2020

Principle or Partisanship: An Analysis of the Role Stare Decisis Plays in Supreme Court Jurisprudence

Clare Burgess
Claremont University Consortium

Claremont McKenna College

Principle or Partisanship: An Analysis of the Role *Stare Decisis* Plays in Supreme Court Jurisprudence

Submitted to
Professor George Thomas
and
Professor Shanna Rose

By
Clare Burgess

For Senior Thesis
Spring 2020
11 May 2020

ABSTRACT

In this thesis, I analyze the reasons that Supreme Court overturns precedent, and how, if at all, does the doctrine of *stare decisis* impact those decisions. The Supreme Court's decisions are often politicized and viewed as a result of the Supreme Court Justices' ideological views. Simply, they abide by precedents they agree with and abandon ones they do not. While the impact of ideology on Supreme Court decisions is unclear, I find that the doctrine of *stare decisis* plays an important role in their jurisprudence. In fact, the doctrine of *stare decisis* has increasingly dominated cases that reverse a prior Supreme Court decision. Modern iterations of the Supreme Court discuss *stare decisis* in more detail than their predecessors. The Supreme Court's treatment of precedent varies over time; however, its general reverence for *stare decisis* will likely persist in the future.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

First and foremost, I would like to thank my thesis readers, Professor Thomas and Professor Rose, for their guidance, expertise, and advice. Professor Thomas inspired my passion for constitutional law, and his encouragement of my academic pursuits have been crucial to my education over the last four years. My thesis would not have been completed without Professor Rose's weekly meetings and her invaluable counsel throughout the year-long process. Her constant support and patience both as my professor and as my academic advisor have positively shaped my experience at Claremont McKenna College.

I would also like to thank all of my friends, who have supported and challenged me intellectually. Taylor Hughes and Joel Krogstad have unceasingly supported my research and listened to my rough ideas about American constitutionalism for the last year. I want to thank the students and staff at the Salvatori Center, who have encouraged me and provided me with the sanctuary filled with endless snacks and coffee, which has been instrumental throughout this process.

Lastly, I would like to thank my family. My sisters have always pushed me to fulfill my potential, and I would not be here without them. Casey, Sarah, and Julia, your friendship, humor, and championship have grounded me for the last 21 years. My parents, Jim and Elizabeth Burgess, have encouraged my educational pursuits more than I will ever know. They provided an environment that has allowed me to grow intellectually and to reach for opportunities beyond belief. Thank you for believing in me.

INTRODUCTION

In 2016, Donald Trump won the presidential election in what will likely be remembered as one of the most shocking and unanticipated victories in American political history. With Justice Scalia's seat still unfilled on the Supreme Court during the presidential election, many conservatives saw Donald Trump's success as a guarantee of a conservative Supreme Court. In fact, poll data shows that 26% of all Donald Trump voters said that filling the empty Supreme Court seat with a conservative drove their decision to vote for Donald Trump.[1]

Donald Trump's election caused anxiety among liberal voters about the future of *Roe v. Wade*, the Supreme Court's controversial 1973 decision. During the Senate confirmation hearings of Neil Gorsuch, Justice Scalia's successor, the Senate Democrats grilled him on his views of *Roe v. Wade* and the reproductive rights of women. During Gorsuch's confirmation hearing, Senator Durbin asked Gorsuch whether he accepted the Supreme Court's decision in *Roe*.[2] This question is shrouded in a lack of confidence in stability within the judiciary. Senator Durbin's question expresses the theory that *stare decisis*, or the judiciary's general respect for prior decisions, is not strongly abided by in the Supreme Court and is influenced by judges' personal political beliefs.

My findings in this thesis are multi-faceted. By analyzing the Supreme Court's decision-making process for abandoning or obeying *stare decisis*, I determine that

---

1 Jane Coaston, "Polling Data Shows Republicans Turned Out for Trump in 2016 because of the Supreme Court," *Vox*, 29 Jun. 2018, https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire.

2 Matt Ford, "Gorsuch: *Roe v. Wade* is the 'Law of the Land,'" *The Atlantic*, 22 Mar. 2017 https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425/.

individual Supreme Court Justices vary their views on *stare decisis* by case. However, the Supreme Court, as an institution, generally maintains reasonable and clear justifications for overturning precedent over time, though there are a few discrepancies. Throughout my research, I find that the legal theory of *stare decisis* differs dramatically from the Supreme Court's practical approach. Furthermore, I argue that the Supreme Court highly values precedent as evidenced by their use of precedent in their abandonment of *stare decisis*. Overall, *stare decisis* is an important, and generally adhered to, doctrine for the Supreme Court more so now than it has ever previously been in American history.

CHAPTER 1

History of *Stare Decisis*

To understand the significance and purpose of *stare decisis*, it is crucial to learn the origins of this legal principle. Although many legal scholars, such as Justice Scalia, credit the emergence of *stare decisis* to English common law, the practice of abiding by previous decisions only arose in the eighteenth and nineteenth centuries in the English courts.[3] Hamilton, however, spoke of judicial precedent in Federalist No. 78 in 1787. He said, "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."[4] Thus, it is likely that the principle of *stare decisis* emerged simultaneously in English and American legal systems.

Despite Hamilton's discussion of precedent in the Federalist Papers in 1788, *stare decisis* was not practiced widely in the early years of the Supreme Court. According to a study written by political scientists, Professor Timothy Johnson, Professor James Spriggs, and Paul Wahlbeck, U.S. Supreme Court cases were only cited in later cases 4.3% of the time between 1791 to 1815. The U.S. Supreme Court does cite English common law 51.8% of the time.[5] The Court largely relied on English common law, and not previous Supreme Court decisions. This does not necessarily indicate nonobservance of *stare*

---

[3] Thomas R. Lee, "Stare Decisis in the Historical Perspective: From the Founding Era to the Rehnquist Court," *Vanderbilt Law Review* 52, no. 3 (1999): 661.
[4] Alexander Hamilton, *Federalist* No. 78, in *The Federalist Papers*, ed. Gary Wills (New York: Bantam Classics, 1982): 399.
[5] Timothy R. Johnson, James F. Spriggs II, and Paul J. Wahlbeck, "The Origin and Development of Stare Decisis at the U.S. Supreme Court," *Law Explorer*, November 9, 2015.

decisis because there were not many Supreme Court decisions to abide by from 1791 to 1815. Thus, the Court relied on precedent set by Great Britain. In a way, the Court recognized the importance of *stare decisis* by respecting the decisions and laws of England, which helped form many of the laws in the United States. The Court was not merely creating entirely new interpretations of laws, but relying on familiar sources (English common law) to understand the meaning of U.S. laws. As time goes on, there becomes more relevant precedent that the U.S. Supreme Court can rely on; thus, the Supreme Court more frequently cited U.S. Supreme Court precedent and fewer English common laws.[6]

According to a prominent English judge, William Blackstone, a significant purpose for the doctrine of *stare decisis* is to ensure that laws are not "liable to waver with every new judge's opinion."[7] While this prevented inconsistency and constant changes in the law, it also assured the public that the judiciary's decisions were impartial. Some political historians view the development of *stare decisis* as a tool for legitimacy. In their study, Professor Johnson, Spriggs and Paul Wahlbeck argue that "judges, desirous of increasing their policy-making authority, fostered *stare decisis* as a way to legitimize the judiciary and to insulate it from outside political attack…It is also consistent with some historical work on the Marshall Court era, which contends that Chief Justice Marshall emphasized the rule of law as a way to bolster the Court's authority."[8]

Despite the general consensus of the history and purpose of *stare decisis*, it is still unclear under what circumstances the Court *can* overturn precedents. Some argue that the

---

[6] Ibid.
[7] Lee, "Historical Perspective," 662.
[8] Johnson, "Origin and Development,"

Supreme Court should not ever apply strong precedential standards to prior cases. Justice Clarence Thomas, for example, recently encouraged the Supreme Court to abandon any prior decision that they considered to be wrong.[9] Still, others argue that the Supreme Court should respect precedent, except in extreme circumstances. Many legal scholars, including Professor Randy Kozel of Notre Dame Law School, describe judicial precedent as "indispensable"[10] because of its promotion of "individual liberty by fostering impersonality, stability, and constraint."[11] So while *stare decisis* is a long-established American legal tradition, there remains significant controversy over its usage and justifications.

