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The Conflict Between
Stare Decisis and Overruling in
Constitutional Adjudication

Steven J. Burton*

Stare decisis — a court’s duty to follow precedents — sometimes gives way to a court’s power to overrule them. When this should happen, however, is a mystery. We need a sound theory of overruling to unravel the mystery. But we simply do not have one.¹

The challenge for such a theory is to resolve a conflict between stare decisis and overruling. Both are vital to the legal system. Stare decisis fosters unity, stability, and equality over time. Overruling enables supreme courts to correct their past errors and to adapt the law to changing circumstances. Without a sound theory of overruling, a paradox results: A supreme court must follow its precedents but, in any case, it can overrule them. That is, a supreme court must follow its precedents except that it need not. The paradox enables supreme courts to pick and choose the law that “binds” them. It tolerates incoherent and unreliable law, result-oriented judging, and, at least at the U.S. Supreme Court, illegitimate constitutional adjudication.

The need for a theory comes to the fore in dramatic constitutional cases, such as Citizens United v. Federal Election Commission and Planned Parenthood of Southeastern

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¹ Originalist scholars have made a few attempts at a theory of overruling, but their attempts are seriously flawed. See infra notes 13–19 and accompanying text; notes 95, 100. See also Note, Constitutional Stare Decisis, 103 HARV. L. REV. 1344 (1990).
Pennsylvania v. Casey. In Citizens United, the Supreme Court overruled two constitutional precedents that blocked the path to its notorious holding. Two opinions, Justice Kennedy’s for the Court and Chief Justice Roberts’s concurrence for himself and Justice Alito, included passages expressing their authors’ views on stare decisis and overruling. Despite all that has been written on Citizens United, however, these passages have not been the subject of scholarly scrutiny. In Casey, by contrast, the Court declined to overrule Roe v. Wade. A central part of its reasoning, as reflected in Justices Kennedy, O’Connor and Souter’s joint opinion, rested upon stare decisis. Much has been written on this aspect of Casey; however, none of it amounts to a theory of overruling.

This Essay analyzes the conflict between stare decisis and overruling in constitutional adjudication before the Supreme Court. It also makes a proposal that resolves the conflict. Part I presents and criticizes the three common approaches to overruling, each of which has been endorsed by Justices of the Supreme Court and scholarly commentators. These approaches hold that the Court has unbridled discretion to overrule. Part I concludes that unbridled discretion renders stare decisis nugatory, and that this is undesirable. The third approach, Justice Sotomayor’s concurrence in Alleyne v. United States, points the way to a better theory, but it retains a discretionary character rather than one of constitutional obligation.

Part II suggests that the Fifth Amendment’s Due Process Clause requires a constitutional law of overruling that constrains the Court’s power to overrule. Moreover, it proposes a law that does so and resolves the conflict. The Court should be bound to respect stare decisis by following its constitutional precedents, subject to a condition: Stare decisis should lapse when a precedent is incompatible with certain components of the Rule of Law, constitutionalized in the Due Process Clause. Hence,

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3 Citizens United, 558 U.S. at 911–13 (opinion of the Court), 917, 920–21 (concurring opinion of Roberts, C.J.).


6 An implication of the argument to follow is that the Constitution also constrains common law overruling. There are, however, some differences flowing from a legislature’s power to correct judicial errors in common law cases. Another implication is that the Constitution constrains state court overrulings of state constitutional precedents. Exploring the argument’s consequences in these different contexts must be left for another day.

the Court should employ a two-step analysis. The first is governed by law: The Court may consider overruling only when stare decisis has lapsed. The second involves lawmaking: The Court may overrule only when a precedent is mistaken, stare decisis has lapsed, and there is a better alternative. Part II also argues that the proposed law is conceptually sound and constitutionally required. Its conceptual soundness rests on our concept of legal authority, as it underlies common judicial and legal practices. Its deeper constitutional justification rests on the conjunction of Marbury v. Madison, Martin v. Hunter’s Lessee, and Cohens v. Virginia, together with the “case or controversy” limitation on the Judicial Power.8

Part III briefly responds to a possible objection that the proposed law is not a determinate rule that will be effective at binding the Justices. The response suggests that the proposed law would effectively constrain Justices who judge in good faith. A determinate rule would not constrain Justices who judge in bad faith anyhow. So, a determinate rule is unnecessary.

The Essay concludes that the Constitution precludes the Court from exercising its overruling power as a matter of unbridled discretion. Rather, the Constitution constrains the Court’s power here, by law, as it constrains every other exercise of governmental power.

I. The Problem: Unbridled Discretion to Overrule

The Court has taken its cue on overruling from Justice Brandeis’s dissenting opinion in Burnet v. Coronado Oil & Gas Co.:

Whether [stare decisis] shall be followed or departed from is a question entirely within the discretion of the court. Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.9

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9 285 U.S. 393, 405 (1932) (dissenting opinion of Brandeis, J.) (citation omitted). See Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) (“[o]ur history does not impose any rigid formula to constrain the Court” when considering overruling); Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 3 (1979) (“the received tradition among most Justices and commentators denies that members of the Court are or should be meaningfully constrained by stare decisis”); 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, 156 (2006) (referring to “the Supreme Court’s well-settled doctrine that it has unfettered power to overrule its own prior decisions”).
This theme runs throughout the two common approaches to overruling, though they usually do not assert such unrestrained power so boldly. One, the “mistake approach,” is most evident in the two passages in *Citizens United* that speak to overruling, and in the work of some originalist constitutional scholars. The other, the “prudential approach,” is represented by the joint opinion of Justices Kennedy, O’Connor, and Souter in *Casey*. A critical review of these approaches indicates that unbridled discretion to overrule is unacceptable in principle. A “special justification” approach, advanced most recently by Justice Sotomayor, points the way toward a better approach, though her view, too, leaves the Court with much discretion.

A. The Mistake Approach to Overruling

A mistake approach empowers the Court to overrule any constitutional precedent a majority of the Justices believes to have been decided incorrectly. In his *Casey* dissent, for example, Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, wrote:

"Stare decisis is not . . . a universal, command, especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that “depar[t] from a proper understanding” of the Constitution."

This view seems to be most popular with originalists. Thus, Justice Thomas has written, “*Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of

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10 *505 U.S. 833 (1992).*

11 *Id.; 505 U.S. at 954–55 (opinion of Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist was not altogether consistent in this regard. See Dickerson v. United States, 530 U.S. 428, 443 (2000) (Rehnquist, C.J (“even in constitutional cases, *stare decisis* carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification”). See also Payne v. Tennessee, 501 U.S. 808, 834 (1991) (concurring opinion of Scalia, J.) (“what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes”); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (“We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause”); Smith v. Allwright, 321 U.S. 649, 665 (1944) (“[i]n constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”).
the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone.”

