Tocqueville’s observation that in America, all political issues end up becoming legal ones.\(^{197}\) But our country is not just run by lawyers, the aristocratic elite that de Tocqueville wrote was necessary to prevent the prevailing egalitarian, democratic ethos from becoming too extreme and volatile. Because there is an enduring tension between the electoral many and the judicial few, a whiff of illegitimacy lingers around every Supreme Court finding of unconstitutionality: why should five unelected, highly successful lawyers tell the rest of us what we can and cannot do in a country that is allegedly “democratic?” How and why can this powerful, elitist institution exist, much

\(^{193}\) “As revolutionary instruments (when nothing but revolution will cure the evils of the State) necessary and indispensable, and the right to use them is inalienable by the people . . .” Letter from Thomas Jefferson to William Duane (July 24, 1803), in THE WORKS OF THOMAS JEFFERSON, VOL. 10 (CORRESPONDENCE AND PAPERS 1803-1807) (Paul Leicester Ford ed. (1905).

\(^{194}\) This circumspection is embedded in perhaps the most prominent of foundational texts, The Declaration of Independence. “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes . . .” The Declaration of Independence para. 2 (U.S. 1776).


\(^{196}\) For example, Art. 1, § 9, cl. 2 specifies the procedure by which a bill becomes law.

\(^{197}\) See DE TOCQUEVILLE, supra note ____, at 330.
less flourish? Efforts to distinguish the Court’s actions as “legal” instead of “political” or “principled” rather than “policy driven” fail because all judicial determinations require some “political” viewpoint that first determines a law’s purposes and next predicts how alternative choices of action may facilitate those ends. Assuming there is a presumption of constitutionality for all governmental action, the Justices need to persuade a large percentage of us that they are properly exercising (or refusing to exercise) their coercive powers. Fortunately for the Court, it need not rely on persuasion alone: the outcome, backed by force, is at least as important. Once the police begin to enforce a particular rule, it gains authority through acquiescence and habit.

Nevertheless, the written opinion forces the Court to be remarkably transparent. The Court must present reasons and outcomes that are acceptable to a significant degree of the public (most cases, of course, are mainly of professional interest). That process limits judicial discretion/activism to an important degree: no Justice would state today that Brown v. Board of Education should be overruled because African-Americans are innately inferior (or even because the Framers of the Fourteenth Amendment did not think that the Fourteenth Amendment

198 That is not to say that we countenance an “attitudinalist” conception of constitutional adjudication. We firmly disagree with the assertion that “precedent rarely influences” the decisions of Supreme Court justices. See HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE SUPREME COURT 287 (1999). Our approach hews more closely to the functional positivism characterizing the Holmesian era of Supreme Court decision-making, with its unrelenting emphasis on purpose. See R. Randall Kelso & Charles D. Kelso, How the Supreme Court Is Dealing with Precedents in Constitutional Cases, 62 BROOK. L. REV. 973, 974 (1996).

199 The extent to which the Court maintains its legitimacy in terms of public opinion is contingent upon the scale at which one examines the public’s perception of the Court’s adjudicative process (i.e., the public’s opinion of specific cases and policies versus the Court’s institutional legitimacy, as in whether the Court is a “trustworthy decision maker whose rulings therefore deserve respect or obedience.”). The Court’s institutional legitimacy is considerably more robust than the substantive legitimacy of particularly contentious decisions, see Richard H. Fallon, Legitimacy and the Constitution, 118 HARV. L. REV. 1787 (2005).

200 Id. at 1806 (“The ordinary citizen . . . manifests his acceptance [of the Constitution] largely by acquiescence.”) (quoting H.L.A. HART, THE CONCEPT OF LAW 61 (1964)).

201 See MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 29 (1964) (“If the Court is to be successful as a political actor, it must have the authority and public acceptance which the principled, reasoned opinion brings.”).
prohibited segregated schools). Stare decisis plays a crucial role in this educative and constraining process by forcing the Court to explain how its recent results coexist with its past.\textsuperscript{202} It is a crucial part of the common law method that requires a Justice to assess a problem from several different levels of abstraction before reaching a final conclusion and then provide publicly acceptable responses to those differing concerns.\textsuperscript{203} Distinguishing and applying prior cases requires the Justice to revisit how prior generations wrestled with the underlying problem. The Justice will have to revisit their initial, instinctual reaction several times before making a final determination. Thus, when the Court avoids this discipline, it undermines the persuasive strength of not just the particular opinion, but also the Court itself. For instance—to use a “liberal” victory for a change—Justice Kennedy’s opinion in \textit{Romer v. Evans}\textsuperscript{204} was bewildering partially because he made no effort to explain why homosexuals deserved constitutional protection after an earlier Court had held that homosexual behavior could be criminalized in \textit{Bowers v. Hardwick}\textsuperscript{205}. Distinctions, of course, can always be made. Justice Kennedy aggressively construed the Colorado statute to deprive homosexuals of all rights,\textsuperscript{206} while \textit{Bowers} only criminalized gays’ right to engage in homosexual activity.\textsuperscript{207} But was that...
distinction important to the Romer majority, and what did it mean about Bower’s future?208

Silence was disappointing evasion.

**B. Maintaining Social, Political, and Legal Stability**

Stare decisis is an inherently conservative doctrine.209 The values of legal stability and obedience are particularly important in this country.210 It borders on intellectual cliché to observe that the Constitution and the legal system play crucial roles in unifying American society. The people of the United States do not have race, ethnicity, or history in common. Perpetual waves of immigration are one of the nation’s defining characteristics.211 Americans live under a system self-consciously created by a few extraordinary statesmen instead of under a State that emerged out of (or was imposed upon) a culture existing for over a thousand years. This nation has no real notion of “time immemorial.”212 Indeed, it has a notoriously bad historical memory, which is a curse (due to resulting ignorance and stupidity) and a blessing (because historical grudges tend to fade more quickly than elsewhere)213. Consequently,

208 This question has essentially been rendered moot by Justice Kennedy’s murky majority opinion in Lawrence v. Texas, 539 U.S. 558 (2003).

209 Craig Haney, Psychology and Legal Change: On the Limits of a Factual Jurisprudence, 4 LAW & HUM. BEHAV. 147, 159-60 (1980).

210 The Court has just recently pithily emphasized this point in the context of stare decisis: “Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.” CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951, 1961 (2008) (emphasis added). See also Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”).


212 The only exception are the few moments when the country and its courts recognize the relationship between Native Americans and the land now falling within the exclusive province of the United States. See, e.g., Oneida County v. Oneida Indian Nation, 470 U.S. 226, 230 (1985) (“From time immemorial to shortly after the Revolution, the Oneidas inhabited what is now central New York State.”).

213 A fundamental question is whether this epoch of relative calm in American politics is coming to an end.
Americans across the political spectrum have a powerful interest in maintaining their belief in the “rule of law,” even if that belief is somewhat fanciful, even mythological.\(^{214}\)

Stare decisis serves this goal by reducing the Court’s visibility (if the Court does not change existing law, it usually is does not make much “news”). It requires the Court to engage in legal craftwork that simultaneously obscures and clarifies its reasoning, keeping many potentially divisive issues out of sight and thus out of mind.\(^{215}\) The Court does not flop about after every election, creating the impression that constitutional law is just another form of partisan politics. The entire country pays a price when Supreme Court nomination hearings become circuses resembling political show trials.\(^{216}\) Nevertheless, the country will become more unglued if every Supreme Court nomination degenerates into the equivalent of a Presidential campaign.

1. Distinguishing on the Facts

A strong commitment to stare decisis reduces the stakes to some degree. Both Chief Justice Roberts’ and Justice Alito’s Senate confirmation hearings contained a great deal of discussion about the role of stare decisis; the two jurists reassured the nation that it would not see


\(^{215}\) See Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 *Stan. L. Rev.* 786, 811 (1967) (“The arts by means of which the Supreme Court delays, equivocates, and avoids some extraordinary issues are therefore well known and have been frequently catalogued.” (citing Alexander Bickel, *The Least Dangerous Branch*, 111-198 (1962)).

\(^{216}\) See Horace Cooper, *Tilting at Windmills: The Troubling Consequences of the Modern Supreme Court Confirmation Process*, 33 *S.U. L. Rev.* 443 (2006). One stunning consequence may be the ostensible refusal of several women to accept nomination offers. *Id.* at 446 n.9.
a new Constitution over the next few years.\textsuperscript{217} So far, they have not engaged in the radical retransformation that Justice Thomas’s seeks.\textsuperscript{218} The two new Justices demonstrated the value of stare decisis and the art of judicial distinction-making in the almost ludicrous case, \textit{Morse v. Frederick}.\textsuperscript{219} A high school suspended a student for displaying a large banner on which he had written “Bong Hits 4 Jesus” while students gathered outside the school to observe the running of the Olympic Torch.\textsuperscript{220} The Justices were unsure what the banner meant.\textsuperscript{221} Although it is always difficult to determine Stoners’ Intentions, one plausible interpretation is that a group of high school students were smoking marijuana when one of them observed that their pipe-passing was a sacrament, similar to communion.\textsuperscript{222} Surrounded by Christian Fundamentalists who had significantly different viewpoints about almost everything, they thought it would be funny to claim they were getting high on behalf of Jesus. After all, what is the difference between wine

\textsuperscript{217}In the context of the Court’s abortion jurisprudence, Roberts responded that “‘a precedent of the court, like any other precedent of the court, [is] entitled to respect under principles of stare decisis.’” See Robin Toner, \textit{Court in Transition: Abortion; In Complex Dance, Roberts Pays Tribute to Years of Precedent Behind Roe v. Wade}, \textsc{N.Y. Times}, Sept. 14, 2005, at A24. Justice Alito paid similar homage to the doctrine of stare decisis, proclaiming it to be “a very important doctrine” and one that is “a fundamental part of our legal system.” \textit{Court in Transition; ’When a Precedent Is Reaffirmed, That Strengthens the Precedent’}, \textsc{N.Y. Times}, Jan. 11, 2006, at A26.

\textsuperscript{218}Justice Scalia has been quoted as saying that Justice Thomas “doesn’t believe in stare decisis, period” and “if a constitutional line of authority is wrong, he would say ‘let’s get it right.’” See \textsc{Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas} 281-82 (2004). Nevertheless, Justice Thomas does apply the doctrine of stare decisis where it is presumably inopportune or imprudent to question longstanding Court doctrine. See \textit{Troxel v. Granville}, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

\textsuperscript{219}127 S. Ct. 2618 (2007).

\textsuperscript{220}Id. at 2622.

\textsuperscript{221}Id. at 2624. (“The message on Frederick's banner is cryptic.”); “Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drug.” Id. at 2625. At various points, the dissent refers to the message on the banner as “curious,” “ambiguous,” “nonsense,” “ridiculous,” “obscure” and “quixotic.” Id. at 2643, 2644, 2646, 2649 (Stevens, J., dissenting). If the Court could only determine that it was a reference to illegal drugs, then perhaps it was critical of such usage?