[9] Jonathan Stempel, "Justice Thomas urges U.S. Supreme Court to Feel Free to Reverse Precedents," *Reuters*, 17 Jun 2019, https://www.reuters.com/article/us-usa-court-thomas/justice-thomas-urges-us-supreme-court-to-feel-free-to-reverse-precedents-idUSKCN1TI2KJ.
[10] Randy J. Kozel, "Precedent and Constitutional Structure," *Northwestern University Law Review* 112, no. 4 (2018):790.
[11] Id., 837.

CHAPTER 2

Theories of *Stare Decisis*

Theories in Favor of Strong Horizontal Judicial Precedent

Both conservative and liberal scholars tend to put forward more distinct arguments in favor of strongly abiding by precedent than against it. Unlike the theories against precedent, conservative and liberal scholars generally present similar theories for upholding precedent. While certain scholars, such as Steven Calabresi, argue against those who believe in the absolute power of precedent, very few people actually believe in blindly following precedent. However, they do believe in the legitimate use of previous decisions to inform future ones, when appropriate.

There are several main reasons behind theories of judicial precedent. One of the most prevalent theories is consistency and predictability. If a justice could change the meaning of the Constitution or of the laws with the stroke of a pen (and the agreement of four other justices), society would be unruly. Professor Michael J. Gerhardt explains that, "interests of fairness, efficiency, and the enhancement of social interaction require that governments and citizens have a reasonably settled sense of what they may and may not do."[12] Predictability is essential in American society due to its widely dispersed citizenry. In addition to the predictability that American society requires, laws and their meaning should not contradict each other depending on the specific litigant. Without precedent, justices could very well decide contradictory opinions for similar cases.

---

[12] Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008), 18.

Those in favor of judicial precedent also argue that precedent is caution. Professor Gerhardt clarifies that "the doctrine of precedent …reflects the view that change poses unknown risks, and that we generally should prefer the risks we know to those we cannot foresee…"[13] For the most part, human behavior tends toward certainty than the mysterious unknown. This is not to say that the judicial system should *never* take risks. However, the judicial system should weigh the current risks against the potential future risks. Overturning precedent presents unknown risks in the law and in society, as a whole.

Following precedent is not only the generally cautious decision, but the expectation of precedent also encourages caution among justices. Justices will exercise more caution knowing that their decisions will affect millions of Americans in the present and future, rather than limited to the specific litigants in the case.[14] Justices will be cautious to overturn precedent, but also cautious to create precedent.

Another argument made among scholars is that the following of precedent allows the Supreme Court to reduce institutional politicization.[15] If the Court could easily overturn previous decisions that the majority of Justices on the Court did not politically agree with, the Court would be regarded as a political institution. If the Court becomes politicized, the Court's legitimacy could be at stake.

As stated before, most scholars who argue in favor of judicial precedent do not advocate for the supremacy of precedent over the Constitution or constitutional interpretation. Professor Akhil Amar, a conservative scholar, says, "We might even not

---

[13] Id.
[14] Id.
[15] Id.

only treat a past precedent as a sort of default or the starting point but even give it a certain epistemic weight."[16] Professor Amar argues against Calabresi's impression of precedentalists. Professor Amar views the power of precedent as nonbinding, yet significant nonetheless. According to him, precedent is not created by those unaware of the Constitution's fundamental values. Many Justices who have created precedent have extensively studied Constitutional law, and they deeply understand its meaning and significance. This is not to say that all precedent should be followed. Professor Amar exemplifies this point through John Marshall. He says that, "if the precedent came from the pen of John Marshall…it might be a very strong reason."[17] In other words, Justices should not entirely disregard the understandings and reasonings of previous decisions because they were crafted by the foremost Constitutional minds at the time. Chief Justice John Marshall is regarded as one of the greatest Justices in United States history, thus, his decisions should maintain some weight on the decisions made today.

Professor David Strauss, a liberal precedentalist, presents a unique argument in favor of abiding by precedent. He poses the question, "If someone else were appointing people, someone you did not like were appointing people to the Supreme Court, what theory would you want them to use?"[18] In this case, it makes sense that precedent should be valued for political impartiality. Precedent constrains justices to reasonably interpret the Constitution. They cannot create a new Constitutional interpretation without explaining the diversion from previous interpretations.

---

[16] Akhil, Amar, "Panel on Originalism and Precedent," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington D.C.: Regnery Publishing, Inc. 2007), 215.
[17] Ibid.
[18] David Strauss, "Panel on Originalism and Precedent," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington D.C.: Regnery Publishing, Inc. 2007), 217.

Another interesting argument in favor put forth by Professor Thomas Merrill examines the *results* of precedent. He says, "a judiciary that stood firm with a strong theory of precedent I think would re-channel our nation back toward democratic institutions, away from using the judiciary to make social policy."[19] He astutely points out that many judges and justices are chosen by the President because of ideological alignments as opposed to legal understanding or knowledge. In fact, Presidents have only crossed party lines to nominate a Supreme Court Justice 12 times since the Founding, and not since President Nixon in 1971.[20] The fact that cross-party nominations are incredibly rare may indicate political motivations behind judicial nominations. However, the judiciary was always intended to be as independent from politics as possible. According to Professor Merrill, disallowing justices to make decisions on their constitutional interpretation alone, which could be informed by their personal political beliefs, would eventually force presidents to adjust how they choose nominees. If executives cannot advance their political agenda through nominations, they would begin to evaluate potential nominees "on their competences and their legal abilities."[21]

Even those who argue against adherence to judicial precedent concede that precedent can often be useful and more beneficial than merely interpreting the law as the judge sees

---

[19] Thomas Merrill, "Panel on Originalism and Precedent," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington D.C.: Regnery Publishing, Inc. 2007), 227.
[20] President Jefferson, a Democrat-Republican offered his nomination to Charles Lee, a Federalist, which he rejected; President Lincoln, a Republican, nominated Stephen Field, a Democrat in 1863; President Harrison, a Republican, nominated Howell Edmunds Jackson, a Democrat in 1893; President Taft, a Republican, nominated three Democrats, Horace Harmon Lurton in 1909, Edward Douglass White and Joseph Rucker Lamar in 1910; President Harding, a Republican nominated Pierce Butler, a Democrat in 1922; President Hoover, a Republican, nominated Benjamin N. Cardozo, a Democrat in 1932; President Franklin Roosevelt, a Democrat, nominated Harlan Stone, a Republican in 1941; President Truman, a Democrat, nominated Republican Senator, Harold Hitz Burton in 1945; President Eisenhower, a Republican, nominated William J. Brennan, Jr., a Democrat in 1957; and President Nixon, a Republican, nominated two Democrats, Clement Haynsworth in 1969 and Lewis F. Powell, Jr. in 1971.
[21] Merrill, "Originalism and Precedent," 227.

fit. For example, Justice Stephen Markman of the Michigan Supreme Court states that, "there are considerations that sometimes argue in favor of adherence to precedent, even when that precedent is wrong. For example, the longstanding nature of some precedents and their effective institutionalization within the law."[22] In other words, it is sometimes more convenient to abide by precedent than to overturn it, despite its inaccuracy. This inclination to preserve institutional structure and ease indicates pragmatism over a purely ideological approach to decision-making.