Originalist scholars take a similar view. Professor Lawson has argued that “the reasoning of Marbury thoroughly delegitimizes precedent.” Professor Paulsen has argued that stare decisis is unconstitutional. As a generalization, these originalists appear to believe that precedents which depart from the original understanding of the Constitution do not qualify as “interpretations” of the document and, therefore, stand apart from it. The Court, they say, has no power to remake the Constitution.

However, not all originalists endorse such a strong version of the mistake approach. Most originalists concede that the Court should follow some precedents, sometimes called “superprecedents,” that are not based on original understandings. Superprecedents include Brown v. Board of Education, which almost everyone agrees is law for the Court, binding via stare decisis, as well as for others. Accordingly, most originalist scholars are loath to endorse a constitutional theory that does not recognize superprecedents.

They have not, however, succeeded in distinguishing superprecedents from ordinary precedents. The originalist argument allows the Court to treat one or another

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15 See, e.g., Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 311 (2005) (framing the issue as precedent or text); id. at 327 (opposing case law to the Constitution’s text); Edwin Meese III, The Law of the Constitution, 61 TUL. L. REV. 979, 983 (1987) (“[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court” (quoting CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 470–71 (1923)). For a somewhat similar contrast between the constitutional document and the Court’s doctrine, see Amar, supra note 5 at 81–83.


precedent as a superprecedent whenever it wishes. In addition, originalists have identified some superprecedents decided in the past, but have not said whether the Court may set a new superprecedent for the future. Consistency with originalism would seem to require that the Court refrain. In that case, from the standpoint of 1954, the Court could not have decided Brown as it did. This renders the superprecedent move untenable.

Not all who take the mistake approach are brazen about it. In Citizens United, for example, Justice Kennedy (for the Court) and Chief Justice Roberts implicitly endorsed the mistake approach. Both of their opinions called stare decisis a “principle of policy and not a mechanical formula of adherence to the latest decision.”20 “Principle of policy,” perhaps a malapropism, indicates that the Court considers stare decisis a matter of discretion. Policies, by contrast with law, do not give rise to duties.

Remarkably, moreover, Justice Kennedy turned stare decisis on its head by a subtle sleight of hand. He opened the relevant passage by announcing a balancing approach that loads the scales in favor of stare decisis: “Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”21 He later considered an argument that the Court should refrain from overruling Austin due to reliance on it.22 He rejected this argument because the relevant reliance interest “is not a compelling interest for stare decisis.”23 Requiring a compelling interest also involves a loaded balancing test. Here, however, the opinion loads the scales against stare decisis. Together, the two statements amount to a contradiction, enabling the Court to pick and choose howsoever it wishes. Neither, therefore, constrains the Court’s power.

The Chief Justice’s opinion also is sly. He wrote: “Stare decisis . . . counsels deference to past mistakes, but provides no justification for making new ones.”24 In any case, however, following a mistake would be repeating it. The statement effectively writes stare decisis out of the law. Nothing is left to constrain the court.

In addition, the Chief Justice wrote:

[T]he validity of Austin’s rationale . . . has proved to be the consistent subject of dispute among Members of this Court. [citing concurring and dissenting opinions of a total of three Justices over three cases]. The simple fact that one of

20 Citizens United, 130 S.Ct. at 912 (citing Helvering v. Hallock, 309 U.S. 106 (1940)).
21 Id., 130 S.Ct. at 911–12.
22 The argument was that legislatures had relied on Austin by enacting bans on corporate indirect expenditures believing that those bans were constitutional. Id. at 913.
23 Id.
24 Id., 130 S.Ct. at 924.
our decisions remains controversial undermine[s] the precedent’s ability to contribute to the stable and orderly development of the law.\textsuperscript{25}

This astonishing passage makes all contested precedents non-binding. The passage implies that every constitutional precedent in which there was at least one dissent should be liable to overruling just for that reason. The Chief Justice’s treatment of \textit{stare decisis} thus virtually banishes it. And that leaves unbridled discretion to overrule.

\textbf{B. The Prudential Approach to Overruling}

In \textit{Casey}, Justices Kennedy, O’Connor and Souter’s joint opinion adopts a “prudential and pragmatic” approach. It suggests that the Court has legally unbridled discretion to overrule, but should consider listed factors when exercising this discretion:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.\textsuperscript{26}

In \textit{Citizens United}, Justice Stevens wrote a dissenting opinion in which he took a similar tack: “[T]here are powerful prudential reasons to keep faith with our precedents.”\textsuperscript{27}

Some scholars have echoed this view. For example, Professor Fallon has written:

[A]n ultimate [Hartian] rule of recognition authorizes the Justices to treat otherwise erroneous precedents either as binding or not on the basis of case–by–case considerations, some of which are “pragmatic” and “prudential.”\textsuperscript{28}

\textsuperscript{25} \textit{Citizens United}, 130 S.Ct. at 922. This passage is almost unprecedented. In \textit{Payne}, at 826, however, Chief Justice Rehnquist relied on similar considerations. For criticism that would apply to both, see Michael J. Gerhardt, \textit{The Role of Precedent in Constitutional Decisionmaking and Theory}, 60 GEO. WASH. L. REV. 68, 113 (1991) (deferring less to precedents where there was a vigorous dissent is antithetical to the Rule of Law).


\textsuperscript{27} \textit{Citizens United} 130 S. Ct. at 929, 936, 938–42.

\textsuperscript{28} Fallon, supra note 5 at 1147.
Prudence and pragmatism, of course, do not treat precedents as law or recognize any duty to follow them. They simply do not constrain the exercise of the unbridled discretion that is presupposed. Under this approach, at best, the Court gets some advice about overruling. The *Casey* joint opinion, in the quotation above, thus lists a number of factors for the Court to consider as it “gauges the respective costs [and benefits?] of affirming and overruling a prior case.” The factors are not grounded in the Constitution or other law. There is no suggestion that the list is authoritative or exhaustive. Consequently, prudence and pragmatism leave the Court with unbridled discretion to overrule together with some advice. They amount to the mistake approach for all practical purposes.

C. The “Special Justification” Approach to Overruling

Justice Sotomayor’s concurring opinion in *Alleyne* develops a third approach to overruling. Though not a common one, it is not unprecedented. In particular, it recognizes the deficiencies of the mistake approach by requiring a “special justification” for overruling. Her approach, however, does not rest on constitutional grounds that constrain the Court’s discretion. Rather, she advances the special justification approach as a “self-governing principle within the Judicial Branch.”