\textsuperscript{222}The entheogenic use of marijuana has ancient origins. See Ernest L. Abel, \textit{Marijuana – The First Twelve-Thousand Years} (1980), available at http://www.druglibrary.org/schaffer/hemp/history/first12000/abel.htm. More recently, at least one religious sect within the United States has petitioned the DEA for a religious exemption for its specifically sacramental use of marijuana. See Judy Harrison, \textit{Group uses marijuana as sacrament}, \textsc{Bangor Daily News}, Nov. 11, 2008, at 1. The school superintendent, in upholding Frederick’s suspension, explicitly rejected the contention that the banner broadcast a religious message. \textit{Morse}, 127 S. Ct. at 2623. Cite recent Gonzalvez case on request to use really weird drug in really weird religion…
and marijuana? This interpretation complicates the issue. On the one hand, it supports the majority’s belief that the banner was advocating the use of illegal drugs and wasn’t pure nonsense. On the other, it suggests that the students may also have been punished for blasphemy, which is an unconstitutional form of “viewpoint discrimination.”

Rather than limiting himself to ancient constitutional history, Chief Justice Roberts weaved through these dilemmas by citing evidence showing the damaging effects of illegal drugs on young people. He argued that the high school had a legitimate interest in preventing its students from displaying pro-drug symbols while at school. This makes sense: high school students should not have a right to wear shirts to school endorsing various illegal vices or even glorifying such legal vices as drinking, smoking, and gambling. There is no total suppression: they can change clothes once they leave school. Roberts distinguished the case from Tinker, which had protected a student’s right to wear a black armband to school to protest the Viet Nam War, by arguing that political controversy over war should be part of one’s education, unlike the

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223 From Justice Stevens’ position, there is no clear distinction in the Court’s majority opinion: “While I find it hard to believe the Court would support punishing Frederick for flying a ‘WINE SiPS 4 JESUS’ banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.” 127 S. Ct. at 2650 (Stevens, J., dissenting). As far as marijuana advocates are concerned, there is a significant difference, one that favorably highlights marijuana and dispels of several generations of anti-marijuana propaganda. See SAFERchoice.org, Alcohol v. Marijuana, http://www.saferchoice.org/content/view/24/53/ (last visited Feb. 12, 2009).

224 Morse, 127 S. Ct. at 2625.

225 Morse, 127 S. Ct. at 2628.

226 Id. at 2628-29.

227 Because Morse is such a recent decision, it is unclear how the Court would approach facts such as of those in Guiles v. Marineau, 461 F.3d 320 (2d. Cir. 2006), cert. denied 127 S. Ct. 3054 (2007), in which the Second Circuit deemed unconstitutional a school’s censorship of a shirt depicting George W. Bush holding a martini glass and surrounded by lines of cocaine. In Guiles, the Second Circuit relied on prior Supreme Court precedent, which permitted suppression of patently-offensive speech in public schools, and did not confront the issue of endorsing alcohol or drug use. For a thorough and voluminous explication of pre-Morse personal appearance regulations in public schools see Robin Cheryl Miller, Annotation, Validity of Regulation by Public-school Authorities as to Clothes or Personal Appearance of Pupils, 58 A.L.R. 5th 1 (1998).

advocacy of illegal drugs. Of course, this distinction is crudely circular, because advocacy of illegal drug usage all but explicitly includes the political message of legalization.

Nevertheless, many high school parents want their children to debate whether or not the nation should go to war and remain in places like Iraq and Afghanistan, but far fewer parents wish for their children to be surrounded at school by peers celebrating the consumption of illegal substances. In his concurrence, Justice Thomas wanted to overrule Tinker, asserting that public high schools could impose whatever constraints on speech they wish.  Roberts’s scalpel is preferable to Thomas’s sledgehammer. High schools should be a place of intellectual and cultural diversity as well as discipline. High school students should be exposed to a wide range of viewpoints and feel comfortable dissenting. Nor do we want public school officials to have the power to impose total orthodoxy. For instance, Students should be able to display religious icons. There have been very few, if any, examples of disruption caused by students wearing campaign buttons or crosses to school. Students benefit from exposure to and expression of different political and religious viewpoints. But there is an immediate cost if many children feel even greater peer pressure, seemingly tolerated by the authorities, to experiment with drugs that

229 Morse, 127 S. Ct. at 2629.
230 Justice Breyer captures the essence of this circularity by pointing out that “[i]f, for example, Frederick’s banner had read “LEGALIZE BONG HITS,” he might be thought to receive protection from the majority’s rule, which goes to speech ‘encouraging illegal drug use.’ But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.” Morse, 127 S. Ct. 2639 (Breyer, J., concurring in the judgment, dissenting in part).
231 127 S. Ct. at 2633-35.
232 Cf. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 530 (9th Cir. 1992) (holding that student buttons containing the pejorative word “scab” were not inherently disruptive).
233 While not precisely on point, a court has held that the distribution of candy canes containing religious messages did not present a reasonable risk of provoking disruption or disorder. Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 111-13 (D. Mass 2003).
range from problematic to fatal. Some viewpoint discrimination is permissible in high school\textsuperscript{234} (very few liberals would argue that public schools should not promote such norms as diversity, decency, and environmentalism).

2. Constitutional Prudence

Stare decisis diminishes the likelihood of rapid intellectual revolutions sweeping through the Court. Linked to the past by doctrine and habit, Justices learn a degree of judicial humility,\textsuperscript{235} a trait these powerful, unelected officials with lifetime tenure desperately need. Not only should they defer somewhat to “the Framers” and “the People” who originally created the Constitutional text, but they also should respect the prior generations of adjudicators who wrestled with similar issues involving the same underlying normative conflicts. First impressions and reactions are often as good as one can hope for. The great conservative theorists Edmund Burke and Michael Oakeshott warned about the dangers of excessive rationalism, a blend of excessive confidence in one’s particular ideology, indifference to the existing culture, and elevation of abstract theory over facts and history.\textsuperscript{236} Many modern conservatives have been as guilty of such sins as their liberal forebears—one need only survey the present and likely future effects of the recent, relentless commitment to market fundamentalism,\textsuperscript{237} originalism, a

\begin{itemize}
\item \textsuperscript{234} Even the dissent in Morse concedes this contention; “[I]t might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.” 127 S. Ct. at 2646 (Stevens, J., dissenting).
\item \textsuperscript{235} See Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 Minn. L. Rev. 1173, 1178 (2006).
\item \textsuperscript{236} This is what Burke describes as the “abuse of reason.” See EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY (Liberty Fund Inc. 1982) (1757); see also EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE passim (Oxford Univ. Press 1999) (1790); MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS (Liberty Fund Inc. 1991) (1962). Stare decisis is very Burkean—asserting the need for continuity, humility, and respect for the past at the expense of abstract theory.
\item \textsuperscript{237} See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); FRIEDRICH HAYEK, INDIVIDUALISM AND ECONOMIC ORDER (1948).
\end{itemize}
conception of the “unitary Executive” elevating the Presidency above the law, and antitrust doctrine that helps protect and create massive corporations which are “too big to fail.” While intellectual fads have more endurance than the average person’s pursuit of pleasure, they are transient forces, products of intellectual arrogance and interest. One decade, Milton Friedman’s belief in the wisdom of market equilibrium frames the debate, while the next era may witness a revival of John Maynard Keynes’ embrace of uncertainty. It is risky when doctrinaire movements grab effective control of the economy and the political process, much less when they gain enduring influence through the less flexible and less democratic process of constitutional adjudication. When people obtain power, they often believe the world has suddenly become a much better and saner place. They perceive a mandate to implement most of their views. Thomas Aquinas explained that rulers must be prudent, not expecting to change people’s habits too quickly. For example, it would probably be a cultural and legal disaster to outlaw cigarettes, despite their obvious danger and the venality of their purveyors. Stare decisis is a reminder that Justices should often err on the sides of caution and tradition.

The Supreme Court might have blundered if it forced busing into the Detroit suburbs to reduce the vile effects of prior segregation in the City, as plaintiffs requested in *Milliken v. Bradley.* The majority’s arguments may not have been the best: what “principled”


239 For a rather prescient statement of the risk created by antitrust doctrine that fails to incorporate the size of merged corporations see Adam Nguyan & Matt Watkins, *Financial Services Reform,* 37 Harv. J. on Legis. 579, 590 (2000).

240 The hubris inherent in this position reached its acme when George W. Bush was reelected in 2004 with a mere 51% of the popular vote. Vice President Dick Cheney, in introducing President Bush following his victory rally, stated, without a hint of pretense that “the nation responded [to President Bush’s campaign] by giving him a mandate.” Adam Nagourney, *The 2004 Elections: Bush Celebrates Victory,* N.Y. Times, Nov. 4, 2004, at A1.

241 THOMAS AQUINAS, *SUMMA THEOLOGICA,* Question 97 “Of Change in Laws” (1274).

distinction can be drawn between Milliken’s protection of the suburbs and an earlier opinion finding pervasive discrimination within a school district based due to limited discrimination within the district? Everyone knows that the suburbs were zoned to keep out undesirables. We all understand that State-designed systems of multiple municipalities facilitated and perpetuated segregation and undermined integration. But blasting apart the suburbs may have done more harm than good to race relations and the gradual emancipation of African-Americans: black middle class flight soon followed white flight. The backlash against liberal judicial activism might have reached epic proportions.

There is an understandable and justifiable tendency for liberals on and off the Court to take a great deal of credit for President Obama’s remarkable achievement; but it is likely that the conservatives’ restraining hand also contributed to his victory by blunting the liberals’ understandable desire to quickly achieve racial justice. Although it is arguably too late for the Courts to dramatically improve race relations in terms of constitutional law, plaintiffs should have focused on quality and/or “equal” neighborhood schools rather than busing. Admittedly, that would have required the Courts to become virtual school boards, but that redistributive


246 In his dissent, Justice Marshall comments on the reinforcing quality of the Court’s intradistrict remedy, “School district lines, however innocently drawn, will surely be perceived as fences to separate the races when, under a Detroit-only decree, white parents withdraw their children from the Detroit city schools and move to the suburbs in order to continue them in all-white schools.” 418 U.S. at 804–05.


intervention would have been warranted in light of the nature and extent of the underlying constitutional injustice. Reviving busing as a major remedy to deal with continuing racial isolation in public schools would probably be bad policy and bad politics, which makes it bad law. 249

Justice Frankfurter and Judge Learned Hand frequently warned that excessive judicial review makes the populace politically docile. 250 If lawyers resolve most important, divisive issues, what difference does it make who gets elected? In addition, extensive judicial review distorts the electorate’s decision-making. It enables parties to combine factions that would otherwise not be able to coexist. There is little doubt that the Warren Court’s protection of many constitutional rights enabled libertarians and social conservatives to combine in the Republican Party, because the libertarians did not have to worry about a significant loss of rights so long as the Court remained somewhat “liberal.”. Judicial restraint forces the Nation to confront serious problems: the Court probably injured the Democratic Party by continuing to permit affirmative action, which alienated many white voters, but at least the populace had the last word on that difficult subject. 251 Although stare decisis perpetuates current forms of judicial

249 The ramifications of widespread, mandatory busing has been explored in great detail elsewhere. See generally NICOLAUS MILLS, THE GREAT SCHOOL BUS CONTROVERSY (1973); see also J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, 161-92 (1979) (presenting arguments for and against mandatory busing as a remedy for desegregation).

250 See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 668 (1943) (Frankfurter, J., dissenting) (asserting that judicial review “is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors”); see also LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958).