Theories Against Strong Horizontal Judicial Precedent

The debate on precedent is a well-balanced and apolitical one. Conservative and liberal scholars alike criticize the theories of strict adherence to previous Supreme Court decisions. In fact, Justice Black and Justice Scalia, a liberal and conservative respectively, are the two Supreme Court Justices who most frequently called for the overturning of precedent.[23] While there are Supreme Court Justices of both ideological leanings who favor a limited approach to obeying *stare decisis*, legal scholars' opinions are more difficult to pinpoint. Conservative scholars, for example, write more extensively on their negative opinions of *stare decisis* than liberal scholars. Thus, this section reflects a more ideologically unbalanced discussion than exists.

Many conservative Constitutional scholars argue against obedience to *stare decisis* for four main reasons. Firstly, there is no Constitutional provision that requires the

[22] Stephen Markman, "Panel on Originalism and Precedent," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington D.C.: Regnery Publishing, Inc. 2007), 231.
[23] Michael J. Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," *William & Mary Law School Scholarship Repository* 74, no. 25 (1994): 33.

Supreme Court to take previous Court decisions into account when deciding on a case.[24] In fact, Article VI, paragraph 2 of the Constitution prohibits the Supreme Court, states, and political institutions from superseding explicit Constitutional provisions as the federal "Constitution, and the laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land."[25]

Secondly, scholars, such as Steven Calabresi claim that the Supreme Court tends to disobey precedent in landmark Constitutional cases.[26] Many long-lasting precedents and Constitutional interpretations are ones that overturn previous precedents. For example, the current broad interpretations of the Commerce and the Necessary and Proper Clauses resulted from the landmark case *West Coast Hotel Company v. Parrish*, which reversed the decision in *Adkins v. Children's Hospital* made only 14 years prior.[27]

Thirdly, many conservative scholars argue against precedent for pragmatic policy purposes. The Founders purposefully made the Constitution exceptionally difficult to amend. Two-thirds of both the House and the Senate or of the states within a state convention must agree to propose the amendment. If proposed, the amendment must be passed with a three-quarters vote of the states or of the state-ratifying conventions.[28] If, however, Supreme Court interpretation can amend the Constitution, Article V, and thus the Founders' purpose, is easily sidestepped.

---

[24] Calabresi, Steven G, "Panel on Originalism and Precedent," in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi (Washington D.C.: Regnery Publishing, Inc. 2007), 252.
[25] U.S. Const. Art. VI.
[26] Calabresi, "Panel on Originalism and Precedent," 204.
[27] Ibid.
[28] U.S. Const. Art. V.

Similarly, the Supreme Court's ability to bind the next generations of the Court strips the other two branches of their ability to check the Court's power through the appointment and confirmation of new Justices.[29] If the Supreme Court's decisions must be revered above all, the purposeful appointment and confirmation of new Justices who would make vastly different decisions would have no meaning. If Supreme Court Justices blindly obeyed *stare decisis*, as some scholars argue in favor of, the impeachment of a Supreme Court Justice would not even allow for the overruling of their potentially misguided or incorrect decisions. The Constitution clearly grants the executive and the legislative branches with power to check the judicial branch. However, the strict view of *stare decisis* would essentially render these checks as futile.

Fourthly, according to Charles J. Cooper, a prominent conservative attorney and legal scholar, precedent is inherently subjective.[30] Judges and Supreme Court Justices, alike, can manipulate or expand the meaning of precedent by applying it to a dissimilar case. Fifthly, Cooper argues that the entire purpose of *stare decisis* is to protect "error from correction."[31] *Stare decisis* allows judges and Justices to reaffirm erroneous decisions instead of correcting them.

While it tends to be true that there are more conservative scholars who argue against the judicial concept of *stare decisis*, many liberal justices have been more than willing to depart from their absolutist stances on precedent. In fact, Cooper wrote "stare decisis has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for

[29] Calabresi, "Panel on Originalism and Precedent," 207.
[30] Charles J. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," *Cornell Law Review* 73, no. 2 (January 1988): 404.
[31] Ibid.

the most part, are determined by the needs of the moment."[32] According to Cooper, liberals and conservative judges adjust their views on *stare decisis* when it is convenient for them. For example, Robert Jackson, an Assistant Attorney General in the Justice Department under President Franklin D. Roosevelt in 1937, said, "Precedents are the most powerful influence in aiding and supporting reactionary conclusions. The judge who can take refuge in precedent does not need to reason."[33] Jackson, however, reversed his opinion on precedent when he was made Supreme Court Justice by President Roosevelt in 1941. In 1944, Justice Jackson said that, "I cannot believe…that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would…substantially impair the rule of *stare decisis*."[34] Justice Jackson's change of heart indicates a reverence for *stare decisis*, only when personally advantageous. As an Assistant Attorney General, he spoke against precedent because it impeded his ability to make change through the Department of Justice. However, as Supreme Court Justice, Jackson revered precedent.

Justice Jackson's approach to precedent once made Supreme Court Justice does not indicate the sentiment of all Justices, or even liberal Justices. In fact, Justice Hugo Black, one of the Supreme Court's most famous liberal Justices, was staunchly opposed to precedent. He "largely rejected precedent as a legitimate source of constitutional decision making."[35] Unlike many moderate *stare decisis* supporters, Justice Black did not believe in prudence for precedent. He not only believed that erroneous decisions be overturned,

---

[32] Ibid, 402.
[33] Ibid.
[34] Ibid, 403.
[35] Gerhardt, "A Tale of Two Textualists," 32.

but also that "any precedent that conflicts with [his approach] to constitutional interpretation" be reversed.[36]

[36] Ibid, 32-33.

CHAPTER 3

Methodology

To understand the Supreme Court's application of *stare decisis* and the reasons it views acceptable to depart from the doctrine, I read every case from the first year of the Supreme Court to the recent Roberts Court that explicitly overturned a prior Supreme Court decision. The Congressional Research Service compiled a list of every Supreme Court decision that has been overruled by a subsequent decision from the first case in 1810 through 2016. To complete the study, I conducted my own research to find cases from 2016 to 2018 that overturned a prior decision. In total, I read 187 cases that explicitly overturned 242 prior Supreme Court decisions.

In order to analyze trends over time, I grouped the cases by Supreme Court Chief Justice: The Marshall-Vinson Courts represents the cases from 1801 through 1953; The Warren Court represents the cases from 1953 through 1969; The Burger Court represents the cases from 1969 through 1986; the Rehnquist Court represents the cases from 1986 through 2005; and the Roberts Court represents the cases from 2005 through 2018. I grouped the cases between 1810 and 1952 into one chapter because it contained roughly the same number of cases as later iterations of the Supreme Court, and I wanted to focus on the modern conceptions of *stare decisis*. However, I did not want to exclude the first 164 years of the Supreme Court because I found these traditional understandings of *stare decisis* to be a useful comparison in order to gauge the changes over time of this doctrine. Each subsequent Court was grouped by Supreme Court Justice. While I understand that

this may not be the most precise way to conceptualize the opinions of *stare decisis* within the Court, I found that it generally encapsulated the views of the era.

CHAPTER 4

The Marshall – Vinson Courts (1810-1953)

From 1789 to 1953, there were only 58 cases in the Supreme Court that overturned a previous Supreme Court decision. Despite the existing philosophy and theoretical exaltation of *stare decisis*, many of majority opinions during this time did not discuss the process or reasoning for overturning previous decisions. Of the 58 cases that overturned a prior Supreme Court decision during this 164-year time period, fewer than 15 cases provided more than one sentence on the rationale for overturning precedent. For example, many cases simply state that the previous decision is not consistent with their current decision, and should thus be overruled.[37] However, in this chapter, I will discuss the few cases that did mention the considerations for upholding or abandoning *stare decisis*. It is important to note that these categories of justification are not mutually exclusive; the Court often provides several rationales, frequently relying on the general inaccuracy of the prior decision.