Justice Sotomayor wrote:

29 For an analysis of advice, see infra text accompanying notes 77 – 82.
30 See supra note 26 and accompanying text.
31 The Court’s list of factors varies considerably from case to case. Thus, in *Montejo v. Louisiana* the Court considered whether the precedent had proven to be unworkable, its antiquity, reliance on it, and, most important, the strength of its reasoning. 556 U.S. 778, 791–97 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1986). Writing for the Court, Justice Scalia balanced these factors to determine whether the precedent’s marginal benefits exceeded its costs. *Id.* See also *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Scalia, J.) (“when governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent’”). In *Citizens United*, Chief Justice Roberts’s concurring opinion considered a yet different set of factors:

[W]e must balance the importance of having constitutional questions decided against the importance of having them decided right. As Justice Jackson explained, this requires a “sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other. . .

*Citizens United*, 130 S.Ct., at 920 (concurring opinion of Roberts, C.J.) (citing Robert Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944)).

33 ___ U.S., at ___.


We generally adhere to our prior decisions, even if we question their soundness, because doing so promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.\textsuperscript{34} Accordingly, she continued, “we require a “special justification . . . . when departing from precedent.”\textsuperscript{35} She did not, however, say what a “special justification” consists in. Presumably, it is a good reason for overruling in addition to a conviction that a precedent was mistaken.

Like the approach in \textit{Casey}, she gave a list of factors the Court should consider when faced with a question of overruling, and the list is very similar. Also like \textit{Casey}, her views are not underpinned by constitutional authority. A “self-governing principle within the Judicial Branch” appears to have none. Her approach seems essentially prudential. Consequently, for her, too, the Court has broad discretion coupled with advice on how to use it.

\section*{D. Some Problems with Unbridled Discretion to Overrule}

There are many problems with unbridled discretion to overrule.\textsuperscript{36} The most salient for the moment is that such discretion negates \textit{stare decisis} altogether. Originalists, for example, generally take the view that the Constitution, as a document, should be interpreted as required by the founding generation’s understanding. An originalist mistake approach to overruling suggests that cases employing any other interpretive method, and reaching results contrary to the original understanding, should be overruled. This is evident in the above quotation from Justice Thomas and in the originalist credo that the Court has no power to change the Constitution.\textsuperscript{37} Hence, it would appear to follow, each Justice should apply the Constitution directly, for this reason alone, irrespective of Supreme Court precedent.

Yet, as Justice Sotomayor recognized, if \textit{stare decisis} means anything at all, it means that the Court should follow some mistaken precedents.\textsuperscript{38} The Court \textit{never}

\begin{itemize}
\item \textsuperscript{34} \textit{___ U.S.}, at \textit{____} (citing \textit{Payne v. Tennessee}, 501 U.S. 808, 827 (1991)).
\item \textsuperscript{35} \textit{___ U.S.}, at \textit{____} (citing \textit{Dickerson v. United States}, 530 U.S., 428, 443 (2000).
\item \textsuperscript{36} On the constitutional problems, see \textit{infra} Part II, §§ A, C, E.
\item \textsuperscript{37} See \textit{supra} text accompanying notes 13-19.
\item \textsuperscript{38} \textit{Alleyne} at \textit{____}, \textit{____}. See also \textit{Casey}, at 857; Frederick Schauer, \textsc{T HINKING L IKE A L AWYER: A N EW INTRODUCTION TO L EGAL R EASONING} 69–70 (2009) (“stare decisis becomes meaningless if a court feels free to overrule all of those previous decisions it believes to be wrong”); Richard H. Fallon, Jr., \textit{Stare Decisis}
should overrule a precedent it does not believe to be mistaken. But it does not follow that the Court always should overrule a precedent it does believe to be a mistake. The key is to distinguish mistaken precedents that should and should not be overruled. In the present context, the role of *stare decisis* is to identify those precedents that, whether or not mistaken, should not be overruled.

There are three clusters of reasons for following some mistaken precedents in the constitutional context. First, as in other contexts, *stare decisis* fosters Rule of Law values. These include consistency and equal treatment, stability, and predictability at any one time and over time. Following precedent, moreover, saves lawyers and judges from having to rethink every legal question from the ground up whenever the question arises, lest overruling come as a surprise. And precedent affords lawyers and lower court judges common points of reference from which to engage productively.

Second, in the present context, *stare decisis* fosters constitutionalism. It constrains the exercise of arbitrary power by the Court. It denies the Court freedom to pick and choose the precedents it will follow. It also tends to bring unity to the Constitution as it is practiced over time, and the Court’s composition changes.

Third, *stare decisis* fosters legitimacy, which requires the Court to have, and be perceived as having, adequate legal justifications for its decisions. Justifications flowing from the Court’s precedents tend, at the least, to be so perceived. Even when

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the Justices disagree, the disagreement will be perceived to be one about the law when all of them reason from the same starting points. To the extent possible, the Constitution and precedents interpreting it should form a coherent corpus of law, widely perceived and practiced as such.

Some, including Chief Justice Rehnquist, would counter that *stare decisis* should not control in constitutional cases because constitutional precedents can be changed only by overruling or constitutional amendment. It is so difficult to amend the Constitution, the counterargument continues, that *stare decisis* should not stand in the way of overruling. As the Court often says, however, “*stare decisis* is not . . . a universal inexorable command.” But it is a command that should have some effect in the absence of a “special justification” for disregarding it: It should count at the least as a reason to follow a precedent, though this reason may be overridden in some cases by other reasons.

Both *stare decisis* and overruling are constitutionally vital. For the reasons to be given below, the Constitution requires the Court to practice *stare decisis*. It is necessary to the Court’s unifying mission, and it is a stabilizing force in a constitutional system under the Rule of Law. In addition, the Rule of Law entails the Court’s duty to follow its constitutional precedents: The Court has a duty to follow the law; such precedents are parts of the law; therefore, the Court has a duty to follow such precedents.

At the same time, the Court’s power to overrule is vital for maintaining constitutionalism by correcting mistakes and updating the law. Overruling, moreover, is the only effective check on the Court’s exercise of its power to interpret the Constitution. The Court’s power to overrule also is essential to the constitutional system’s continuing legitimacy. As Oliver Wendell Holmes, Jr. memorably put it:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Similarly, H.L.A. Hart questioned “the strange moral alchemy which treats the fact that evil has been done in the past as a moral reason for doing it now.”

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42 *See supra* text accompanying note 11.
44 *See supra* text accompanying notes 32-35; *infra* text accompanying note 59.
45 *See infra* Part II, §§ A, E.
So, the law should not jettison either *stare decisis* or overruling. A conflict follows: The Court’s power to overrule constitutional precedents appears to make its duty to follow them hollow. In any case, the Court can exercise this power to relieve itself of *stare decisis*. The Court should not be able to pick and choose between the sides howsoever it wishes.