251 Daniel Patrick Tokaji, Note, The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991, 103 YALE L.J. 567, 584-86 (describing how the political rhetoric surrounding potential affirmative action legislation fomented opposition among whites and “was aimed to exploit the ‘drift of white voters away from the Democratic Party, particularly white males . . .’”).
activism, it tends to depoliticize the Court by reducing the incentives to pack the Court with partisan ideologues and by reducing the rate of legal change.252

C. Temporal Equality

Stare decisis promotes “fairness.”253 The steady wave of conservative Justices did not jettison most of the Warren Court’s jurisprudence: they embraced cases like Brown and Brandenburg254 and extended the Warren Court’s egalitarianism to gender equality255 and, to a lesser degree, gay rights.256 The goal of consistency contained in the malleable doctrine of stare decisis is the egalitarian norm of temporal equality. Liberals tend to see themselves as more committed to equality than their political rivals—stare decisis reminds everyone that there is a presumptive fairness in deciding similar cases in similar ways over relatively long periods of time. The Supreme Court can ignore or repudiate any doctrine under the “changed circumstances” test, but it should not employ that tool frequently.257 After all, many problems have not changed: the struggle between the few and the many, man’s inhumanity to man, the need for safety, the destruction of the environment, and the value of self-expression (just to name a few of the values and conflicts that have absorbed humans for thousands of years). Citizens

252 Henry Paul Monaghan suggests that one indispensible benefit of stare decisis is that “[e]ven when the prior judicial resolution seems plainly wrong to a majority of the present Court, adherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a “‘law which binds [it] as well as the litigants.’” Monaghan, supra note ___, at 752 (quoting ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976).

253 The notion that the Court should not discard precedent merely because of changes in personnel has been described as an “argument from fairness.” See Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 595-97 (1987). Fairness also permeates Justice O’Connor’s conception of “reliance” in Casey.


257 Cf. Suzanna Sherry, The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana, 57 U. CHI. L. REV. 1260, 1271 (1990) (“[D]epartures from stare decisis are justified either where changed circumstances have so undermined the prior case as to deprive it of its legitimacy, or where later cases have revealed glaring inconsistencies in the law.”); see also State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (“[S]tare decisis is not an inexorable command . . . there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances.”) (citations omitted).
feel degraded when they are informed that they lost after relying upon a prior decision, because new Justices believe that times have changed.\textsuperscript{258} Finally, (and more prosaically) constitutional stability benefits both the Court and the rest of society by reducing transaction costs.\textsuperscript{259} Lawyers, potential litigants, governmental officials, and lower courts can rest upon existing doctrine, knowing that it is unlikely to be reversed or even altered.\textsuperscript{260} Lower courts should reject most efforts at major constitutional transformation, knowing that four Justices can reconsider their reluctance. There will not be numerous, expensive efforts to revisit issue after issue, at least until Supreme Court Justices send out signals.

Stare decisis is just one of several variables, because the Court, the intellectual leadership, and the populace all recognize the need for flexibility and adaptability.\textsuperscript{261} If the Court were unwilling to change any prior doctrine, the country would be governed by rules that few people support. When the Justices took their judicial oath, they vowed to support the Constitution, not the Court’s prior opinions.\textsuperscript{262} Prior adjudications are constitutional derivatives, worthy of limited deference. One of several penultimate balancing tests (the ultimate balancing test takes place when the Justices take everything into consideration), stare decisis helps fosters by its weaknesses. In other words, stare decisis should not be taken too seriously.

\textsuperscript{258} Cf. Monaghan, \textit{supra} note ___, at 749-50 (“Expectations, tangible and symbolic, have developed around the critical decisions; massive destabilization following a successful attack on any of these would threaten the functioning of the federal government, if not the viability of the constitutional order itself.”).

\textsuperscript{259} Farber, \textit{supra} note ___, at 1177; Marin Roger Scordato, \textit{Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence}, 7 NEV. L.J. 263, 278 (2007) (“[A]dherence to the existing precedent in a jurisdiction may be valuable to the extent that it permits parties to anticipate accurately the outcome of disputes, thus reducing the volume of costly litigation brought into the system.”).


\textsuperscript{261} Hence, Justice Brandeis famous admonition that “[s]tare decisis is not . . . a universal inexorable command.” \textit{Burnett v. Colorado Oil & Gas Co.}, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). This statement is invariably quoted by the Court whenever it seeks to either invoke or dismiss the doctrine of stare decisis.

IV. NORMATIVE, DIVISIVE FACTORS

While the prior factors are always relevant, they cannot decide by themselves “battleground issues,” which reflect a clash of values (usually on and off the Court). At this stage, the Justices can and usually do take almost anything and everything into consideration.

A. Controversy and Importance

Justices never overturn a decision simply because of the vote count. Nor do they always uphold cases to create stability and foster obedience. Indeed, all the previously discussed factors cannot resolve the problem. At best, those concerns collectively suggest that the Justices should only overrule “dreadful” cases, those that are perceived to be dreadful. This normative assessment will always be controversial; after all, five prior, highly skilled and experienced Justices once thought differently. Because the final decision turns primarily upon normative considerations, it is possible to create a hierarchy of relevant, acceptable factors (without claiming that the list is definitive). For starters, the societal importance of the existing rule is and ought to be most salient. But there is no consensus about the hierarchy; each Justice has the authority to ignore any of these proffered considerations. For example, a relatively minor case might warrant reversal because a small group of academics have convincingly demonstrated that it is counterproductive. However, some Justices believe that professional literature borders on the irrelevant.

No Court explored the role of stare decisis with more candor and depth than the plurality in Planned Parenthood of Southeastern Pennsylvania v. Casey.263 The three Justices refused to overrule a woman’s “core right” to have an abortion during the earlier stages of pregnancy.

because that right was the “essential holding” of the incredibly controversial \textit{Roe v. Wade}.^{264}

They listed considerations that normally resolve the stare decisis question—practical workability, reliance, consequences, abandoned doctrine, and changes in either the facts or the interpretation of the facts—^{265} but next emphasized that a few areas are different because the Court had “responded to national controversies.”^{266} In other words, the decisions were extremely important to many people and were highly visible. The Justices found two relevant analogues in the Twentieth Century: the Supreme Court’s rejection of \textit{Lochner v. New York’s} applying substantive due process to the economy and the \textit{Brown’s} decision to invalidate \textit{Plessy v. Ferguson’s} “separate but equal” public school systems.^{267}

There is no self-evident way to ascertain which cases fall within this category; each Justice must calibrate the importance of the issue and the degree of public reaction. But the \textit{Casey} plurality undoubtedly reviewed three deeply divisive, important issues that bedevil the nation: the appropriate degree of economic regulation, race relations, and gender relationships. The plurality explained that it had previously reconfigured economic and racial constitutional law because “society” had a newer and better “understanding of the facts.”^{268} Somehow, the Court became “society.” Although that move seems presumptuous, it also is necessary whenever the Court revisits its most important holdings. The Court is more justified in invoking “society” when it reduces judicial review, as in \textit{Lochner}, than when it continues to limit legislative action, as in \textit{Brown} and \textit{Roe/Casey}, because legislative actions also reflect social understandings. Still, the Court correctly put a few important issues in a special stare decisis

\footnote{264 \textit{Id.} at 846.}
\footnote{265 \textit{Id.} at 854-55.}
\footnote{266 \textit{Id.} at 861.}
\footnote{267 \textit{Id.} at 861-63.}
\footnote{268 \textit{Id.} at 862-63.}
category. On the one hand, the existing rules help create and reinforce some of the culture’s
basic assumptions; unelected Courts should be reluctant to engage in massive social engineering.
Yet, when many people believe that prior, imbedded decisions create much damage and do little
good, the Court should intervene. *Plessy v. Ferguson* was a heartless opinion, a betrayal of
African-Americans that poisoned race relations and elevated constitutional hypocrisy to an
intolerable level. Quite simply, the bigger the constitutional stakes, the harder the fall. When it
comes to the less important cases, the Court can more easily overrule “bad decisions” because
few people will notice or care. The Court also can engage in the usual tradecraft of isolating and
distinguishing prior cases to the point of “abandonment.” It really does not matter all that
much whether or not States have certain constitutional immunities or individuals have a right
to pass out campaign materials at private shopping centers. To put it bluntly, a lot of
constitutional law is not very significant. But there is no subtle way to eliminate segregated
schools: either the Court overrules *Plessy* or perpetuates injustice.

In addition to “controversial” cases, there is a cluster of cases that the Court will not
revisit because they are both important and effective. They are known as “superprecedents.”

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269 This is essentially the incrementalist view of stare decisis, one captured by the traditional theory of ratio
decidendi (“the reasons for the decision”). A neoformalist conception of stare decisis expressly incorporates this
approach for managing constitutional precedent. *See* Lawrence B. Solum, *The Supreme Court in Bondage:
Constitutional Stare Decisis, Legal Formalism and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155,

270 *See*, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment immunizes states from
citizen suits in federal court); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that the commerce
clause of Article 1 does not vest Congress with the power to abrogate state sovereign immunity guaranteed by the
Eleventh Amendment). If only to demonstrate that we are not totally passive, we would revisit the Eleventh
Amendment doctrine and seriously limit its existing scope.


272 An exception to limited deference is arguably prudent for so-called “superprecedents,” those rare cases whose
permanence is far more important that its correctness. *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV.
1204 (2006). Examples of cases that Professor Gerhardt posits have reached “superprecedent” status include:
*Marbury v. Madison; Martin v. Hunter’s Lessee, Mapp v. Ohio; Baker v. Carr*, the Legal Tender cases, and perhaps
surprisingly, *Washington v. Davis*. In other words, there are some important cases that are not (currently)
Many of them are structural—creating an allocation of powers that has worked over the past two centuries. Most law students begin their studies with Marbury v. Madison and McCulloch v. Maryland because those cases fleshed out much of the Constitution’s textual structure. As discussed above, there is also some consensus on a few rights: American citizens have a presumptive right to run for office, vote for their political leaders, and dissent.

B. The “Fit” Between Doctrine and Text

Over time, cases cluster around a text. Whether the underlying issue is monumental, as in Casey and Brown, or relatively technical and obscure, as in Spannaus and Boddie, the Court sorts through the cases to determine which are the most important for implementing a particular text. In Philosophical Investigations, Wittgenstein presented a relatively straightforward way to understand how everyone, including Supreme Court Justices, uses language as a “game.” Words cannot be applied or understood in isolation. They gain their particular meaning from the function they play within the particular language “game” being played. Thus, we don’t know what the word “strike” means until we ascertain its function in such different “games” as bowling, baseball, lighting a cigarette, criminal law, and labor law. Each clause within the Constitution creates its own “game,” containing its own technical meanings: “fundamental rights” means different things under each of the “Privileges and Immunities” clauses and something very different under “Substantive Due Process” or the First Amendment.

Wittgenstein then explained that rely upon exemplars to illuminate and justify our

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273 WITTGENSTEIN, supra note ___, at 5e, Aphorism 7.