Abandoning Erroneous Decisions

Despite the long history of *stare decisis* as a legal doctrine, the first 164 years of the Court rarely discussed the rationale for overturning precedent. The most commonly cited reason for overturning a previous decision during this time was that the precedent was erroneous. Most of the cases during this time period briefly say that the governing

[37] Examples include Union Pac. R. Co. v. McShane, 89 U.S. 444; Leisy v. Hardin, 12 Ky.L.Rptr. 167; Terral v. Burke Const. Co., 257 U.S. 529; Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U.S. 203; East Ohio Gas Co. v. Tax Commission of Ohio, 283 U.S. 465;

precedent is in conflict with the decision of the current court and should no longer be considered binding. These cases imply the prior precedent's erroneous nature. However, there are a few cases that expand this explanation by delving into the prior decision and why the Court considers it to be mistaken. In 1941, through *Nye v. U.S.*, the Court overturned the 1918 decision in *Toledo Newspaper Co. v. U.S.* based on its erroneous nature. In *Nye v. U.S.*, the petitioners were found guilty of contempt under section 268 of the Judicial Code for attempting to dismiss a wrongful death suit through undue influence. However, *Toledo Newspaper Co. v. U.S.* previously held that a congressional act passed, which further detailed the court's power to hold a person in contempt, did not limit or expand the court's power to hold a person in contempt, but was purely intended to clarify the rights of the judiciary. That is to say *Toledo Newspaper Co. v. U.S.* determined that the Court is not limited in holding a person in criminal contempt. In *Nye v. U.S.*, the Court held that Congress did, in fact, limit the powers of the judiciary; and thus, it could not hold a person in criminal contempt unless the individual was physically near the courthouse itself. In his majority opinion, Justice Douglas wrote, "the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended for the statute to have."[38] Based on a thorough examination of the statute and case history, the Stone Court determined that *Toledo Newspaper Co. v. U.S.* was wrongly decided.

The Court similarly overruled *Crain v. United States* in *Garland v. State of Washington* in 1914. The Court closely analyzed the prior ruling's reasoning, but

[38] Nye v. United States, 313 U.S. 33, 51 (1941).

ultimately found its interpretation and holding incorrect. In 1896, the Court held that, in criminal cases, entering a formal plea was an entitlement provided for by the Due Process clause of the Fourteenth Amendment. However, the Court later unanimously held that the Due Process clause does *not* require the states to adopt the same criminal procedures in order to protect citizens' privileges and immunities; thus, the Court overturned the initial decision in *Crain*. Unlike *Nye v. U.S.*, however, Justice Day mentioned his disinclination to abandon *stare decisis* in his majority opinion in *Garland*. He said:

> Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled.[39]

This opinion breaks the judicial norm for the era by paying lip service to the importance of *stare decisis*. This decision instituted the Court's tendency to justify its abandonment of precedent. Now, it would be unthinkable for the Court to overturn precedent without any explanation.

According to Amy Coney Barrett, a United States Appellate Judge in the Seventh Circuit, the Court's use of an erroneous decision as justification for abandoning *stare decisis* can be difficult to argue. She wrote, "an erroneous precedent is one that reflects the 'wrong' constitutional philosophy: a judge espousing an approach of active liberty may judge an originalist precedent mistaken, not because it incorrectly determined the relevant provision's public meaning, but because it treated that meaning as dispositive."[40] Individual Supreme Court Justices often use competing methodologies for evaluating

---

[39] Garland v. State of Washington, 232 U.S. 642, 646-47 (1914).
[40] Amy C. Barrett, "Precedent and Jurisprudential Disagreement," *Texas Law Review* 91, (2013): 1718.

constitutional meaning, which informs their opinion of a precedent correctness. Since the Vinson Court ended in 1953, the Supreme Court has drastically decreased the number of cases that use erroneous decisions as the sole justification for overturning a precedent. Abandoning *stare decisis* due to the Justice's personal belief in its misinterpretation of the law perpetuates the belief that the Supreme Court acts on the nine Justices personal opinion as opposed to professional jurisprudence.

Judge Barrett's association between the abandonment of *stare decisis* and the drive of the Justice's personal opinion is illustrated in Justice Roberts' dissenting opinion in *Smith v. Allwright* in 1944. He wrote:

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinions, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.[41]

Justice Roberts attributed the overturning of *Grovey v. Townsend* to the majority's personal opinions and the public's temporary feelings. Furthermore, Justice Roberts is the first to voice concerns of the Court's legitimacy when overturning precedent; this concern with *stare decisis* and has since become pervasive in Supreme Court jurisprudence.

Obeying the Intention

When the Court faces the predicament of choosing one precedent over another, the Court often favors the prior decisions' *purpose* instead of its decrees. For example, in *West Coast Hotel Co. v. Parrish* chose to uphold cases such as *Radice v. New York* and

[41] Smith v. Allwright, 321 U.S. 649, 670 (1944).

Nebbia v. New York and *O'Gorman & Young v. Hartford Fire Insurance Company* over *Adkins v. Children's Hospital of D.C.* because its principles reflected the original *purpose* of the statute. In his majority opinion, Chief Justice Hughes said, "We think that the views expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. Those principles have been reinforced by our subsequent decisions."[42] Chief Justice Hughes cited *Radice v. New York*, *O'Gorman & Young v. Hartford Fire Insurance Company*, and *Nebbia v. New York*, which were decided in 1924, 1931, and 1934 respectively, all after the 1923 case of *Adkins v. Children's Hospital of D.C.* Because those cases did not directly relate to women's minimum wages, the Court was able to distinguish them from the Adkins case. However, when *West Coast Hotel Co. v. Parrish* came to the Court with virtually similar facts, the Court had to choose between the rule dictated by Adkins or the general principles affirmed in the more recent precedents. The Court decided to rule in favor of the more recent precedents and officially overrule *Adkins v. Children's Hospital of D.C.* in order to pursue the principles of protecting a class of workers with unequal bargaining power.

Three years later, in 1940, the Court faced a similar obstacle of deciding between the rule and the principle in *Helvering v. Hallock*. Two previous decisions dictated that a grantee's income through property held in trust could not be taxed by an estate transfer tax after the grantor's death. In *Helvering*, however, the Court ruled the opposite due to the prior Court's plain misunderstanding of the Revenue Act of 1918. In this case, the Justice Frankfurter wrote in his majority decision that:

---

[42] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).

> The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie stare decisis to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it.[43]

Although the Court recognized the importance of *stare decisis* as a social policy, they prioritized the maintenance of the principle set out in Congress' statute over the Court's wrongful practice of it.

Obeying Federalism

Another significant theme seen throughout the Supreme Court's first 164 years is the Court's acquiescence to decisions made at the state level. The Supreme Court often defers its decision to the decisions of the state judiciary. For example, in *Green v. Neal's Lessee*, the Supreme Court examined the statute of limitations for a peaceable possessor of land with no legal claim by suit in Tennessee. Although two previous Supreme Court cases[44] determined that the statute of limitations is only applied to those who possess the land under a grant or deed, the Supreme Court overruled those decisions in favor of the settled law in Tennessee. The majority opinion in the Marshall Court wrote, "it is now made to appear that these decisions were made under such circumstances, that they were never considered in the state of Tennessee as fully settling the construction of the act."[45] The Court abandoned its own federal precedent in favor of Tennessee's state precedent

[43] Helvering v. Hallock, 309 U.S. 106, 122 (1940).
[44] Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476 (1816); and Powell's Lessee v. Green, 2 Peters, 240 (1829).
[45] Green v. Neal's Lessee, 31 U.S. 291, 292 (1832).

made in 1828, which settled the question within the state more so than the federal cases seemed to.