II. A Proposed Constitutional Law of Overruling

This Part proposes, explains, and defends a law of overruling in constitutional cases before the Supreme Court. Section A argues that the Fifth Amendment’s Due Process Clause (“due process of law”) requires a constitutional law of overruling, by contrast with unbridled discretion. Section B contains the proposal. Section C explains the key legal standard for defining the limits of *stare decisis*: A precedent should lose its authority when it significantly impairs the constitutionalized Rule of Law. Section D supplies the conceptual underpinnings of the proposal from our concept of legal authority. Finally, Section E supplies a deeper constitutional argument supporting the proposal.

A. Due Process of Law

The discretionary approach to overruling is constitutionally untenable as a matter of principle. Under it, no precedent is immune to overruling. In fact, this approach abandons *stare decisis* in constitutional adjudication at the Supreme Court, even though the Court commonly reasons from precedent.

The Supreme Court’s power to overrule is formidable. For the same reasons that every other governmental power is constrained by the Constitution, the exercise of this power should be subject to a check, if only by a subsequent Court. For constitutional precedents, the only available checks are by overruling or constitutional amendment.

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For the philosophically inclined, note that the following argument is premised at a deeper level on H.L.A. Hart’s “incorporationist” jurisprudence, rather than Joseph Raz’s “sources thesis” or Ronald Dworkin’s “law as integrity.” See generally RONALD DWORKIN, LAW’S EMPIRE (1986); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1997); Joseph Raz, Authority, Law and Morality, 68 THE MONIST 295, 315–20 (1985). For another version of incorporationism, see JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001). Accordingly, the structural argument in this Part, the conception of the Rule of Law that is embedded in the Due Process Clause, presented *infra* Part II, §C, and the arguments supporting the Essay’s proposed law, given *infra* at Part II, §§ C, E rest on constitutionalized normative principles.
The prospect of constitutional amendment is too remote to be effective.\(^49\) There should be a check by overruling that is subject to a constitutional law that constrains the checkers.

For these structural reasons and also textual reasons, the Fifth Amendment’s Due Process Clause should be construed to constrain the Court.\(^50\) As Justice Kennedy has emphasized, “[t]he Due Process Clause is a central limitation on the exercise of judicial power.”\(^51\) The Fifth Amendment’s Clause says, “nor shall any person be deprived of life, liberty, or property, without due process of law.”\(^52\) Familiar understandings have emphasized “due process of law” (procedural due process) and “due process of law” (substantive due process). This Essay suggests that there also should be considerable emphasis on “due process of law.”\(^53\) Precedents may recognize and protect interests in life, liberty, or property. A line of Supreme Court cases, for example, recognizes and protects liberty interests in privacy. One of these cases, *Griswold v. Connecticut*, protects a married couple’s constitutional right to use contraceptives.\(^54\) Overruling *Griswold* would deprive them of that right, thereby harming a liberty interest. To generalize, the text of the Due Process Clause requires overruling to comply with due process of law.\(^55\)

Accordingly, the Clause requires a constitutional law that obligates the Court to follow precedent but allows it to overrule in appropriate cases. Such a law should guide

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\(^50\) On the constitutional history, see *infra* note 100.

\(^51\) See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2614 (2010) (concurring opinion of Kennedy, J.). In *Stop the Beach*, a plurality held that judicial action could be a “taking” under the Takings Clause of the Fifth Amendment. *Id.* at 2601–2602 (plurality opinion of Scalia, J.). The analogy to a “deprivation” under the Due Process Clause is a close one. See also *Hunter v. Murray’s Lessee*, 59 U.S. (18 How.) 272, 276 (1855); *Griffin v. Griffin*, 327 U.S. 220, 232 (1946).

\(^52\) U.S. CONST. amend. V.

\(^53\) Here, “law” is emphasized in a juridical sense that encompasses minimal components of the Rule of Law. See *infra* Part I, § C. This sense is sharply different from the one in *Dred Scott v. Sanford*, 60 U.S. 393 (1856), which read what we now call substantive due process into that word. See *Laurence H. Tribe, The Invisible Constitution* 110–12 (2008).

\(^54\) 381 U.S. 1678 (1965).

\(^55\) The Clause might be construed in this context to require due process of law only when overruling would deprive a person of life, liberty or property that is protected by a precedent. On that approach, overruling precedents that concern the allocation or scope of governmental powers might not be so constrained. Such a conclusion, however, would rest entirely on the literal meaning of the constitutional text. Structural considerations still would support a check on this judicial power. Hence, for the sake of consistency, the Clause should not be construed so literally.
and constrain the Court, as do most laws, especially those within constitutional law. To guide, a law of overruling should pinpoint the pertinent issues, provide suitable standards, and identify distinct sets of reasons for deciding each issue. To constrain, each set of reasons should include relevant reasons and exclude others from the Court’s deliberations. It is not necessary for the law to determine a single correct answer by the force of its logic. Few laws do. The law, however, should do more than proclaim the Court’s unbridled discretion or to smuggle it in.

B. The Proposal

This Essay proposes that constitutional *stare decisis* be understood to require the Court to follow an indistinguishable constitutional precedent conditionally. The condition is that the precedent in question does not significantly impair the constitutionalized Rule of Law, which will be explained in the next Section. This condition calls for a “special justification” to overrule, a Rule of Law justification by contrast with a justification based on the precedent’s substantive or procedural merits. So, when the condition his met, the precedent binds the Court unconditionally. When it is not, *stare decisis* (as applied) lapses for the Court, which then is free to overrule.

To elaborate, the starting assumption is that an indistinguishable precedent is in question. The proposal is that the Constitution should be construed to require the Court to follow it conditionally. The proposal thus poses and orders two distinct questions. The first is whether the Court should even consider overruling the precedent (the “threshold question”). A negative answer makes *stare decisis* unconditional, and the Court must follow the precedent. The Court should consider overruling when, and only when, the answer is affirmative. *Stare decisis* then lapses for the Court. The second question is whether the court should overrule (the “overruling question”). It should do


57 See generally STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992); *infra* Part III.

58 To constrain by the force of a law’s logic, the law would have to apply whenever one fact in a case supports a sufficient reason for deciding one way. However, laws rarely take this form. Instead, they apply on the basis of more than one reason, opening the door to judicial judgment whenever the reasons cut in different directions. Accordingly, “constraint” should be understood as a limit on judicial deliberations to a legally-sanctioned subset of reasons. *See infra* Part III.

59 See *Arizona v. Rumsey*, at 212.

60 If the Court overrules a precedent, a further issue would be whether the overruling should have retrospective or only prospective effect. See generally Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); James O. Freedman, Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).
so only when *stare decisis* has lapsed, the precedent in question is mistaken, and a better alternative is available. So, the proposed standard for answering the threshold question is: *Does the precedent in question significantly impair the constitutionalized Rule of Law?* This standard requires some explanation.