274 Id. at 6e, 109e, Aphorisms 11, 340.

275 Slaughter-House Cases, 83 U.S. 36 (1873); see also Saenz v. Roe, 526 U.S. 489 (1999) (right to travel under the Privileges or Immunities clause of the Fourteenth Amendment).

interpretation.\footnote{Wittgenstein, \textit{supra} note \__, at 34e, Aphorism 71.} Thus, to invoke Professor Hart’s famous example, we establish what is or is not a prohibited “vehicle in the park”\footnote{Hart first proffered the heuristic in \textit{Positivism and the Separation of Law and Morals}, 71 \textit{Harv. L. Rev.} 593, 607 (1958). Frederick Schauer revisited the Hart-Fuller debate, \textit{See A Critical Guide to Vehicles in the Park}, 83 \textit{N.Y. Univ. L. Rev.} 1109 (2008).} by determining the ordinance’s ends and by considering a particular situation that many (hopefully most) of us would consider to be a clear violation, such as a drunk who plowed his truck through the park’s flowerbed. If we disagree there, it will be hard to find common ground.

Sooner or later, cases create a “core right,” supported by “core examples,” that are the heart of the doctrine within a particular text. Almost by definition, these cases will be harder to overrule than more peripheral instances. For example, it would be far more disturbing if the Supreme Court eliminated \textit{Brandenburg v. Ohio}'s vitally important incitement test, which both on its face and as applied created the judicial ban on viewpoint discrimination against political speech, than if it stopped protecting lap dancing or internet obscenity. Wittgenstein believed that interpretation consists of the interpreter’s substituting one set of words for another.\footnote{Wittgenstein, \textit{supra} note \__, at 81e, Aphorism 201.} Thus, futures Justices can and will disagree over earlier Courts’ characterization of the text’s purposes. They may find the “fit” between the examples, the doctrine, and the purposes to be flawed. They differ over which cases reside at the “core” and which at the “periphery.” Even if they concur on purposes, they dispute which consequences undermine or advance those ends. They also can disagree about the likely occurrence of certain consequences, good and bad.

Although it would take at least a law review to begin to develop the numerous points made in the prior paragraph, \textit{R.A.V. v. St. Paul}\footnote{505 U.S. 377 (1992).} provides a good example of Wittgenstein’s methodology in action. Although the liberal wing concurred in the judgment, the case has

Just like Justice Kennedy in \textit{Romer}, Justice Scalia reconstrued the statute so many times that it became a straw statute. But that straw statute was worth burning down. According to Scalia, the statute was one-sided, applying only to white racists and other politically incorrect segments of our society but not to those whom the City believed had been historically oppressed.\footnote{\textit{R.A.V.}, 505 U.S. at 391-92.} \textit{R.A.V.} fits well into the existing First Amendment universe by reinforcing the core right of “political speech”\footnote{\textit{Morse}, 127 S. Ct. at 2626 (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’” (quoting \textit{Virginia v. Black}, 538 U.S. 343, 365 (2003)). See also \textit{R.A.V.}, 505 U.S. at 422 (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . .”).} through the “core doctrine” of viewpoint discrimination,\footnote{\textit{Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 59 (Brennan, J., dissenting) (describing viewpoint discrimination as “the core First Amendment prohibition”).} both of which advance the First Amendment’s goals of having robust debate so the people can make informed political and personal decisions in an Open Society.\footnote{See \textit{POPPER}, \textit{supra} note ___.} Although there are risks in allowing racists to express themselves, there are greater risks of political oppression, distortion of the electoral process, and costs to individual autonomy if the State can totally suppress certain modes of political expression on one side but not the other.\footnote{See generally Steven G. Gey, \textit{The Case Against Postmodern Censorship Theory}, 145 U. PA. L. REV. 193 (1996) (decrying scholarship advocating government censorship of “oppressive speech” and describing the risks of vesting government with plenary power to regulate such speech); Edward J. Eberle, \textit{Hate Speech, Offensive Speech, and Public Discourse in America}, 29 WAKE FOREST L. REV. 1135, 1204-09 (1994) (advancing several reasons why hate speech should not be suppressed, including the “dismal” record of government in regulating ideas and the “undercutting of personal and collective autonomy values”).}

\textit{R.A.V.} also gains strength because it is difficult to design a better alternative. It is not enough to criticize an opinion before overruling it; one also needs to create new rules. The concurring liberals believed that the speech could possibly be suppressed under a better drafted
statute falling within the “fighting words” exception.²⁸⁷ But Scalia had a telling response: the State’s power to ban fighting words does not include the lesser power to ban a subset of politically unpopular fighting words.²⁸⁸ Furthermore, there is no obvious alternative doctrine that better serves the First Amendment’s purposes. The liberals’ position would permit the government to ban obscene movies that criticize the government.²⁸⁹ Finally, general laws proscribing harassment, threat, and assault have worked reasonably well in preventing the spread and damage of hate speech.²⁹⁰ Once again, the Obama victory signifies that somehow the nation has done some excellent work in the area of race relations over the past few decades. And many liberals and conservatives share in the credit. R.A.V. created a rule of formal equality; formally equal rules are much less vulnerable to slippery slope arguments than alternative solutions. If selected forms of “hate speech” can be banned in certain situations, why not ban other unpopular speech when it falls within marginally protected areas?²⁹¹

C. Consequences

Aristotle maintained that prediction was the primary rhetorical tool: opponents argue that their solution better serves a particular society’s chosen ambitions.²⁹² Every lawyer knows about the “slippery slope”: the immediate issue may be close, but ruling for the other side would create

²⁸⁷ R.A.V., 505 U.S. at 413-15 (White, J., concurring) (invalidating the statute on the grounds that it had applied the fighting words doctrine too broadly).
²⁸⁸ Id. at 386-88. In his concurrence, Justice White accuses Justice Scalia of creating an “underbreadth” doctrine. Id. at 402.
²⁸⁹ Id. at 388.
²⁹⁰ Obviously, there is speech at the margins that does not fall within the ambit of harassment, threat or assault.
²⁹¹ Gey, supra note ___, at 229-31.
²⁹² “The deliberative orator aims at establishing the expediency or the harmfulness of a proposed course of action; if he urges its acceptance, he does so on the ground that it will do good; if he urges its rejection, he does so on the ground that it will do harm; and all other points . . . he brings in as subsidiary and relative to this main consideration.” ARISTOTLE, 1 Rhetoric, reprinted in THE COMPLETE WORKS OF ARISTOTLE 2160 (Jonathan Barnes ed. & J.O. Urmson trans., 1984).
a dangerous precedent applicable to disturbing new situations. Justices on the Supreme Court often foretell cataclysmic results if their views do not prevail. Whenever the Court is asked to reconsider an opinion, it has the advantage of hindsight. To some degree, it can rely upon “the test of time” to determine which of its prophets were right or if the decision generated unintended consequences. To paraphrase Karl Popper’s description of the scientific method, the Court makes a series of propositions that may be refuted by subsequent facts.

Of course, the scientific analogy does not carry very far. There are no double blinds in constitutional law: we cannot rerun opinions to see how things would have turned out if the Court had acted differently. Causation is far more attenuated; we cannot be sure how the Court’s doctrine influenced culture over time. A particular decision may have been basically irrelevant. Verification also fluctuates depending upon the nature of the issue and the outcome of the case. If the case is a relatively unimportant component of constitutional law, it will be difficult to demonstrate its overall effect on society. It will be mainly of interest to the professional class of lawyers, one of the spoils of the constitutional system. Conversely, should the case be central to our culture, it will be difficult to determine what would have happened if the decision had gone the other way. Thus, for example, it is possible that Gerald Rosenberg and Derrick Bell are

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293 “Slippery slope” arguments have been dissected and discussed in great detail in legal scholarship. See, e.g., Frederick Schauer, Slippery Slopes, 99 HARV. L. REV. 361 (1985); see also Eric Lode, Slippery Slope Arguments and Legal Reasoning, 87 CAL. L. REV. 1469 (1999); Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026 (2003)

294 Justice Scalia is particularly adroit at capturing the “parade of horribles” that will ensue from a particular decision: “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices. Every single one of these laws is called into question by today's decision ...” Lawrence, 539 U.S. at 590 (Scalia, J., dissenting).

correct that *Brown* did more harm than good\textsuperscript{296} or was at best insignificant,\textsuperscript{297} but we fortunately never will be able to verify those claims. In addition, any legal “prediction” or “refutation” invariably consists primarily of normative assessments of subsequent events and of public reactions to the particular decision, placing the entire inquiry in the land of “ought” instead of Popper’s scientific world of “is.” Furthermore, there will be no consensus over the consequences, even assuming there is a casual link between doctrine and cultural evolution. *Roe’s* defenders point to changes in family structures, particularly female autonomy. But for some of *Roe’s* critics, that is another deplorable aspect of the opinion.

It is somewhat easier to assess the impact of cases where the Court restrained itself from making a finding of unconstitutionality instead of actively striking a law down. Once the Court determines an action to be unconstitutional, it is harder to determine the costs and benefits of the original, successfully challenged decision. We are cut off from many subsequent facts that would help us determine if the Court or the legislature had initially been correct. The legislature no longer can gather evidence to justify its law. This empirical obstacle is yet another reason why there should be a presumption of constitutionality. For instance, when the Court held that the death penalty was not a cruel and unusual punishment,\textsuperscript{298} the Nation can continue to debate its worth. The public and the legislature can determine, for example, if the death penalty should be used aggressively against convicted murderers, limited to massive terrorist attacks, or eliminated all together. There will be plenty of statistics and chilling anecdotes to support both positions. More recently, the Court refused to prevent a city from aggressively using eminent


\textsuperscript{297} See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Univ. of Chicago Press) (2008) (arguing that the civil rights movement, Congress and the Executive did far more to advance desegregation than *Brown*).

domain power when it provided just compensation.\textsuperscript{299} In an angry response, many States passed laws or constitutional amendments limiting that power. Thus, the issue remained in the public domain, and we can study which approach works better. But even in that situation, the majority may not feel they were “refuted.” They only limited the Court’s role, thus enabling other governmental entities do what they thought was best.

\textit{D. Changed Circumstances}

The \textit{Casey} plurality emphasized two versions of the “changed circumstances” test: the Court changes law because it discovers new facts (Chief Justice Warren’s made the same argument in \textit{Brown} when he implied that prior generations did not appreciate how segregation damaged to black children)\textsuperscript{300} or it develops a “new understanding” of pre-existing facts.\textsuperscript{301} These two formulations are insufficient and misleading, because they make the Supreme Court look merely ignorant when sometimes it also was venal (it is often impossible to determine when a person or institution is acting as a fool, a knave, or both). There are at least six possibilities: (1) The Court did not know what was going on; (2) The Justices drew the “wrong” inferences due to their ignorance of the facts; (3) New developments demonstrate that they had an inadequate data base; (4) New developments inspire new jurisprudential perspectives creating a different set of inferences; (5) The majority understood the facts and their implications; and (6) The majority drew the “wrong” inference from the facts due to their “flawed” jurisprudence.

Both \textit{Brown} and \textit{Casey} place their predecessors in the first four categories: the \textit{Lochner} Court had not lived through the Depression, which undercut, at least for a while, the allure of


\textsuperscript{300} \textit{Brown v. Board of Education}, 347 U.S. 483, 494-95 (1954) (“Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.”).