This theme is seen again in 1877 in *Cass County v. Johnston*. This case overturned *Harshman v. Bates*, which determined Missouri's Township Aid Act to be unconstitutional under the Missouri Constitution in 1875. In Chief Justice Waite's majority opinion, he references nine cases that appeared in the Missouri Supreme Court, each of which upheld the Township Aid Act of Missouri. Chief Justice Waite said:

> These decisions had all been made, and had never been questioned, when the act of 1868, now under consideration, was passed. They were also in force, as evidence of the law of the State, when the bonds in controversy were issued; and so far as we are advised, there has been no disposition since on the part of the courts of the State to modify them.[46]

Chief Justice Waite deferred to the decision of a state court over that of the federal court. He even stated that the state court's decision "is binding upon us."[47] Early conceptions of federalism consider state governments to be the primary arbiters of governmental responsibilities, and that federal interference requires special justification.[48] The nineteenth century iterations of the Supreme Court manifest the federal government's general deference to state governments.

Abandoning Nonaccepted Decisions

During this period, the Supreme Court generally overruled precedents that are eroded by subsequent decisions. According to Professor Randy J. Kozel of Notre Dame Law

---

[46] Cass County v. Johnston, 96 U.S. 360, 368 (1877).
[47] Id.
[48] Henry M. Hart, "The Relations Between State and Federal Law," *Columbia Law Review* 54, no. 4 (April 1954): 497.

School, these eroded decisions are seen, by the Court, as "anachronism[s] that should be overturned."[49] In 1798, the Supreme Court determined that the Court's jurisdiction over a case depends on the sum in dispute before the initial decision.[50] In *Gordon v. Ogden* in 1830, Chief Justice Marshall overturned *Wilson v. Daniel*, and he decided that the Court's jurisdiction over a case depends on the sum in dispute when the writ of error is filed. In his decision, Chief Justice Marshall said:

> Although that case was decided by a divided court, and although we think that upon the true construction of the twenty-second section of the judicial act, the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much include to adhere to the decision in Wilson vs. Daniel, had not a contrary practice since prevailed.[51]

Even though the Court believed the decision to be wrong, they would have felt compelled to follow the prior decision. However, because the decision upheld in *Wilson v. Daniel* was no longer the prevailing practice of the judiciary, the Court felt compelled to follow a more recent precedent set by the Court in 1809 by *Cooke v. Woodrow*. The Court abandoned its eleven-year-old precedent because it indirectly overturned in *Cooke*. The Court's quick rejection of the doctrine set out in *Wilson* not only indicates its weakness as a decision, but also its inability to bind to the fabric of society.

Later, in 1867, the Supreme Court overturned *Sheehy v. Mandeville & Jamesson* through its decision in *Mason v. Eldred* due to its inefficacy as a precedent. In the majority decision, Justice Field noted the refusal of state courts to follow the decision in *Sheehy*. He explained that:

---

[49] Randy J. Kozel, "*Stare Decisis* as Judicial Doctrine," *Washington & Lee Law Review* 67, no. 2 (2010): 433.
[50] Wilson v. Daniel, 3 U.S. 401 (1798).
[51] Gordon v. Ogden, 28 U.S. 33, 34 (1830).

> [T]he Supreme Court of Illinois commented upon the case of *Sheehy v. Mandeville,* and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.[52]

Although horizontal precedent is often assumed and unquestioned, the decisions made by the Supreme Court are not always believed correct to the states' conception of the law. The widespread refusal or hesitation of states to follow Supreme Court precedent, despite their reverence for opinions from the highest court, indicates to the Court a potential error in judgment on their part. Not only does this decision reinforce the Supreme Court's deference to state courts during this era, but it reinforces the idea that the Court's susceptibility to public opinion, especially to that of legal scholars and lower courts.[53]

Not only does the state courts' refusal to uphold Supreme Court precedent indicate that the Court may have been mistaken when deciding the prior judgment, but it also prevents the very things *stare decisis* was intended to protect: uniformity and certainty. Justice Brandeis made this clear in his majority decision in *Erie R. Co. v. Tompkins* in 1938. He said, "[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."[54] The prior law affirmed in *Swift v. Tyson* in 1842 expanded the powers of the federal judiciary by allowing federal courts to not "apply the unwritten

---

[52] Mason v. Eldred, 73 U.S. 231, 237 (1867).
[53] Pamela C. Corley, Paul M. Collins, Jr., and Bryan Calvin, "Lower Court Influence on U.S. Supreme Court Opinion Content," *The Journal of Politics* 73, no. 1 (January 2011): 31.
[54] Erie R. Co. v. Tompkins, 204 U.S. 64, 74 (1938).

law of the state as declared by its highest court."[55] The Court disavowed *Swift* 's conception of an expanded federal judiciary because "in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."[56] Although the Court determined *Swift* to be erroneous, they further justified their decision to overturn *Swift* by demonstrating state courts' disapproval and noncompliance to the Supreme Court precedent. The uniformity of laws and clarity of its application is the purpose of *stare decisis*; thus, a precedent that not only prevents but causes the absence of those principles is not a precedent worth upholding in the name of the thing it defeats.

Abandoning Decisions That Have Unforeseen Consequences

An uncommon, but nonetheless mentioned, consideration for overturning precedent in this era was unintended consequences often causing social detriment. This concern was mentioned in *Erie R. Co. v. Tompkins* when overturning *Swift v. Tyson* 's expansion of the federal judiciary. In his majority decision, Justice Brandeis said, "Experience in applying the doctrine of Swift v. Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."[57] The reality of the decision defied the Court's expectation for the outcome of the decision. In this sense, a negative impact on society or unintended consequences cannot be prevented entirely by an initial Supreme Court decision. Only society's experience of applying the law and seeing its

[55] Id., 75.
[56] Id., 80.
[57] Id., 74.

negative effects can inform the Court's reconsideration of the initial decision. Thus, it can only be undone by the initial decision's later overruling.

This justification was used earlier by Chief Justice Taney in *The Genessee Chief* in 1851. In this case, the Court overruled *The Steamboat Thomas Jefferson* in *the Genesee Chief v. Fitzhugh*. In *The Steamboat Thomas Jefferson,* the Court limited federal jurisdiction to merely tidal waterways, while *The Genessee Chief* expanded federal jurisdiction to include interior waterways and bodies of freshwater.[58] Although Chief Justice Taney said that "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to,"[59] he found it imperative to overturn *The Steamboat Thomas Jefferson* on the foundation that it could create severe societal damage. In his majority opinion, he wrote that the "former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."[60] The potential impact of such an egregiously erroneous decision motivated the Court to overturn it despite its recognition of the general importance of *stare decisis.*

Obeying Congressional Power

The Court emphasizes Congress' ability to change their decision through legislation, while also distinguishing between the Court's strengthened ability to overturn precedent in constitutional cases because of Congress' inability to change constitutional

[58] James W. Ely, Jr., "Overview: The Genessee Chief v. Fitzhugh," Oxford Reference, Oxford University Press, 2020, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095847439.
[59] The Genessee Chief, 53 U.S. 433, 458 (1851).
[60] Id., 459.

interpretation. In *Green v. Neal's Lessee*, the Court said, "[i]t is emphatically the law of the state; which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it."[61] In other words, the Court shifts the responsibility of their decision to Congress by stating their ability to change the interpretation of the law with clearer legislation. With this opinion, the Court opposes prior justifications set forward by the Court for overturning precedent, namely, unforeseen consequences. This opinion suggests that the responsibility is in the hands of Congress to respond to the unforeseen consequences of their decisions. Whereas the decision in *Erie*, decided only six years before, indicated that the Court was responsible for overturning decisions with harmful effects on society. Furthermore, the Court stated that their decisions are not the be-all-end-all of legal interpretation, thus lowering the stakes of their decision to overturn precedent. This consideration dismantles the public's perception of the Court as final arbitrators of the law. This concept was reiterated nineteen years later in Chief Justice Taney's majority opinion in *The Genessee Chief*. He said, "[f]or if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it without impairing rights acquired under it."[62] While Congress' ability to change the law as a reaction to social detriment experienced by the decision or their pure disagreement with the decision, this is only true in statutory cases.