C. The Constitutionalized Rule of Law

I suggest that certain basic components of the political Rule of Law are embedded in the Due Process Clause (again, ”due process of law”). That is, some components are “constitutionalized.” The evident purpose of the due process requirement is to prohibit the state from depriving individuals of life, liberty, or property arbitrarily or tyrannically. The baseline purpose of the Rule of Law is the same. Accordingly, in his *Citizens United* concurrence, Chief Justice Roberts wrote that the “greatest purpose” of *stare decisis* is “to serve a constitutional ideal — the rule of law.” Similarly, Justices Kennedy, O’Connor, and Souter wrote in their joint opinion in *Casey*: “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” A law of overruling provides for due process if, and only if, it makes an apt version of the Rule of Law central.

The political Rule of Law can be understood in many ways. Friedrich von Hayek, for example, extolled the virtues of the Rule of Law as a protector of individual liberty. The Rule, he wrote, requires that
government in all its actions [be] bound in advance by rules fixed and announced beforehand — which makes it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances. Whether or not this is an adequate political conception, however, the Due Process Clause encompasses transparency (reasonable notice and predictability) and more.

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61 The same interpretation of due process applies to the Fourteenth Amendment’s clause, but that is not within the scope of this Essay. *See supra* note 6.


63 *Citizens United*, 130 S.Ct. at 921 (concurring opinion of Roberts, C.J.).


Tyrants may use transparent laws arbitrarily and as instruments of their tyranny, as did South Africa under apartheid. But the Constitution’s Preamble makes explicit that which is obvious: The Constitution was adopted “in order to establish Justice . . . and to provide for the General Welfare. . . .” So, the Due Process Clause should be construed to distinguish American laws and legal practices from arbitrary and tyrannous laws and legal practices.

Other scholars, by contrast, would project onto the Rule of Law all of the values embraced by their political philosophies. Ronald Dworkin, for example, once wrote that the Rule of Law requires a community to be ruled by an accurate public conception of individual rights. The Due Process Clause, however, requires much less than this. Other constitutional clauses protect individual rights; other rights are matters for statutory protection; and yet other rights are matters for the common law.

Accordingly, the Due Process Clause constitutionalizes only basic Rule of Law components that rule out arbitrary and tyrannous laws and judicial decisions. Whatever a general political theory might require, I suggest, the constitutionalized Rule of Law requires laws and precedents to be (1) capable of guiding conduct, which requires that they be transparent, coherent, reliable, and workable, both inside and outside of the courthouse; and (2) at least minimally or colorably justified on a continuing basis for the present and future. The first cluster is process–oriented, familiar, and should not be controversial. The second is substantive and requires elaboration.

In this context, minimal or colorable justifications rule out arbitrary and tyrannous precedents while allowing less serious mistakes to stand. Precedents like Plessy v. Ferguson, for example, do not rest on minimal or colorable justifications, from a present standpoint looking forward. That case held that a blatantly racist law was constitutional despite the oppression it wreaked. Whatever may have been considered a constitutional justification when the Court decided that case, there is now no justification for including it in the constitutional corpus. Other precedents may be minimally or colorably justified even though, when decided, they were erroneous interpretations of the Constitution. The Court, for example, might have balanced the right reasons but attached too much or too little weight to some of them, producing a mistaken result. The question should be whether the present Court finds a minimal or colorable justification on its own, whether or not it agrees with the precedent’s holding.

The justification judgment thus should require substantial deference to the Court that decided the precedent. Deference, however, is an elastic concept, a matter of

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67 U.S. CONST., Preamble.


69 Plessy v. Ferguson, 163 U.S. 537 (1896) (separate but equal) (overruled by Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954) and subsequent per curiam decisions).
degree. It is difficult to draw a sensible and firm line. Guidance, however, is possible. One source is by analogy to the Court’s practice of deferring to Congress or a state legislature when reviewing the constitutionality of legislation. A “minimal or colorable justification,” however, is not meant to mimic rational basis or intermediate scrutiny review. Another is the standard’s purpose or rationale. Thus, when deciding whether a precedent has a minimal or colorable justification, the Court should balance the needs for constitutional unity and stability against constitutionality in the specific context of the precedent in question.

The constitutionalized Rule of Law generates several factors that bear on the proposed standard for deciding the pivotal question. To reconstruct the Court’s overruling cases, for they are not coherent, a special justification should depend on several factors, notably (1) notice and predictability;\(^{70}\) (2) legal developments that make the precedent anomalous;\(^ {71}\) (3) the precedent’s workability;\(^ {72}\) (4) reliance on the precedent;\(^ {73}\) (5) the quality of the precedent court’s reasoning;\(^ {74}\) and (6) changes in factual circumstances that erode the precedent’s justification.\(^ {75}\) These factors do not just inform an unbridled discretionary judgment or offer the Justices advice. The basis for minding them is constitutional.

To elaborate, the constitutionalized Rule of Law requires a precedent to be capable of guiding conduct and minimally or colorably justified. To guide conduct, the precedent must be transparent, which is the Court’s aim in its factor of ‘notice and predictability.’ It must be coherent, which is the upshot of the Court’s factor of ‘legal developments that make the precedent anomalous.’ The precedent must be reliable.

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\(^{72}\) Montejo v. Louisiana, 556 U.S. 778, 779 (2009) (“the fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it”). For a critique of the workability factor, see Lauren Vicki Stark, Note, The Unworkable Unworkability Test, 80 N.Y.U. L. Rev. 1665 (2005).


\(^{74}\) In Lawrence v. Texas, 539 U.S. 558, 560 (2004) (overruling Bowers v. Hardwicke, 478 U.S. 186 (1986)), the Court emphasized that “Bowers was not correct when it was decided, and it is not correct today.”

\(^{75}\) In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (overruling Adkins v. Children’s Hospital, 261 U.S. 525 (1923)), the Court emphasized “recent economic experience,” i.e., the Great Depression.
which corresponds to the Court’s ‘reliance’ factor. The ‘quality of a precedent court’s reasoning’ rests mainly on the value of a minimal or colorable justification, as does the Court’s ‘changes in factual circumstances,’ though this part of the constitutionalized Rule of Law should look to the present and future. Thus, a justification may peter out as the legal or factual context of its operation evolves. So understood, the constitutionalized Rule of Law requires *stare decisis*.76

It bears emphasis that the threshold standard operates as a gateway that may block or admit the Court to a plenary overruling deliberation. At the threshold, the Court would not consider reasons that justify the precedent, or the alternatives that could supplant it if it is overruled. That is, crossing the threshold is a condition precedent to a full overruling deliberation. The proposed law would allow the Court to remove the condition only for a restricted set of reasons, namely, constitutionalized Rule of Law reasons.

The conditional structure of the two questions, and the threshold standard upon which they pivot, are novel. They define the limits of *stare decisis*. They make the conflict between *stare decisis* and overruling vanish. When a precedent does not significantly impair the constitutionalized Rule of Law, *stare decisis* governs. When a precedent does significantly impair, *stare decisis* expires. There then is no conflict when the Court considers the question of overruling. And the threshold standard meets the key challenge: It distinguishes mistaken precedents that should be liable to overruling from those that should not.