\textsuperscript{301} 505 U.S. at 854-55.
market fundamentalism, and the *Plessy* Court was unaware of modern sociological findings. Furthermore, the Court and American society had evolved and learned from its past “mistakes.” But Justice Harlan’s stirring dissent in *Plessy* reminds us that the *Plessy* majority grasped the moral, political, and legal implications of apartheid. Those Justices knew whites were systematically degrading African-Americans. The Court either did not care or thought it felt impotent in light of foreseeable backlash. In a similar vein, the *Lochner* Justices understood the competing economic philosophy: the belief that an unregulated market perpetuates and facilitates injustice due to unequal bargaining power. They simply concluded that that belief was an unconstitutional end and could not be part of the constitutional order. The *Casey* Court demonstrates the extraordinary discretion the Court has when faced with issues it characterizes as “controversial.” If five Justices on the Court conclude that “society” has determined that the “facts” have changed then one side’s position in the continuing controversy is truly history. If that judicial majority determines there is no need to reinterpret the “facts,” they refute those who continue to see the facts otherwise. Such decisions infuriate the losers: not only have they lost, but they have been effectively disenfranchised, without easy avenue for electoral recourse. That foreseeable rage is another reason for prudence.

**E. Stare Decisis and Two Forms of “Judicial Restraint”**

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302 *Casey*, 505 U.S. at 861-62 (“In the meantime, the Depression had come and . . . the lesson . . . that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”) (citations omitted).

303 *Id.* at 863 (“Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.”).

304 163 U.S. 537, 552-64 (1896).

305 *Cf. id.* at 557 (Harlan, J., dissenting) (“Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”).
Zelman v. Simmons-Harris\textsuperscript{306} culminated a long campaign by judicial conservatives to reinterpret the First Amendment to permit school vouchers for private religious schools.\textsuperscript{307} Another example of formal equality, Zelman can be broadly interpreted to hold that States can distribute vouchers to private religious schools so long as they do not discriminate among religions nor discriminate in favor of religions.\textsuperscript{308} Many opponents believed this holding would devastate inner city school systems,\textsuperscript{309} while advocates argued that it provided parents, particularly inner city parents, with more options and put needed competitive pressure on often corrupt, inadequate public school systems.\textsuperscript{310} By lifting the pre-existing constitutional ban, the judicial conservatives allowed the populace the opportunity to assess the costs and benefits of vouchers. Although not much time has passed, the change has not yet been profound. Very few school systems have implemented a voucher system.\textsuperscript{311} Where vouchers have been permitted, many parents have chosen to remain in the public school system. And the results of increased privatization have been mixed: some children have access to superior educational

\textsuperscript{306} 536 U.S. 639 (2002).


\textsuperscript{308} Zelman, 536 U.S. at 662 (emphasizing that the Ohio program was “entirely neutral with respect to religion”).


opportunities, while others have become exploited by private schools primarily designed to enrich their founders. The fight is bitter and political. Not all voucher advocates are primarily concerned about children: many want to reduce taxes. On the other hand, many opponents are interested in keeping public school jobs and tenure. In short, both sides have strong constitutional and policy arguments. That constitutional doubt warrants keeping the voucher issue in the political domain.

Stare decisis’s presumption of continuity creates a different conception of “judicial restraint” than the presumption of constitutionality, which restrains the Court from invalidating actions of other governmental entities chosen by the electorate. Stare decisis restraints Justices from overruling their predecessor’s actions, not from overruling the actions of other parts of the government. In other words, stare decisis does not always support the argument that the Court should stay out of many controversies having constitutional implications, because there is reasonable doubt about the proper outcome and because it is important that the body politic be primarily responsible for the nation’s future. Stare decisis perpetuates prior judicial activism as well as prior judicial restraint. On the other hand, doctrinal stability somewhat satisfies Frankfurter’s anxieties by tending to remove the Court from the center stage of politics, because neither party expects as much out of the Court in the future and because less happens during the present. Stare decisis usually works below the surface: the Justices simply refuse to

312 Wolf, supra note ___, at 435.
314 This, in part, explains the vociferous opposition by teachers and school administrators to the school voucher program at issue in Zelman. See Fried, supra note ___, at 168 n.21.
315 This is especially true for adherents of a neoformalist or other proponents of “strong” theories of stare decisis. See, e.g., Solum, supra note ___.
316 The politicization of the judiciary is presumably at its apogee when the Court’s decision reflect attitudinalist theories and give credence to accusations “that the Constitution is nothing more than what five Justices say it is.” Powell, Jr., supra note ___, at 288.
grant certiorari. But to the degree that Frankfurter is correct about the related presumption in favor of judicial restraint, stare decisis should carry more weight in cases where the Court had refused to find governmental action to be unconstitutional (such as vouchers and of the use of affirmative action in higher education).

By helping keep the Court out of the political limelight, stare decisis helps preserve the reputation of the Court as a “legal” institution rather than as another legislative branch. Any strict distinction between law and politics approaches the absurd, because all legal decisions are a form of political/practical reasoning, of choosing between competing interests. Americans need to believe that they live under a “rule of law” as well as a “rule of politics.” The Constitution, the Court, and the legal/political system would lose a great deal of adhesive power if Justices said that they decided a certain case a certain way to benefit the supporters of the political party that selected them in the first place. One of the ways the species is able to coexist is by engaging in the “willful suspension of disbelief,” partially believing in and being dazzled by the Wizard of Oz’s pyrotechnics while also knowing that a regular person was pulling levers somewhere behind all the gloss. Indeed, it is hardly a coincidence that the author of the Wonderful Wizard of Oz worked in public relations, an ironic profession that self-consciously develops necessary illusions.

317 See Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 GEO. WASH. L. REV. 68, 78 (1991) (arguing that “precedents perform a crucial role in constitutional decisionmaking by framing the Court's decisions on whether to grant certiorari”).

318 This is in direct conflict with a “realist” or “instrumentalist” theory of stare decisis, which conceive of the power of courts as quasi-legislative in nature. See Solum, supra note ___, at 188.

319 See Casey, 505 U.S. at 865-66 (O'Connor, J., plurality opinion) (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded in true principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.”).

320 See Tim Ziaukas, Baum’s Wizard of Oz as Gilded Age Public Relations, 43 PUBLIC RELATIONS Q. 7 (1998). L. Frank Baum, the writer of the Wonderful Wizard of Oz, also served as editor of The Show Window, the official journal of the National Association of Window Dressers and was thus undoubtedly aware of the role of marketing in
Major cases invariably tend to strip away the useful fiction of the law/politics
distinction. It is hard to take the legal arguments in Bush v. Gore very seriously when every
Justice found an argument that supported the Presidential nominee who would most likely
appoint similar Justices to the Supreme Court, and every Floridian official proposed solutions
benefiting their Party. Does anyone really believe that the case would been decided in exactly
the same way if it had been entitled Gore v. Bush? Bush v. Gore also belied the claim by many
contemporary conservatives that judicial restraint is crucial to keep the Court out of politics, to
preserve judicial capital. On the other hand, the Casey plurality risked its capital by defiantly
stating that it would not change the law “under fire.” Indeed, the Casey plurality went over
the edge when it not only dismissed the continuing public outcry, but also asserted that critics
should quiet down.

F. Reliance, Rights, and Structures

While bad facts are known to make bad law, difficult cases can generate clumsy
arguments. In Casey, the plurality shifted the justification for the abortion right away from

securing consumption, Stuart Culver, What Manikins Want: The Wonderful Wizard of Oz and The Art of
considered the father of public relations, began formulating a grammar for the nascent field of public relations. See,
e.g., EDWARD BERNAYS, PROPAGANDA (1928).

321 The law/politics dichotomy plays a vital role in maintaining the legitimacy of the Court and, consequently, falls
well within the ambit of what Lon Fuller famously coined a “legal fiction.” LON L. FULLER, LEGAL FICTIONS
(1967). It is a “meta-legal fiction.” These fictions are “not intended to deceive” and serve an invaluable emotive
function in “induc[ing] conviction that a given legal result is just and proper.” Id. at 6, 54. For an historical account
of the development of legal fictions in jurisprudence see Louise Harmon, Falling Off the Vine: Legal Fictions and
the Doctrine of Substituted Judgments, 100 YALE L.J. 1 (1990).


(“Indeed, Bush v. Gore is almost a parody of the Bickelian notion of judicial restraint.”); see also, Bush v. Gore, 531
U.S. 1046, 1047 (2000) (Stevens, J., dissenting) (castigating the majority for “depart[ing] from three venerable rules
of judicial restraint that have guided the Court throughout its history). In this context, the Court has become
“judicially active” by entangling itself too much in the political thicket.

324 Casey, 505 U.S. at 867 (O’Connor, J., plurality opinion).

325 Id. at 866-67.
Roe’s emphasis on medical autonomy to concerns over bodily integrity and a woman’s right to family planning. But that welcome move was accompanied by a claim that the continuation of Roe protects women’s “reliance” interests. At first blush, “reliance” seems an odd metaphor because the Court is protecting the right of women to have future abortions. To use the contract distinction made famous by Fuller and Purdue, the Court was protecting an “expectancy” interest. The purpose of reliance is to protect what has already been done. Even the Casey Court agreed that reliance is more applicable to the “commercial context.” But that concession was a bit distorted: they justified commercial reliance in terms of future planning, not past investments.

The Court partially escaped this confusion by noting that it was protecting a culture that Roe helped create by making it much easier for “women to participate equally in the economic and social life of the Nation.” Thus, women rely on Roe because it supports in their current status in the world. This broad conception of “cultural reliance” can be applied to any contentious case, whether criticized from the populace, the elite, or a faction on the Court. After all, all laws help establish the underlying culture.

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326 Compare Roe, 410 U.S. at 153 (framing a women’s decision as a part of her relationship with her physician) and Casey, 505 U.S. at 857 (conceptualizing Roe as an exemplar of liberty “decisions about whether or not to beget or bear a child” as well as “a rule . . . of personal autonomy and bodily integrity.”

327 Casey, 505 U.S. at 856.

328 The plurality acknowledges that the use of the term “reliance” may appear inapposite, “except on the assumption that no intercourse would have occurred but for Roe’s holding, such behavior may appear to justify no reliance claim.” Id. at 856.


330 Id.

331 Casey, 505 U.S. at 855.

332 Id. at 856.

333 Id.

status during the segregation era. Furthermore, an important constitutional distinction can be lost by blurring reliance and expectancy. Constitutional cases that protect fully formed, pre-existing rights—“vested rights,” to revive an ancient doctrine that once animated constitutional law—involves both forms of reliance. Thus, cases preventing the government from retroactive retaliation should be given extra stare decisis weight.

    To the degree that “reliance” is a legitimating factor, it should be more applicable to “rights” cases than to “structure” cases, which involve the distribution of public power. Vulnerable and emotional, individuals have a greater need for continuity and will be more emotionally and sometimes even physically damaged when their constitutional rights are altered. Bureaucracies can adapt more easily to redistributions in power than emotional individuals. If one looks at the public reaction to recent constitutional decisions, the average person cares far more deeply about rights cases than structure cases.\footnote{This is reflected in the news coverage, which emphasizes individual rights cases. Ethan Katch, \textit{The Supreme Court Beat: How Television Covers the U.S. Supreme Court}, 67 JUDICATURE 1, 10 (1983).} Admittedly, the categories overlap.