[61] Green, 31 U.S. at 299.
[62] The Genessee Chief, 53 U.S. at 458.

In the 1944 case *Smith v. Allwright*, Justice Reed distinguished between the Court's levels of scrutiny of *stare decisis* in constitutional versus congressional statutory cases. In his majority opinion, he said:

> In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout history has freely exercised it power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.[63]

Changing the Court's interpretation of the Constitution would necessarily require Congress to pass a constitutional amendment. According to the Pew Research Center, there have been 12,000 proposed constitutional amendments, of which only 33 have gone to the states for ratification, and only 27 have passed.[64] Thus, constitutional amendments have a 0.225% pass rate. Amendments to the Constitution are so rare that only four Supreme Court decisions have been undone by constitutional amendment.[65] Because of this difficulty, it is generally more acceptable to overturn precedent when it relates to a constitutional provision as opposed to a congressional provision, which can be undone by a simple majority in Congress.

However, this was not always the case. Only six years before Justice Reed's opinion in *Smith v. Allwright,* he concurred in the decision for *Erie R. Co. v. Tompkins*. In his concurring opinion he said, "In this Court, stare decisis, in statutory construction, is a useful rule, not an inexorable command…it seems preferable to overturn an established

---

63 Smith, 321 U.S. at 665-66.
64 Drew DeSilver, "Proposed Amendments to the U.S. Constitution Seldom Go Anywhere," *Pew Research Center*, 12 April 2018, https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/.
65 *Chishold v. Georgia* was undone by the 11th amendment; *Dred Scott v. Sanford* was undone by the 14th amendment; *Pollock v. Farmers' Loan and Trust Co.* was undone by the 16th amendment; and *Oregon v. Mitchell* through the 26th amendment. Gerhardt, *The Power of Precedent*, 9.

construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution."[66] Justice Reed clearly changed his opinion of the Court's role in overturning constitutional provisions. In this decision, he stated his preference for overturning congressional statutes over interpreting constitutional ones; however, six years later he explained his preference for overturning constitutional provisions due to its difficulty for change through Congress. Justice Reed's change of heart represents the conflicting views of legal scholars when it comes to the Supreme Court's reliance on precedent in constitutional cases. The doctrine of *stare decisis* often has a positive connotation because it evokes thoughts of certainty, reliance, equality, efficiency, and judicial restraint.[67] Thus, overturning precedent, and specifically much relied upon constitutional precedent, often awakens fear of the strength and power vested in the Supreme Court.

Obeying Stability

Many of the cases' dissents elucidate the Court's jurisprudence with respect to *stare decisis*. In *Helvering v. Hallock* in 1940, Justice Roberts' dissent, joined by Justice McReynolds, spoke in depth about the importance of *stare decisis* to creating uniformity and stability in the law. He said:

> If there ever was an instance in which the doctrine of stare decisis should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases different from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier considerations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other

[66] Erie R. Co., 304 U.S. at 92.
[67] Patrick Higginbottom, "Text and Precedent in Constitutional Adjudication," *Cornell Law Review* 73, no. 2 (January 1988): 412.

> federal tribunals; and that, to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts and make it impossible for inferior tribunals to adjudicate controversies in reliance on the decisions of this court. To nullify more than fifty decisions, five of them which have stood for a decade, in order to change a mere rule of statutory construction, seems to me an altogether unwise and unjustified exertion of power.[68]

Justice Roberts' argument against the overruling of precedent in this case rests upon the themes of reliance, stability, and passivity. By inverting decisions that have been relied upon for a decade, the Court creates uncertainty and instability throughout the public on their rights. Justice Roberts also pointed to a theme that is pervasive throughout the discussion of *stare decisis*: power. Many scholars argue that the Court's abandonment of *stare decisis* in certain cases is evidence of the Court's expansion of power and activism. In an essay on the relationship between *stare decisis* and judicial restraint, former Supreme Court Justice Lewis Powell, Jr. said, "[t]he inevitability of change touches the law as it does every aspect of life. But stability and moderation are uniquely important in the law. In the long run, restraint in decision-making and respect for decisions once made are the keys to the preservation of an independent judiciary and public respect for the judiciary's role as guardian of rights."[69] The Court clearly feels required to balance the necessity for correctly interpreted law and stability within the law.

Similarly, Justice Roberts argued against the overturning of *Grovey v. Townsend* in his dissenting opinion in *Smith v. Allwright*. *Smith v. Allwright* determined that denying blacks the right to vote in the primary violated the Fourteenth Amendment. This decision abandoned a unanimous precedent set nine years prior that the Democratic Party's

---

[68] Helvering, 309 U.S. at 129.
[69] Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint," *Washington & Lee Law Review* 47, no. 2 (Spring 1990): 289-290.

exclusion of blacks in the primary was free from the protections in the Fourteenth and Fifteenth Amendments. In his dissenting opinion, Justice Roberts said:

> The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a railroad ticket, good for this day and train only, I have no assurance, in view of current decisions that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.[70]

Although many of the arguments in favor of abiding my *stare decisis* tend to be philosophical, Justice Roberts discussed the pragmatic implications of overturning precedent. He expressed his concerns for the legitimacy of the Court and the stability of their current decisions. It is fitting that Justice Roberts voiced this concern in this case as he wrote the opinion for the unanimous decision in *Grovey v. Townsend*. Justice Roberts' argument illustrates Professor Michael Gerhardt's theory that respecting precedent makes the current decisions seem more lasting. In his book he wrote, "If a Justice disregards the judgments of those who preceded him, he invites the very same treatment from those who succeed him. A justice who wants to preserve the value of his own coin must not devalue the coin of his predecessors."[71]

Conclusion

Although many recent legal philosophies indicate that an erroneous decision is not enough to justify the overturning of longstanding precedent, the early years of the Supreme Court indicate otherwise. Michael Kimberly, the co-director of Yale Law School's Supreme Court Clinic, said, "Concluding that a prior decision may be wrong —

---

[70] Smith, 321 U.S. at 669.
[71] Gerhardt, *The Power of Precedent*, 18.

even one that interprets the Constitution — is not enough to justify overruling it."[72] However, the early decisions of the Supreme Court demonstrate that that was not always the case. In fact, the majority of cases that overturned Supreme Court precedent merely cited that the prior decision was incorrect, and should no longer be considered good law. Some early decisions, such as *Erie R. Co. v. Tompkins*, strengthen their argument to abandon *stare decisis* with arguments of public rejection of the decision or an unforeseen social detriment; however, these arguments were always founded on the prior decision's erroneous nature.

Despite the lack of stringent standards for overturning precedent between 1789 and 1953, the Supreme Court only averaged a 0.35 overturned cases per year. While the Court did not have many precedents to overturn, the Court clearly maintained respect for *stare decisis*. Even Chief Justice Vinson, who served for seven years between 1946 and 1953, averaged fewer than one overturned case per year. During this time period, only two Chief Justices had overturned more than one case per year. The first 164 years of the Court's existence was marked by the tension between caution and correction, where caution tended to win out.