D. The Proposal’s Conceptual Basis

The proposed law rests on conceptual and further constitutional supports, the latter of which will be discussed in the next Section. With respect to the conceptual the proposal draws on the practice of law and judging. Lawyers and judges routinely refer to precedents, including constitutional precedents, as “legal authorities.” The proposal takes this locution seriously.77

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76 As does the Constitution in a deeper way. *See infra* Part III, § E. *See also* Randall v. Sorrell, 548 U.S. 230, 244 (2006) (“the rule of law demands that adhering to our prior case law be the norm”); Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) (“the doctrine of stare decisis is of fundamental importance to the rule of law”); *Payne*, 501 U.S. at 827 (“*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”).

77 Practical and theoretical authorities should be distinguished. To be brief, practical authorities concern what people should do, while theoretical authorities concern what people should believe. Thus, practical authorities include moral and legal authorities. Theoretical authorities include scientific authorities. In
To grasp the relevant concept of authority, first consider authoritative advice. Assume that you recognize your lawyer, Anne, as an authority on questions of effective representation and advocacy in criminal cases. You are not such an authority. You have become a “person of interest” in a criminal investigation. You consult her immediately. She asks you a few questions and advises you (emphatically) not to talk about the matter with anyone unless she is present. Should you follow her advice? More important for present purposes, what reasons are relevant when you deliberate about whether to follow it?

You do not treat Anne as an authority if you decide what to do by evaluating the rationale for her advice and making an independent judgment on the merits. You would not be “following” her advice if you act as advised because you agree with her. If you keep mum because you agree, her advice would be superfluous. There would be no reason to have sought it. You would be contradicting the assumption with which you began, that you recognize Anne as an authority in this matter. By recognizing her authority, you gave up the opportunity to make a decision de novo.

The proposed law’s conceptual basis is comparable to Joseph Raz’s account of de facto authority. See generally JOSEPH RAZ, THE MORALITY OF FREEDOM 41–47 (1986); RAZ, AUTHORITY, supra note 65 at 3–36. Raz, however, has not said anything about the point at which stare decisis gives way to a court’s power to overrule. For the author’s analogous account of a contract’s authority, see Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 369, 373–78 (1980).

78 RAZ, AUTHORITY, supra note 65 at 21–23. It would be another matter to seek a second opinion from another authority. For example, if a second lawyer disagreed with Anne, you should not choose to follow the advice of the one you agreed with on the merits. Instead, you should consider whether one of the lawyers had greater authority than the other, as relevant. Thus, if the second lawyer had little experience in criminal matters, while Anne was an experienced specialist, you would follow Anne’s advice because of her experience and expertise, not because you agreed with her on the merits of keeping mum. It also would be a different matter if you and Anne were relevantly and equally authorities. That may seem to be closer to the case of a later Court consulting the precedent of an earlier Court. For the reasons given above, however, the earlier Court’s precedent is law that binds the later Court (conditionally). See supra Part II, § B. Hence, the two Courts are not relevantly and equally authorities.

79 You might consult Anne to learn of the considerations you should consider when deciding whether to keep mum. In that case, however, you would be seeking information, not advice. You would be treating Anne as a theoretical authority. See supra note 77.
It is a short step from understanding advice in this way to understanding authoritative legal precedents similarly. Authoritative precedents are familiar and ubiquitous phenomena in legal and judicial practice. Judges, for example, routinely cite precedents when justifying their decisions, without reviewing the grounds on which the precedents were or should have been based. When advocates offer propositions of law in briefs or oral arguments, citations to legal authorities are not normally accompanied by their rationales. When case law contains the relevant authorities, judges normally are satisfied with a citation to precedent and, perhaps, a brief statement of the holding, again without considering the precedent’s rationale. And judges commonly criticize each others’ opinions on grounds of precedent when there are concurring or dissenting opinions, again without reasserting rationales.

The concept of authority underlying the advice illustration explains why lawyers and judges thus rely on precedents: When they do, they need not rethink everything before doing anything. A precedent’s holding, like Anne’s advice, normally supplants its rationale. The proposal, accordingly, restricts the Court’s deliberations on the threshold question to Rule of Law reasons. The rationale, however, may re-enter deliberations when there is a special justification for considering whether to overrule. Hence, much legal and judicial practice suggests, stare decisis requires a court to follow a relevant precedent conditionally, without rethinking its rationale.

It is a separate question whether a precedent is authoritative when an overruling question arises. The preceding Section suggested (in effect) that an indistinguishable precedent loses its authority for the Court when it significantly impairs the constitutionalized Rule of Law. The proposal thus treats precedents and stare decisis as

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80 There is a difference: An advisee has no obligation to follow advice whereas a Justice has a constitutional obligation to follow the law, including constitutional precedents. But this difference is irrelevant to the present point.


82 See sources cited supra note 40.

83 Judges, however, will and should consider a precedent’s rationale to determine whether it is relevant. A case that should be distinguished is not relevant to the case at bar. It is not in question, and stare decisis does not require a court to follow it. Thus, a court may ignore it; draw a distinction, as by carving out an exception to it; or refuse to extend it into a previously unoccupied space. In such cases, the Court is not faced with an overruling issue.
authoritative law for the Court up to that point. Thereafter, the precedent in question has no authority. The way then is clear for the Court to consider whether to overrule on the basis of all relevant reasons. It may decide to overrule, thereby extending the precedent’s loss of authority. Or it may decide to retain the precedent despite its deficiencies, as when there is no better alternative with which to replace it.

E. Constitutional Unity and Stability

As Professor Richard H. Fallon, Jr. has written, “stare decisis presents constitutional puzzles . . . [that] extend deep into the foundations of constitutional law.”

The Court’s overruling jurisprudence does not penetrate these foundations.

A fresh examination of them sheds new light on the legal status of constitutional precedents and stare decisis. It reveals a consequential conjunction of Marbury v. Madison, Hunter v. Martin’s Lessee, and Cohens v. Virginia, together with Article III’s case or controversy limitation on the federal judicial power: The Court has a constitutional duty to treat its constitutional precedents as law and to practice stare decisis with respect to them, subject to a proviso that permits justified overrulings.

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Professor Merrill has countered effectively that these studies count cases in which a precedent was overruled, but not those in which it was followed. Thomas W. Merrill, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 22 CONST. COMMENT. 271, 279 (2005). Professor Fallon has criticized such studies for taking up only the “external point of view,” thus neglecting H.L.A. Hart’s paradigm—shifting distinction between internal and external ways of looking at law, the former of which would emphasize the Justices’ practices of conforming to precedents, and of criticizing each other in opposing opinions and in conference, on the basis of precedents. Fallon, supra note 5 at 1150–58. Professor Schauer is more impressed with the studies. Frederick Schauer, Has Precedent Ever Really Mattered in the Supreme Court?, 24 GA. ST. U. L. REV. 381, 389–91 (2007). See generally Michael J. Gerhardt, The Power of Precedent (2008).