    Expanding state immunities against tort suits under the Eleventh Amendment has both structural and rights implications. But even those cases, which stripped millions of people of a crucial remedy, have generated little public debate in comparison to such areas as affirmative action, school prayer, and abortion.

    Thus, a pure structural case, such as \textit{I.N.S. v. Chadha}\footnote{462 US 919 (1983).} or \textit{New York v. United States}, has a lesser claim to stability than a mixed case or a pure individual rights case. Furthermore, the rights cases contain their own spectrum. Some rights involve actions that have little or no effect on other people: one of the defenses of “innocent delights”\footnote{\textit{JOHN LOCKE, TWO TREATISES OF GOVERNMENT; AND A LETTER CONCERNING TOLERATION} 155-56 (Ian Shapiro & John Dunn eds., Yale Univ. Press 2003) (1690).} is that they comply with John
Stuart Mill’s libertarian principle that permits people to act so long as they do not injure anyone else.\textsuperscript{338} Thus, there is less reason to revisit the Court’s recent protection of gay sexuality in \textit{Lawrence}. Criminal procedure rights fall in the middle of this libertarian spectrum: on the one hand, such rights protect all individuals against the state; on the other, criminal defense rights make it harder to punish victims’ perpetrators. Other rights, such as the right to an abortion and the right not to be discriminated against on the basis of race via an affirmative action program, are zero-sum games: pregnant women terminate their fetuses while selected minorities compete with others over governmental benefits. It is not surprising that these “zero sum” issues generate the most heat.

\textit{G. Judicial Theory, Partisan Politics, and Public Opinion}

By cataloging some of the many reasons why a Court should or should not retain precedent, this article has simultaneously listed major ways to evaluate all legal determinations, including initial assessments. After all, the stare decisis inquiry largely consists of revisiting a prior case and reconsidering everything while using the same basic methodology called “legal reasoning.” Although all the factors that have been discussed are relevant, they are dwarfed by opinion. As intimated throughout this article, opinion drives the interpretation of all those factors and is a separate, major factor. Justices begin every decision with a candid admission of their limitations: they write an “Opinion,” not “Truth,” “Knowledge,” or “Right Answer.” It is time to take opinion from the background and place in the foreground by subdividing it. First, how much weight ought to be given Court’s dissents at the time of the original decision? After the opinions have been delivered, how should future courts evaluate professional opinion, including the role of constitutional theory and the scholarly and public discovery of relevant

\textsuperscript{338} \textsc{John Stuart Mill, On Liberty} 21-22 (1859).
facts? Justices also have to answer to the elite in general and the elite within their particular political movement. In addition, Justices represent the mass political movements that placed them in power. They should consider the cultural ramifications of changing the existing law. More controversially, we believe their opinions should be evaluated in terms of probable future political impact. Finally, Justices have a duty to transcend partisan politics, to aspire to statesmanship, a duty requiring them to respond to and help form public opinion.

There must be a moment when all sitting Justices size up a new member to determine which prior decisions may now be narrowed, abandoned, or even overruled. Chief Justice Rehnquist quickly moved to overrule a death penalty case after David Souter joined the Court.\textsuperscript{339} Rehnquist explained that the prior cases were decided by a five-to-four margin containing “spirited dissents.”\textsuperscript{340} Since then, more and more dissents aspire to be “spirited.” In Justice Scalia’s case, most of his dissents are not just spirited, but also acerbic. The “spirited” adjective raises both methodological and normative concerns. How are we to determine when an opinion is “spirited?” And does not this factor encourage Justices to argue with each other more shrilly, undermining internal institutional cohesiveness, reducing public civility in front of an already polarized citizenry, and dissolving the useful myth that law is a profession of principle, not just a reflection of contemporary partisan conflict?

On the other hand, passions, some hot and some cooler, animate every outcome. As Holmes famously said, “law is the felt necessities of the times.”\textsuperscript{341} In other words, law consists of emotions transformed into power. Anger can distort, but also can inspire. Justice Scalia’s dissents make unpleasant reading for many, but they usually are peppered with sardonic wit and


\textsuperscript{340} Payne, 501 U.S. at 828-29.

\textsuperscript{341} Holmes, supra note __, at 477.
insight. Thus, a “spirited dissent” immediately serves several purposes. Merely by existing, it becomes a legally acceptable ground for reversal. It sends a signal to lawyers representing losing interest groups that they may prevail if political fate provides additional sympathetic Justices. Depending upon the stakes, the Justice also appeals to the broader community, particularly his or her political base. Justice Scalia bitterly claimed that Lawrence’s legalization of homosexual behavior was a liberal victory in the “Culture Wars.” More recently, Justice Breyer read an angry dissent from the bench in Parents Involved to emphasize his despair at the majority’s unwillingness to permit cities to implement integration programs at public schools. Professor Guinier subsequently showed how community organizers have used Breyer’s dissent for political as well as legal purposes. Breyer’s passion informed the liberal intelligentsia that this case really matters.

1. Public Opinion

While few Supreme Court decisions capture the public imagination, most never register. At best, they spend a day on the front page of the New York Times. For example, it is unlikely that many people are aware of Parents Involved (although many more know and care about Heller’s protection of firearms under the Second Amendment). Nor has there been much outrage over the partial birth abortion decision. It is not easy to predict public reactions, to know in advance when an opinion will be controversial. Many people, including Justice Blackmun, were surprised about the widespread, continuing hatred of the Roe decision after the mild response to

342 539 U.S. at 602 (Scalia, J., dissenting).
Griswold’s protection of contraceptives.\textsuperscript{345} More often than not, judicial restraint will be met with more favor because it less disruptive and validates pre-existing governmental preferences established through the electoral process. Although the Burger Court was not as conservative as some would have wished, it made a series of decisions protecting suburban, middle-class lifestyle. States were under no constitutional obligation to integrate suburban schools via busing\textsuperscript{346} or suburban neighborhoods via housing.\textsuperscript{347} Nor need suburbs share their wealth with inner city schools.\textsuperscript{348} Mall owners could protect their shoppers from distracting political protesters.\textsuperscript{349} Plaintiffs could not prove racist intent in housing or jobs requirements simply because a facially neutral law had a disparate effect on minorities.\textsuperscript{350} And so on. All of these constitutional compromises may or may not be justifiable under many moral theories or preferred interpretive methods, but the best reason not to revisit them is that they reflect Aquinas’ observation that rulers must operate within the constraints of a particular society. Aggressively reconfiguring suburban life would embitter millions of citizens who would have little or no recourse.

2. Stare Decisis and Legal Theory

After the public has reacted to a particular case, debate over most cases shifts to the elite—lawyers, law professors, business leaders, economists, political scientists, governmental officials and so forth. At that point, interested opinion leaders propose theories to rationalize or attack the opinions, trying to create some coherent pattern out of the somewhat random process

\textsuperscript{347} Lindsey v. Normet, 405 U.S. 56 (1972).
\textsuperscript{349} Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
of constitutional adjudication caused in part by the Court’s inability to choose issues by itself.

After Edwin Meese retired from serving as United States Attorney General, he inspired the conservative “originalist” movement.\textsuperscript{351} Owen Fiss proposed “antisubordination” as a major normative standard.\textsuperscript{352} John Hart Ely recommended an approach policing the democratic process.\textsuperscript{353} To the degree that these visions attract attention and support, they become another way to appraise prior Supreme Court opinions. Their continuing popularity among the intelligentsia establishes their legitimacy; they, like all other legal tropes, are creatures of convention. To the degree that these often-competing approaches support a particular outcome, they create broader consensus and more justifications for continuation.

For example, no decision was more politically provocative in recent years than \textit{Bush v. Gore}, when five Justices determined who should be President. Although the actual outcome is very debatable—the Court should have remanded the Court back to the recalcitrant Florida Supreme Court with clear directions for counting ballots—\textit{Bush v. Gore’s} formally equal rule of “equal voting procedures” makes great sense. First of all, one can reasonably assume that the Framers wanted all eligible votes to be counted the same way. Second, voters who have their vote excluded in one precinct but not in another are subordinated to those voters who live in more lax regions. They are also oppressed by election officials, who have excessive discretion. Third, equal electoral standards reinforce Ely’s vision that the Court’s primary obligation is “representation reinforcement,” the protection of the democratic process.\textsuperscript{354} More generally, formally equal standards reduce corruption, increase accuracy, legitimate the system, and are

\textsuperscript{351} See JOHNATHAN GEORGE O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 133-61 (2005).

\textsuperscript{352} Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFFAIRS 107 (1976). Fiss designated the standard as the “group-disadvantaging principle.”

\textsuperscript{353} Ely termed his approach “representation reinforcement.” See Ely, supra note __.

\textsuperscript{354} Ely, supra note __, at 88.
inherently fair. Thus, future liberals should not overrule *Bush v. Gore*; they should expand it.\textsuperscript{355} For example, they could hold that the constitution requires a paper trail for every major election to monitor compliance. Of course, it is not necessary that an opinion satisfy any particular jurisprudential theory. Elite criticism, like general public attitudes, ebbs and flows; the academy is as vulnerable to fads as the masses. Many scholars attacked the Court for creating an intent requirement in *Washington v. Davis* to prove equal protection violations; over time, that nontextual addition to the Equal Protection clause has faced less criticism. While zoning laws and SAT tests create obstacles for some minorities, most members of our society find those standards to be valuable because they serve other, constitutionally acceptable purposes. Aggressive zoning creates attractive, park-like suburbs that exclude true undesirables, the poor and the working class. Although SAT tests are crude proxies for measuring academic aptitude, they have some degree of accuracy and provide a tool to uniformly measure students from many different backgrounds.

\subsection*{a. Originalism}

Over the past few years, constitutional scholars have focused on the role of originalism in constitutional interpretation. The continuing endurance of this methodological formalism, which looks only to the “original understanding” of a text, is a bit of a puzzle. Its persistence demonstrates that the quantity and quality of supporters, on and off the Court, can be as important as anything else. Over twenty years ago, Professor Powell provided massive evidence supporting the conclusion that the Framers were not originalists.\textsuperscript{356} Thus, to be an originalist meant not to be an originalist. There are innumerable evidentiary problems in determining what


the Framers, much less the general populace, meant when they voted for a Constitution containing a multitude of clauses.

   In addition, a serious commitment to originalism (assuming one can find one “right,” “clear” answer to so many contemporary questions in the scrolls of history) probably requires a massive dose of judicial activism: Justice Thomas doubts the constitutionality of the New Deal.\textsuperscript{357} Relentless originalism threatens many important doctrines that modern conservatives, who tend to be originalism’s warmest advocates, wish to retain: corporations have significant constitutional rights; the Federal Reserve Board is relatively autonomous; and public schools cannot segregate the races. The argument seems inherently bizarre: why would anyone want to make any serious decision without considering what had happened throughout the past; what they were trying to accomplish; and what would likely happen next? Justice Scalia then blurs the issue by invoking “tradition,” which consists of events taking place before and after a particular text was ratified.\textsuperscript{358} Furthermore, it is hard to remain a pure originalist, even within a single opinion. How can one reconcile Justice Scalia’s claim in \textit{Heller} that the Court should determine the “scope” of the Second Amendment by looking only at the original understanding, while reassuring us that citizens do not have a right to a machinegun or a sawed off shotgun because people “typically” do not keep such guns for “lawful purposes”?\textsuperscript{359} Silly Scalia. Isn’t the scope of the right being largely determined by present customs, not ancient understandings? Doesn’t a

\textsuperscript{357} \textit{See}, \textit{e.g.}, Lopez, 514 U.S. at (Thomas, J., concurring) (“At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes . . . As one would expect, the term “commerce” was used in contradistinction to productive activities such as manufacturing and agriculture . . . My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.”).