[72] Michael Kimberly, "Symposium: The Importance of Respecting Precedent," *SCOTUSBlog*, 20 December 2017, https://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/.

CHAPTER 5

The Warren Court (1953-1969)

Although the Warren Court immediately followed the Vinson Court in 1953, its reasons for overturning precedent are very different. The Court during Warren's sixteen years as Chief Justice faced very different questions than previous courts such as the incorporation doctrine and union rights. The incorporation doctrine plays a particularly large role during this time because it required the Court to determine whether the Fourteenth Amendment's due process clause disallowed states from passing laws that violated the first Ten Amendments of the Constitution.[73] This constitutional doctrine emerged in the early twentieth century and made extreme headway in the middle of the century.[74] When faced with a case involving the incorporation doctrine, the Supreme Court had to determine whether the amendment would be fully, partially or not incorporated. To do so, the Court had to overturn nineteenth century precedent expressly disaffirming the principles of the incorporation doctrine. While the incorporation doctrine is a significant theme throughout this time period and can account for a large portion of the overturning cases, the Court put forward many reasons for overturning precedent including tradition, eroded decisions, policy and public opinion.

---

[73] "Incorporation Doctrine," Legal Information Institute, *Cornell Law School*, 2020, https://www.law.cornell.edu/wex/incorporation_doctrine.
[74] "Incorporation Doctrine," *Law Library – American Law and Legal Information*, 2020 https://law.jrank.org/pages/7578/Incorporation-Doctrine.html.

Obeying Tradition

A frequently cited reason during this time period was that the overturned case had in fact broke away from prior constitutional precedent, tradition or principles. For example, in *Reid v. Covert* in 1957, the Court overturned a one-year old precedent set in *Ross v. McIntyre* that held that American citizens abroad could be tried by military authorities. In his majority opinion, Justice Black defended Mrs. Covert's right to a trial by a jury of her peers. He said, "We should not break with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution."[75] Although this principle is not expressly written in the Constitution, the majority of the Court at the time believed that this tradition should be affirmed nonetheless. To legal scholars, this case affirms the formidable weight of the American constitutional right to trial by jury established in the Fifth and Sixth Amendments of the Constitution.[76] However, to Brittany Warren, a United States Army captain in the JAG Corps, this case upholds the U.S. judiciary's tradition of skepticism of independent military jurisdiction.[77]

Furthermore, in *James v. United States*, in 1961, the Court determined that illegally obtained income, such as extorted money, could be taxed. The majority decision expressly overruled *Commissioner of Internal Revenue v. Wilcox*, a fifteen-year-old precedent. In justifying this decision to overrule an older, and thus relied upon, precedent, Chief Justice Warren wrote, "It had been a well-established principle, long before either

---

[75] Reid v. Covert, 364 U.S. 1, 40 (1957).
[76] Brittany Warren, "The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Court-Martials," *Military Law Review* 212 (Summer 2012): 133.
[77] Id., 192.

Rutkin or Wilcox, that unlawful, as well as lawful, gains are comprehended within the term 'gross income.'"[78] In his majority opinion, Chief Justice Warren used several Supreme Court decisions to indicate the "well-established" nature of this principle. While Chief Justice Warren argued that his decision endorsed a more traditional view of tax law, he also pointed to a change in Section II B of the Income Tax Act of 1913 made in 1916 that omitted the word "lawful" from its inclusion of income. Thus, according to Chief Justice Warren, his conception of tax law was well-supported by historic *and* more recent developments.

Similarly, in 1963, *Gideon v. Wainwright* overruled *Betts v. Brady*, which determined that the right to a lawyer only extended to federal criminal cases, not state criminal cases. The Court in *Gideon*, however, relied on the incorporation doctrine to extend this Sixth Amendment right to states. In his majority decision, Justice Black stated:

> The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice.[79]

The Court defended its overturning of precedent on the basis that the precedent abandoned its prior precedent. Despite overturning a twenty-one-year old precedent, the Court maintains the importance of precedent by relying on precedent and constitutional principles for its decision. Many legal scholars and Justices have voiced their concern that overruling precedent delegitimizes the Supreme Court as an influential institution.[80]

---

[78] James v. U.S., 366 U.S. 213, 218 (1961).
[79] Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).
[80] James C. Rehnquist, "The Power That Shall Be Invested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court," *Boston University Law Review* 66, no. 2 (1986): 346.

Thus, referring to prior precedent as justification for overturning a long-established decision lends legitimacy to the decision, and the Supreme Court generally.

The Court in *Peyton v. Rowe* similarly overruled *McNally v. Hill* on the basis that it contradicted constitutional principles and tradition. In this case, the Supreme Court unanimously decided that a prisoner serving consecutive sentences can petition for writs of habeas corpus for a future service. According to Chief Justice Warren, the Court "need not look very far to discover three principal characteristics of the writ as it had developed in the federal courts even before the decision in McNally."[81] The Court analyzed the history and founding of the United States to determine the purpose of the writ of habeas corpus. The Court determined that the purpose of habeas corpus was the "protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[82] Because *McNally* undermined this significant constitutional principle and tradition of liberty, the Court unanimously overruled it as good law.

Although the Court overturned precedent in *Peyton v. Rowe*, it nonetheless clarified the usefulness of *stare decisis*. In order to legitimize their abandonment of *McNally*, the Court said, "[n]o prior decision of the Court was cited as clear authority for the prematurity doctrine."[83] The decision in *McNally* lacked reliance on Supreme Court precedent; thus, the Court viewed it as having weakened legitimacy. This attempt to garner legitimacy by the Warren Court reinforces the legal theory of a correlation between upholding prior decisions and the Court's legitimacy.

---

[81] Peyton v. Rowe, 391 U.S. 54, 59 (1968).
[82] Id., 66.
[83] Id., 65.

Abandoning Eroded Decisions

Another very common reason for overturning precedent during this time period is that the precedent had been undermined by subsequent decisions, and thus, its standing as precedent had been eroded. Just as arguing the case's breach from prior Supreme Court cases lent the Court legitimacy, the Court similarly relied on precedent decided after the precedent in question. The Court carefully uses some form of judicial precedent to ground its later decisions.[84] For example, in *Smith v. Evening News Association*, the Court overruled a fifteen-year-old precedent in favor of prohibiting discrimination on the basis of union membership. In his majority opinion for eight members of the Court, Justice White stated, "However, subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent."[85] Although subsequent cases did not expressly overrule *Westinghouse Employees v. Westinghouse Corp.*, the basis on which this decision rested was no longer applicable. In *Westinghouse,* the Court ruled that section 301 did not give federal courts the jurisdiction to rule on contracts between the employer and employee. However, four later federal courts used section 301 to resolve suits between employers and employees' collective bargaining contracts about wages, hours, wrongful discharge, back pay, and no-strike clauses. While these cases were not specifically about discrimination on the basis of union membership, they clearly undermined the argument that this section did not give the federal courts the ability to rule on collective bargaining agreements.

---

[84] James H. Fowler and Sangick Jeon, "The Authority of Supreme Court Precedent," *Social Networks* 30 (2008): 16.
[85] Smith v. Evening News Association, 371 U.S. 195, 199 (1962).

Similarly, in *Jackson v. Denno* in 1964, the Court overruled *Stein v. New York*, which allowed a jury may hear a potentially coerced confession as evidence. In his majority decision, Justice White said:

> This underpinning of Stein proved to be a short-lived departure from prior views of the Court, and was unequivocally put to rest in Rogers v. Richmond, where it was held that the reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne.[86]

Justice White relied on a more recent precedent, *Rogers v. Richmond*, which held that the admissibility of confessions had to comply with the Due Process clause of the Fourteenth Amendment. Thus, the 1953 decision in *Stein v. New York* was weakened after *Rogers v. Richmond* was decided in 1961, and the Court could not consider it to be binding precedent.