85 The Court has simply assumed a power to overrule constitutional precedents in its unbridled discretion. See supra Part I, §§ A, B. See also John Wallace, Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey, 42 BUFF. L. REV. 187, 192–96 (1994) (reviewing leading judicial statements that the Court has unbridled power to overrule). Professor John Harrison has argued that stare decisis is not rooted in the Constitution. John Harrison, The Power of Congress over the Rules of Precedent, 50 DUKE L.J. 503, 513–25 (2000). He did not, however, consider the arguments in the text above. Professor Paulsen has argued that stare decisis is unconstitutional. Paulsen, supra note 14, at 291, 298. He also did not consider this Essay’s arguments.
One of the Court’s principal constitutional missions is to pursue a unified constitutional system, within the bounds of its institutional competence, under the Rule of Law.\textsuperscript{86} \textit{Marbury}, of course, announced that the Court has a power of judicial review over acts of the coordinate branches of the federal government.\textsuperscript{87} \textit{Martin} and \textit{Cohens} established the Court’s power to review state court decisions.\textsuperscript{88} In \textit{Martin}, Justice Story wrote that the Constitution requires “uniformity of decisions throughout the whole United States, upon all subjects within [its] purview.”\textsuperscript{89} Similarly, the \textit{Cohens} Court warned:

But the judicial control of the Union over State encroachments and usurpations, was indispensable to the sovereignty of the constitution — to its integrity — to its very existence. Take it away, and the Union becomes again a loose and feeble confederacy — a government of false and foolish confidence — a delusion and a mockery\textsuperscript{90}

Thus, the justification for judicial review is based in important part on the need to avoid a centrifugal Constitution, one that flies apart in practice.\textsuperscript{91}

The Court pursues this unifying mission by wielding its power of judicial review in cases. As Chief Justice Marshall famously wrote, the Constitution is law, and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”\textsuperscript{92}

An important link between this part of \textit{Marbury} and Article III, Section 2, appears to have gone unnoticed:\textsuperscript{93} The Court \textit{says} what the law is only when it decides cases or


\textsuperscript{87} \textit{Marbury} v. Madison, 5 U.S. (1 Cranch) 137 (1803).


\textsuperscript{89} \textit{Martin}, at 14 U.S. at 347–348.

\textsuperscript{90} \textit{Cohens}, at 371–72.

\textsuperscript{91} To be sure, the Constitution permits great diversity within its constraints on the federal and state governments. The constraints, however, should be generalizable.

\textsuperscript{92} \textit{Marbury}, 5 U.S. at 177.

\textsuperscript{93} Professor Fallon has argued that Article III, Section 1 (“The Judicial Power”) authorizes the Court to follow precedent. He did not rely on the Court’s power of judicial review together with Article III, Section 2’s case or controversy requirement. Fallon, supra note 38 at 577. Professor Lawson has argued that “the reasoning of \textit{Marbury} thoroughly delegitimizes precedent.” Lawson, supra note 13, at 28; Lawson, supra note 13. However, he did not consider the argument presented in this Essay, either.
controversies and, therefore, only by the holdings of its precedents.\footnote{U.S. CONST. art. III, § 2. “Holdings” may be stated in broader or narrower terms depending on the degree of abstraction used to describe the facts. It is a question of degree and, therefore, not susceptible to any general definition or rule that would draw a workable and defensible line at any particular place. Article III, Section 2, however, should drive a federal court’s understanding of a federal constitutional precedent toward the narrow end of the spectrum.} It follows that the Constitution requires the Court to treat the holdings of its constitutional precedents as law.\footnote{For originalist arguments that constitutional precedents are law, see John O. McGinnis & Michael B. Rappaport, \textit{Reconciling Originalism and Precedent}, 103 NW. U. L. REV. 803, 823–25 (2009); Lee J. Strang, \textit{An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent}, 2010 B.Y.U. L. REV. 1729; Lee J. Strang, \textit{An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good}, 36 N.M. L. REV. 419, 447–62 (2006) [hereinafter “Strang (2006)"].}

If the Court’s constitutional precedents were not law, they would not bind other branches of the federal government, state courts, and other state officials, or lower federal courts. \textit{Marbury}, as commonly understood today, would lose its bite if these precedents were not law binding on the other branches of the federal government. \textit{Martin} and \textit{Cohens} would function poorly if constitutional precedents were not binding on state courts and other state officials. The Court’s supervisory role over lower federal courts would be hamstrung if its precedents did not bind them. The unfortunate consequence of failing to treat such precedents as law would be a Constitution that needlessly tolerates inconsistencies and political conflict at the foundations of government and individual rights. That would be a self–defeating Constitution.

\textit{Stare decisis} avoids such absurd consequences. Following constitutional precedents is the only way to extend their reach beyond the particular decided case.\footnote{Strong legal skepticism, legal pragmatism, strict originalism, and pure natural law do not treat constitutional precedents as law. Strong legal skepticism doubts that there is anything worthy of calling “law” in the normative (conduct–guiding) sense used here. See Steven J. Burton, \textit{Judge Posner’s Jurisprudence of Skepticism}, 87 Mich. L. REV. 710 (1988). Legal pragmatism looks to the future: A pragmatist judge may treat precedents as “information, rather than as authority” when gauging the consequences of a decision. \textit{Richard A. Posner, The Problems of Jurisprudence} 97 (1990). For a more cautious pragmatic approach, see Daniel A. Farber, \textit{Legal Pragmatism and the Constitution}, 72 Minn. L. Rev. 1331, 1341–46 (1988). Strict originalism requires the Court to apply the Constitution directly, regardless of what the Court has held in the past. \textit{E.g.}, Lawson, \textit{supra} note [12]; Michael Stokes Paulsen, \textit{Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?}, 109 Yale L.J. 1535, 1538 (2000). Pure natural law does not depend for its pedigree on human decisions, including precedents. Other versions of natural law, however, include Rule of Law values among those within the natural law, thereby raising the issues considered in this Essay. See Michael S. Moore, \textit{A Natural Law Theory of Interpretation}, 58 S. Cal. L. Rev. 277, 313–18 (1985). The threshold of “fit” in Ronald Dworkin’s theory of “law as integrity”, for example, functions comparatively. \textit{Ronald Dworkin, Law’s Empire} 176–78 (1986).}
Stare decisis therefore is constitutionally required by the conjunction of Marbury, Martin, and Cohens, together with Article III’s case or controversy requirement (as well as the constitutionalized Rule of Law, embedded in due process of law). Stare decisis is the thread with which the Court weaves the fabric of a unified and stable constitutional system. Too loose a practice of stare decisis would allow the constitutional fabric to unravel. (Too tight a practice would make the fabric stiff and uncomfortable.)