\textsuperscript{358} \textit{See}, \textit{e.g.}, \textit{Washington v. Glucksberg}, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”). Scalia also relies on a bizarre amalgam of contemporaneous and subsequent sources in his explication of the Second Amendment in \textit{District of Columbia v. Heller}, 128 S.Ct. 2783 (2008).

\textsuperscript{359} \textit{Heller}, 128 S.Ct. at 2815-16.
sawed off shotgun resemble a blunderbuss? And wouldn’t such a weapon be handy if burglars or tyrants confronted you in your house? In future years, many frightened homeowners might “typically” want such weapons. Justice Scalia obviously spent too much time duck hunting instead of playing video games.

Some originalists attempt to solve the problem that so many decisions violate originalist interpretive techniques and outcomes by accepting much of the constitutional status quo: stare decisis trumps originalist findings.\(^\text{360}\) The Court should “sin no more,” exclusively using originalist approaches in the future while leaving the past alone. But if one takes the theory seriously, shouldn’t some prior decisions be overruled? And which ones? Or, if there are good reasons to keep old cases that do not fit into the originalist straightjacket, why aren’t similar reasons appropriate now? If the Court ought to overrule \textit{Roe} because it emerged out of the oxymoronic doctrine called “substantive due process,” it seems the Court should also overrule \textit{Griswold}’s protection of the use of contraceptives and \textit{Bolling v. Sharpe}’s\(^\text{361}\) ban of racial segregation in the District of Columbia. Either the approach is a “one size fits all” method that reduces judicial discretion and makes the system more “legal,” as originally advertised, or it degenerates into a balancing test with a very skewed perspective. There are many reasons to overrule or preserve \textit{Roe}, but they extend far beyond the debate over interpretive method. Another suggestion is “soft originalism.” The Court should create a presumption favoring originalist outcomes. But once one moves beyond the founding era, one has more or less adopted the common law method. There is a widespread consensus that Courts should seriously


\(^{361}\) 347 U.S. 497 (1954).
consider constitutional text, history, and legislative intention (which some of us would reconceptualize as “legislative purpose”). It is hard to think of a scholar or judge who expressly ignores text and history in all situations.

b. Antisubordination and Anti-tyranny Principles

As mentioned above, many liberals want to revive the “antisubordination” principle, which includes concerns about tyranny but seeks to solve many more injustices. While not totally opposed to that principle, we are wary of applying it too aggressively at the constitutional level. After all, antisubordination provides less guidance when rights collide. In *Parents Involved*, for instance, the white parents who wish to send their children to nearby schools were subordinated by school officials who wanted to send the children to less integrated schools. Admittedly, they have not endured the systemic subordination of African-Americans over the past centuries, but they were coerced into sending their child far from home. Furthermore, the poor and the working class have been among the most subordinated over the past few decades. And although it would be inspiring to reconfigure the Constitution to help fight the perpetual class war, that struggle should primarily be fought within the elected branches. Thus statutory construction, particularly in the antitrust area, can be more important than constitutional interpretation.

The great conservative thinkers Edmund Burke and Michael Oakeshott feared political, economic, or legal theories that provide a single normative standard or interpretive technique. First of all, such a high degree of rationality and abstraction easily generates decisions that are

362 This is ostensibly the “soft originalism” advocated by Professor Sunstein in *Designing Democracy: What Constitutions Do* 87-89 (2002). *See also* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *Fordham L. Rev.* 1335, 1344 (1997) (“In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory.”).

363 Siegel, *supra* note __.
out of touch with the body politic, which is hardly monist in its thinking. The elite seduce
themselves with their alleged “rationality.” Such reductionist thinking is particularly hard to
implement within constitutional law: each text in the Constitution provides a different set of
interpretive problems because each clause serves particular purposes (which often are in tension
within the text and conflict with other legitimate purposes served elsewhere in the Constitution).

Nevertheless, all of us use abstractions to regulate behavior. Our society sometimes
strongly feels the need to create significant consistency by creating a general value/norm that is
often described in the legal realm as a “principle.” For instance, under the First Amendment, it
is crucial to preserve the egalitarian concept of very strict scrutiny of “viewpoint discrimination”
and slightly less strict scrutiny of “content discrimination.” Consequently, liberals should not
revisit *Rosenberger v. Rector*, which held that Universities had to provide any committed
support to all student publications. The University of Virginia could not discriminate against
those students who wrote about religion because they were engaging in a “religious activity,”
which was defined as any activity which “primarily promotes or manifests a particular belief in
or about a deity or an ultimate reality.”

The scheme has many problems. First, it is difficult
to implement—can the University refuse to give money to atheist Marxists or Darwinists?
Second, it discriminates against a cluster of beliefs, subordinating the “religious” to the
“political,” “cultural,” or “artistic.” And what is “ultimate reality” anyway? Finally,
*Rosenberger* is worth retaining because it all but holds that blasphemy laws would be
unconstitutional.

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365 *Id.* at 822.
366 *Id.* at 836-37.
367 *Id.* at 831-32.
It is not enough for the Court to come up with a seemingly attractive doctrine. One must ask why the Court should vigorously enforce “viewpoint discrimination” doctrine. It is necessary to go up at least another level of abstraction, making the analysis ever more vulnerable to abuse, the cult of “rationality,” interpretive manipulation, and uncertainty in application. This article’s authors believe the “anti-tyranny” principle is attractive because it is more limited in scope than many alternatives and focuses on tyranny, a particularly odious, substantive evil.\(^368\) It helps determine which constitutional issues are really important, which “fundamental rights” are more fundamental than others. The list of “core rights” include the right to vote for political leaders\(^369\), to dissent, to not be summarily incarcerated by the government, to not be a slave or live in an apartheid or virulently sexist system, and to not live in a society premised upon the Divine Right of Presidents. After those initial “deductions” from the general principle, conclusions which are debatable in their own right, “tyranny” does not provide much more guidance that “Natural Law.” Some will say banning abortion is tyrannical; others will reply that killing the fetus is the shocking injustice. Noam Chomsky has asserted that corporations are a form of private tyranny.\(^370\) Despite these problems, the prevention of tyranny is a reasonable place to stop the process of legal/political abstraction, lest we spin into an infinite regress.

There are many reasons to oppose tyranny in its myriad forms, but the core “reason” is a self-

\(^{368}\) John Locke adroitly defined “tyranny” as “the exercise of power beyond right, which nobody can have a right to. And this is making use of the power one has in his hand, not for the good of those who are under it, but for his own private separate advantage.” Locke, supra note __, at 188.

\(^{369}\) Although the fictional Justice Handy may not have been speaking for his creator, Lon Fuller, Handy argued there are only a few “fundamental rules of the game:” “the conduct of elections, the appointment of public officials, and the term during which an office is held.” Lon Fuller, The Case of the Speluncean Explorers, 62 HARV. L. REV. 616, 638 (1949). But Handy extended the notion of “fundamental rights” to protect the bizarre “free civilmoign system.” Id. at 639. Fuller may have been ironically intimating that once a jurist extends the notion of “fundamental rights” beyond the basic electoral system, all bets are off.

evident limit that ultimately must be intuitively accepted: “All men are created equal.” The tyranny standard reminds us that we have a common ground: the abortion issue will not go away, but few Americans want to create a Taliban-like culture that systemically degrades women. Returning to free speech doctrine, the “fit” between “viewpoint discrimination” doctrine and the “anti-tyranny” principle is very tight. It is hard for government officials to overwhelm political opponents as long as dissenters can openly express themselves and influence future elections.

As soon as one raises the level of abstraction to this degree, it is necessary to look all prior decisions, not just those decided by conservative Justices. The “anti-tyranny” principle uneasily coexists with Hamdi v. Rumsfeld, which authorized the government to incarcerate citizens without providing them with full Article III Court protections. Most importantly, suspects do not have a right to a jury, the institution that Jefferson called a “sacred palladium of liberty.” The Trial's Josef K may end up with more procedural protections than the Court eventually provides through the malleable Mathews v. Eldridge due process balancing test. Everyone ranks constitutional cases differently—the very complexity of the decision-making process and the underlying philosophical differences guarantee perpetual disagreement.

371 See The Declaration of Independence para. 2 (U.S. 1776).
373 Id. at 533 (O'Connor, J., plurality opinion) (holding that all that is required when a citizen-detainee seeks to challenge his classification is “notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker”); contra id. at 570 (Scalia and Stevens, JJ., dissenting).
375 FRANZ KAFKA, THE TRIAL (1925).
376 424 U.S. 319, 335 (1976) (proffering a three factor balancing test consisting of (1) “the private interest that will be affected”; (2) “the risk of an erroneous deprivation” of such interest “through the procedures used” and the probable value of alternative safeguards; and (3) “the Government’s interest”).
For the two of us, *Hamdi* is the worst decision since *Buckley v. Valeo*[^377] (*Buckley* involves the related political problem of “corruption,” which, if unchecked, is often a precursor to tyranny). Because *Hamdi* enables the government to easily sweep up many citizens, it has the potential for even greater evil. Both *Buckley* and *Hamdi* were decided by a liberal-conservative coalition (only Justices Scalia and Stevens required that the entire Constitution apply in *Hamdi*). *Buckley* and *Hamdi* should fall within the important, “controversial” decisions that *Casey* wrestled with, even though *Hamdi* has not provoked much academic or public outrage. One can only hope that “new facts” or “new understanding of the facts” will someday lead to the burial of these two woefully misguided decisions. Perhaps the economic meltdown will make the Court reconsider the role of political donations. Maybe stories of widespread torture and murder will make the nation reevaluate *Hamdi*.

c. Backlash

When reconsidering a decision, the Court should not only assess past and present reactions from the general public and the professional classes; it also needs to estimate future public sentiment. Just as there can be “backlash” when the Court expands a right, as it did in *Roe*[^378] and *Brown*,[^379] there also can be public outrage whenever the Court contracts a right or makes other dramatic changes.[^380] Supreme Court Justices need to be prophets—guessing the likely impact of their decisions and probable reactions. Once again, Aquinas’ conception of

[^379]: See, e.g., Klarman, *supra* note __.
[^380]: See Eskridge, Jr., *supra* note __, at 1314 (decrying the Court’s decision in *Bowers v. Hardwick* as a “judicial blunder” for “generating a firestorm of protest” because “it seemed like a declaration of war by the state against ‘homosexuals.’”)}
prudence rises to the forefront: the Court, consisting of intellectual leaders, needs to be wary of imposing too many of its imaginings on the populace. Every time the Court is judicially active, it subordinates other officials who more directly represent the citizenry. In his famous article on judicial restraint, Professor Thayer described this art as “that combination of a lawyer’s rigor with a statesman’s breadth of view.” The Court is one of the managers of our society; we only hope it can help steer the nation through its inevitable problems instead of adding to them.

The Court is not an Olympian institution. There is a more disturbing component of judicial forecasting that is rarely discussed, a factor that the Justices should never include in their opinions even though it lurks about every controversial decision: Justices should consider how their decision may influence future elections. Because it is absurdly easy to make conventionally acceptable constitutional arguments without including this publicly unacceptable assessment, Justices will never admit to such a crass calculus. They probably would deny that they think about such things—and because power has tremendous capacities of self-rationalization, they may well persuade themselves of this virtue. There is no need to push this irrefutable (and thus unprovable) argument too far. Perhaps they don’t think about future elections. Perhaps they are unaware, even at the unconscious level, of some powerful, rather obvious reasons why they might consider political as well as cultural consequences. There is no reason for outsiders to be so proper. Even if one believes that the Court operates on a less sordid plane, one can obtain an illuminating perspective from the vantage point of judicial realpolitikism. As Bush v. Gore demonstrated all too crudely, Justices have a strong interest (whether they aware of it or not or believe in it or not) in having new members of the Court who are sympathetic to their ideology.

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382 Recall Justice O’Connor’s admonition in Casey, 505 U.S. at 865-66.
All Justices want to win future cases and not see their prior victories reduced to little or nothing. Thus, Justices do not just read election returns: they influence future elections and probably make calculated forecasts. Of course, they are torn when faced with a decision they probably would have initially rejected. The party faithful expect the Justices to champion many of their causes, yet too many victories in one direction enrages the opposition and expands its base by taking many controversial issues off the immediate political agenda (after Lawrence, it is easier for libertarian gays to be members of the Republican Party). Supreme Court nominations are one of the great spoils of every Presidency. And Supreme Court decisions are the great spoils of the Court. Over time, a bloc of Justices rewards its allies more than its opponents. Thus, whatever else can be said about Heller, it was a victory not just for the National Rifle Association, but also for every person who drives around with a rifle in the back of a pickup truck. A future liberal majority should be very wary of revisiting Heller or limiting it to Washington, D.C. through a crabbed reading of the incorporation doctrine. Neither wing of the Court has done much for rural white society and the working class over the past few decades. Once these voters need not worry about the right to keep their rifles and pistols, many of them will be more open to a leftist message and more likely to vote for a party that appoints more liberal Justices. The understandable desire to preserve one’s work product provides yet another reason why Justices will support stare decisis. If prior doctrine is easily dismissed, then their opinions will soon fade into insignificance.

383 Several blogs picked up on this theme in the aftermath of Heller, especially given the largely positive endorsement of Heller’s central holding by Democratic political candidates. See, e.g., David Frum: Democrats Make Peace with the Second Amendment, http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/06/27/david-frum-democrats-make-peace-with-the-second-amendment.aspx (June 27, 2008, 17:29 EST) (“[T]his new liberty is also shaping up to be a clear gain for Democrats:... On this once so divisive issue, the Supreme Court has helped to make Obama’s Democrats … bulletproof.”)
At least from the perspective of those who are not members of the Court, taking future
elections into account is a valid normative criterion. It seems preferable to have a less than ideal
constitutional jurisprudence if that collection of rules makes it easier for a one’s preferred
political movement to gain and hold electoral power. Most of the time, Congress and the
Presidency are more important than the Court. Even if Justice O’Connor’s opinions were not as
elegant and precise as many scholars would have liked, she created an extraordinary body of
doctrine while in control of the Court. Whether one looks at her overall work from the
perspective of Thayer’s “statesmanship” or from the political perspective of keeping moderate
Republicanism in power (at least for a while), she created a constitutional settlement of many
existing controversial issues that both sides should be wary of disturbing. There is a “core right”
to an early abortion. Affirmative action is permissible only in higher education. Religious
private schools are eligible for vouchers. Gays cannot be arrested. Sickly citizens have a
limited “right to die.” If either side profoundly alters such doctrines, their corresponding
political party may pay a high price. Total elimination of the abortion right would anger many
men and women. Eliminating vouchers would alienate inner city parents and those who wish to
send their kids to religious schools, another swing voting group polarized by the culture wars.
Permitting the criminalization of gay behavior would drive many gays Republicans to the
Democratic Party. Most senior citizens do not want to spend their last months or years in great
pain or in a vegetative state (and look how many seniors live in the swing state of Florida).
Thus, future liberal Justices should tolerate the Court’s determination that public schools, unlike
Universities, could not use race as a factor in Parents Involved. Liberals should live with
legislative constraints on late-term abortions, which are quite grisly and provoke understandable
empathic anguish among many people. There is no clear “empathy line” in the abortion area:
some of us not disturbed by the destruction of a few cells; others become upset when the fetus resembles a human being; and almost all of us draw the line at infanticide. There will be plenty of new problems for future Justices to handle—the treatment of suspected terrorists and their captors will continue to raise painful legal issues, particularly whether or not some victims of American terror should obtain damages. And there will be numerous technical issues, such as the scope of federalism and federal court jurisdiction, to provide fodder for the professionals. It is probably naïve to hope for something of a constitutional cease-fire over the culture wars, but that is our recommendation. If Justices on both sides see judicial restraint toward precedent to be in interests of themselves, their party, and the nation, there may be a better chance to deal with other important issues that have been ignored during the Culture Wars. We do not propose this overall strategy because we are constitutional “minimalists.” Sometimes the Court needs to be very aggressive, as in Brown. We are relying upon a constitutional hunch, a hunch that could easily be refuted by new forms of governmental tyranny.

H. Better Reasoning

Justice Brandeis once argued that a case should be overturned when there is “better reasoning.”384 Because all majority opinions contain a cluster of reasons that were conventionally acceptable when the case was decided, it is hard to determine when a competing set of reasons is “better.” Whether one agrees with this article’s normative recommendations or not, the compilation of stare decisis factors demonstrates that constitutional reasoning invariably involves numerous considerations. If the Court revisited every case whenever five Justices thought they had better reasons than their predecessors, stare decisis would be a very thin reed. It is worth re-emphasizing that one of the functions of stare decisis is to pressure Justices to

384 Burnet, 285 U.S. at 406-408 (1932) (dissenting opinion).
accept earlier decisions that they initially rejected (or would have dissented from had they been on the Bench) for what they thought were better reasons.\textsuperscript{385} The legal realist Karl Llewellyn once wrote that every legal decision needs a “singing reason,” a fit between justification and outcome that resonates with lawyers’ informed intuition.\textsuperscript{386} The purposes served by stare decisis suggest that the Court should often accept prior decisions even when they are quite out-of-tune. The good decisions should be retained and the bad overruled, but tolerance ought to be shown to the merely ugly.

V. CONCLUSION

Stare decisis is a multifactor balancing test that is just one variable in an even bigger balancing test consisting of (at least) text, history, tradition, articulation of purpose, consequences, judicial competence, judicial role, structure, choice of remedy, prudence, international norms, choice of form of doctrine, politics, and political morality. Furthermore, each of those factors can be broken into many subcomponents: “history,” for instance, consists of what happened before, during, and after ratification of a particular text. The Court next must determine the significance of different historical sources, and so on. And all of this varies with each text. Thus this survey is very limited, both in terms of the factor (stare decisis) and the application of that factor (primarily evaluating closely contested cases won by conservatives). Because it is a survey, it has not attempted to definitively answer any particular constitutional issue. Nor has it compartmentalized the many reasons why precedent should be overturned, most of which fall under norm of flexibility. Aristotle’s position that the law needs to be adaptive is descriptively more accurate and normatively more attractive than Plato’s static system.

\textsuperscript{385} One could argue that this is the central thrust of stare decisis. \textit{See} Paulsen, \textit{supra} note ___, at 1171.

\textsuperscript{386} \textsc{Karl Llewellyn, The Common Law Tradition} 210-15, 493-96 (1960).
Nevertheless, there is partial wisdom within both perspectives: healthy growth emerges out of flexible stability.

Despite these limitations in scope, this inquiry supports three general propositions. First, the vast number of legitimate factors and sub factors demonstrates that it is all but impossible to create a unified, easily applied theory of constitutional interpretation. Next, one of the great strengths of the Common Law method is that it precludes a rush to judgment. Justices must run their initial assessment, an intuitive reaction formed by character, ideology, and experience, through a lengthy jurisprudential gauntlet. It is unlikely that all the variables point in the same direction, particularly in “hard” constitutional cases. Indeed, most “hard” cases are “hard” because both sides have compelling arguments. This recycling process enables the Justice to pause; perhaps his or her initial reaction was flawed. Eventually the Justice must stop deliberating and act. And who can say what will be tipping point that triggers the Justice’s informed intuition to proceed one way or the other? It may well be the fact that the prior case was decided by a five-to-four vote instead of seven-to-two. Finally, future liberals should not launch a constitutional crusade to cleanse the past or profoundly change the future. As much as we admire Justice Brennan’s and Justice Marshall’s politics, we have serious reservations about reviving their jurisprudence of “antisubordination,” particularly in terms of scope. The future will bring problems enough. Unless governments create new forms of tyranny, Justices should focus on the frightening problems of private power, environmental degradation, resource depletion, and wealth distribution, issues that should be resolved primarily at the statutory level. Thus, progressives should evaluate future Justices’ economic views as closely as their constitutional ones.387

387 All nine contemporary Justice essentially maintain a conservative economic ideology. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES (Magazine), March 16, 2008, at 38.
Henry Adams observed many years ago in his extraordinary autobiography that human thought and actions tend to fluctuate between universals and particulars. In some eras, grand abstraction captures the collective imagination. During other times, individual details seem to matter more. The Court follows this pattern, shifting between broader, more abstract interpretive techniques (such as various forms of Originalism and Textualism or some norm such as “antisubordination” or Ely’s “representation reinforcement”) and the more incremental, particularized common law method. It is possible that we are entering a less abstract era; the ideological hatreds of the Sixties seem passé in light of current economic and environmental difficulties. Many of the rigid, ideological motifs of contemporary conservatism appear to be fraying. Yet the left is capable of substituting its own collection of ideological litmus tests. Even if the nation has been in the thrall of a flawed, perverted ideology, it does not follow that many of the Court’s recent decisions were “wrong” at all, so “wrong” that they ought to be reversed or limited to their facts, or so “wrong” that they have not created a cultural reliance interest that would trigger politically dangerous anger if a resurgent liberal judicial majority undermined those interests.

These ruminations raise a psychological question. What motives reside behind the endless debate between those who tend to prefer law’s certainty and continuity, be it through a glorification of stare decisis, an appeal to Framers’ Intentions, or confident interpretation of unchanging tests into enduring bright line rules, and those who see law as dynamic and plastic? Why do some of us gravitate toward a Platonic conception of static law and others feel more comfortable with Aristotle’s fluid jurisprudence? Perhaps one unexplored impulse is the adjudicator’s feelings about death. If law is fixed, then life’s rate of change is slowed down and

death is delayed, if not defeated. To embrace law’s indeterminacy and plasticity is to
acknowledge one’s unique subjectivity, humanity, and mortality. Death is essential to evolution.
Thus, this article concludes with intimations of a theory of existential jurisprudence that
commingles in the mists of memory of any reader who bothered to get this far.