It might be countered that the Court should treat its constitutional precedents as law for others but not for itself. However, the constitutional system should be unified and stable across governmental institutions at any one time and over time. A Supreme Court not bound by its precedents likely would vacillate over time as its composition changes, yielding unacceptable discontinuity and instability, and deflating the Court’s legitimacy.

The Court’s constitutional precedents bind the Court, in addition, because the Constitution is law that binds the Court and such precedents interpret the Constitution. The Court has held, for example, that “speech,” within the meaning of

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97 See infra Part II, § C.

98 See Monaghan, supra note 9 (“[T]he question of the appropriate internal authority of the Court’s opinions — their stare decisis effect — is not resolved by the observation that other tribunals are bound”); cf. Payne v. Tennessee, 501 U.S. 808, 834 (1991) (concurring opinion of Scalia, J.) (“what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes”); William O. Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 736 (1949) (“[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it”). Perhaps something like the Scalia–Douglas view was Professor Paulsen’s unstated assumption when he proclaimed without qualification that “stare decisis is unconstitutional,” and that “stare decisis in constitutional law is utterly unjustifiable,” while at the same time endorsing Marbury. Paulsen, supra note 14.


100 See generally Fallon, supra note 38; Strauss, supra note 96.

In any event, the original understanding of the Constitution may have been that the Court would be duty-bound to treat its constitutional precedents as law for itself. In THE FEDERALIST PAPERS NO. 78, Hamilton wrote:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them (emphasis added).
the First Amendment’s Speech Clause, includes symbolic expressions like wearing a black arm band to protest a war. Consequently, the First Amendment protects such expressions; the interpretive precedent just draws this meaning out. The interpretation does not change the Speech Clause. Constitutional precedents are (or, at least, ought to be) hinged on the Constitution’s text.

III. Judging in Good Faith

The Court should answer the threshold question without “peeking behind the curtain” at the precedent’s merits and those of possible substitutes. “Peeking” would be result–oriented judging, which is antithetical to the Rule of Law in any version and, so, fails to provide due process of law. But some might think it unrealistic to suppose that, if it were adopted, the proposed law would stop a Justice from peeking because the proposal does not offer a determinate rule. To assess this objection, consider a distinction between Justices who judge in good faith and others.

As suggested elsewhere, judges (and Justices) have a duty to uphold the law in good faith. In brief, judging in good faith requires a judge to decide on the basis of the relevant legal reasons and only those reasons. This judicial duty excludes from a judge’s proper deliberations all other kinds of reasons, including moral reasons not incorporated into the law, reasons of political loyalty or identification, and reasons of personal interest. A judge forgoes the opportunity to act on such reasons, in her judicial capacity, when assuming the bench. Bad faith occurs when she recaptures such a forgone opportunity.

Adams wrote, “the Laws of every State ought always to be fixed, [and] certain,” and that “every possible Case [should be] settled in a Precedent, leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge.” Strang, supra note 95 at 456–57 (citing 1 Diary and Autobiography of John Adams 167 (L.H. Butterfield ed., 1961)). But the proposition is not supported by clear evidence. See generally Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800–1850, 3 AM. J. LEGAL HIST. 28 (1959); McGinnis & Rappaport, supra note 95; Henry Paul Monaghan, Supremacy Clause Textualism, 110 COLUM. L. REV. 731, 743 (2010); Polly J. Price, Precedent and Judicial Power after the Founding, 42 B.C. L. REV. 81 (2000); Strang (2006), supra note 95 at 447–62. For this reason, the argument in this Essay does not depend on original understanding(s).

101 Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 505 (1969) (“the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment”).

102 M’Culloch v. Maryland, 17 U.S. 316, 407 (1819) (“we must never forget that it is a constitution we are expounding”).

103 See generally BURTON, supra note 57.
It may be added here that the law’s categories stand for different sets of possible reasons bearing on the answers to different legal questions. Judgments in contract law, for example, properly depend on different reasons from those on which criminal law judgments depend. Thus, just deserts is an important reason for punishing criminals, but it counts for nothing in contract law. Within contract law, as well, different sets of reasons bear on questions concerning offers, breaches, remedies, etc. Within criminal law, different sets bear on the required actus reus and mens rea.

The proposed law of overruling identifies the appropriate kinds of reasons for answering each of the two questions it poses. To reiterate, for the threshold question, a Justice should consider reasons based on the constitutionalized Rule of Law. For the overruling question, a Justice should deliberate on merits and Rule of Law reasons as they bear on the precedent and possible substitutes.

At the threshold, “peeking” at the merits would be in bad faith because it would take into account the wrong sorts of reasons — excluded reasons that bear only on the overruling question. At one extreme, no law — even a determinate rule — can stop a bad faith Justice from thus judging in bad faith. At the other extreme, however, a good faith Justice benefits from a law that clarifies and guides deliberations and judgments. And, in between, a law may encourage a puzzled Justice to judge in good faith. Skeptics are wide of the mark if they believe that all Justices would “peek” in all cases. The proposed theory should help to the extent that Justices judge in good faith.

In a hotly contested case on a topic that elicits strong emotions, like Roe v. Wade,104 the temptation to “peek” may be hard to resist. Even so, constitutionally speaking, it is and should be a Justice’s duty to resist. Realistically, humanly, and understandably, some would succeed while others would give in to this temptation. That some, even many, would give in, however, is a poor reason for concluding that the Justices ought to give in. The proposed law assumes that the Justices judge in good faith. But it is no more a panacea, whether for bad faith or some sort of weakness of the will, than is any other law.

Conclusion

The Constitution precludes the Supreme Court from exercising its overruling power as a matter of unbridled discretion. The Fifth Amendment’s Due Process Clause constrains the Court’s power to overrule its constitutional precedents: It requires a constitutional law of overruling. This Essay has proposed a law that poses two distinct questions to be decided in order and in turn: (1) should the Court consider overruling

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the precedent in question? (2) If so, should the Court overrule it? The pivotal question is the first one. The answer should turn on whether a precedent in question significantly impairs the constitutionalized Rule of Law. A precedent thus significantly impairs when the precedent is incapable of guiding conduct, as when it is opaque, incoherent, unreliable, or unworkable, or when it lacks at least a minimal or colorable justification. When the precedent so impairs, *stare decisis* lapses for the Court as applied to that precedent. The Court then may overrule if the precedent is indistinguishable, mistaken, and there is a better alternative. There then is no conflict between *stare decisis* and overruling. Rather, the Constitution constrains the Court’s power here, by law, as it constrains every other exercise of governmental power.