The Court overruled a forty-nine-year-old precedent for similar reasons in *Spevack v. Klein*. In this case, the Court extended Fifth Amendment protections to lawyers refusing to testify on the basis that it might incriminate them. The Court relied on *Malloy v. Hogan* to show how far Fifth Amendment protections have come. In his majority opinion, Justice Douglas stated, "While Cohen v. Hurley was not overruled [in Malloy v. Hogan], the majority indicated that the principle on which it rested had been seriously eroded."[87] Although the Court affirmed precedent in *Malloy v. Hogan*, the Court decisions set forth very different principles. Thus, through this case, the Court weakened and eventually invalidated the principles and ruling in *Cohen v. Hurley*. Differing principles must eventually be reconciled through overruling one case over the other.

---

[86] Jackson v. Denno, 378 U.S. 368, 384-85 (1964).
[87] Spevack v. Klein, 385 U.S. 511, 513 (1967).

The Court's reliance on a recent precedent that overturned a prior case in order to overrule another indicates the Court's susceptibility to changing legal interpretation in response to social change. When a case overturns a prior decision, it leaves similar decisions vulnerable for revocation. The Supreme Court's persistent argument that a preceding decision has been eroded by subsequent decisions supports the political science theory that precedents depreciate rather quickly.[88] Significant legal research demonstrates a close relationship between weakened precedent and changing societal conditions.[89]

Similarly, in *Katz v. United States*, the Court decided that the Fourth Amendment protection against unreasonable searches and seizures extended to phone calls. Through this decision, the Court overturned *Olmstead v. United States* and *Goldman v. United States*. In his majority decision, Justice Stewart cited several cases that expanded Fourth Amendment protections from the narrow view set out in the two precedents in questions. To further justify the Court's decision to overturn over twenty-year-old precedents, Justice Stewart said, "We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."[90] In this reasoning, Justice Stewart used passive voice to exonerate the Court from any responsibility for overturning precedent. He indicated that the overturning of precedent was inevitable due to subsequent decisions erosion of that precedent. By doing so, Justice Stewart places more significance to more recent precedent than older precedent. The Court's affinity for more

---

[88] Ryan C. Black and James F. Spriggs II, "The Citation and Depreciation of U.S. Supreme Court Precedent," *Journal of Empirical Legal Studies* 10, no. 2 (2013): 327.
[89] William M. Landes and Richard A. Posner, "Legal Precedent: A Theoretical and Empirical Analysis," *Journal of Law and Economics* (September 1976).
[90] Katz v. U.S., 389 U.S. 347, 353 (1967).

recent precedent may indicate the importance of societal change in overturning precedent. More recent precedent reflects a revision in Constitutional interpretation caused by societal change.

The Court in *Peyton v. Rowe* reflected a similar proclivity for more recent precedent as opposed to older ones. In addition to stating that its precedent, *McNally v. Hill*, did not accurately reflect the constitutional purpose of habeas corpus, the Court wrote that they chose to follow more recent precedent. In his unanimous, majority opinion, Chief Justice Warren cited an appellate decision in his justification. He wrote:

> Writing for a unanimous court, Chief Judge Haynsworth reasoned that this Court would no longer follow McNally, which in his view represented a 'doctrinaire approach' based on an 'old jurisdictional concept' which had been 'thoroughly rejected by the Supreme Court in recent cases.' We are in complete agreement with this conclusion and the considerations underlying it.[91]

The Court validated the Court of Appeal's decision to abandon Supreme Court precedent because its archaic and uncompromising principles had been undermined by later Supreme Court decisions. The eroded concepts of this precedent made the decision unable to stand. Similar to Justice Stewart in *Katz v. United States*, Chief Justice Warren approached overturning longstanding precedent with passivity. He used a lower court's judge's decision and the uncontrollable erosion of *McNally* to justify overturning Supreme Court precedent. This further advances the Court's hesitance to take responsibility for the erosion and overruling of precedent.

---

[91] Peyton, 391 U.S. at 57.

Abandoning Poor Policy

The most controversial reason perpetuated by the Warren Court for overturning precedent is the Court's disagreement with the government's policies. In *James v. United States*, the Court not only believed that *Commissioner of Internal Revenue v. Wilcox* broke valid constitutional principles, but they also believed the inability to tax illegally obtained income as poor policy. In his majority opinion, Chief Justice Warren wrote:

> We believed that Wilcox was wrongly decided and we find nothing in congressional history since then to persuade us that Congress intended to legislate the rule. Thus, we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it.[92]

In addition to believing *Wilcox* was decided erroneously, the Court argues that its poor policy, which Congress will not change, warrants the Court overrule. This logic strongly departs from previous Courts, which have deliberately decided to not overturn precedents where Congress clearly did not intend to change the policy or the law.[93]

The Supreme Court during this period took policy into consideration on many levels. Not only did the Court overturn cases which perpetuated bad policy, but they also looked into a policy's history when determining whether a precedent should be overturned. For example, in *Murphy v. Waterfront Commission of New York Harbor*, the Court unanimously overruled five precedents in favor of incorporating the Fifth Amendment right against self-incrimination to the states. Despite the five, now overruled, precedents, the Court said, "We reject—as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in United States v. Murdock, and

---

[92] James, 366 U.S. at 221.
[93] Green, 31 U.S. 291 (1832); The Genessee Chief, 53 U.S. 433 (1851).

Feldman v. United States."[94] The Court used the lack of policy enacted by Congress or the executive to support *United States v. Murdock* and *Feldman v. United States*' non-incorporation of the Fifth Amendment to the states as a reason to overturn them.

Although the Warren Court often referenced policy as a consideration for overturning precedent, this novel reasoning was not supported by all members of the Court. In *Harper v. Virginia State Board of Elections*, the Court overruled *Breedlove v. Suttles*, which allowed states to have poll taxes. In his dissent, Justice Black argued against what he perceived as judicial activism on the Court. He said, "The court, however, overrules Breedlove in part, but its opinion reveals that is does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy."[95] Their belief that overturning *Breedlove v. Suttles* represented better policy perpetuated their own personal ideology, and thus, motivated the Court's overturning of precedent.

In addition to the many unprecedented reasons the Court gave for abandoning *stare decisis*, the Court during this time period presented familiar justifications for overturning precedent. Many cases during this period revive the argument from previous Courts that the maintenance of certain precedents lead to uncertainty or confusion. For example, in *Mapp v. Ohio*, the Court held that state courts cannot admit evidence seized without complying with the Fourth Amendment. In his concurring opinion, Justice Black stated :

> Only one thing emerged with complete clarity from the Irvine case—that is that seven Justices rejected the 'shock-the-conscience' constitutional standard enunciated in Wolf and Rochin cases. But even this did not lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in

[94] Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 77-78 (1964).
[95] Harper v. Virginia State Board of Education, 383 U.S. 663, 672 (1966).

> the Irvine case left the situation at least as uncertain as it had been before. Finally, today, we clear up that uncertainty.[96]

In *Wolf v. Colorado*, the Court held that the Fourth Amendment protection against unreasonable searches and seizures was applicable to states, but that the exclusionary rule disallowing this evidence from court was not a constitutional protection. In *Irvine v. California*, the Court relied on *Wolf v. Colorado* to determine that "the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[97] However, *Irvine* did abandon the standard created in *Wolf*, thus, creating an uncertain standard and rule to follow in Fourth Amendment cases. By overturning *Wolf v. Colorado* in part, and *Irvine v. California* in part, the Court viewed its decision as elucidating clearer guidelines for Fourth Amendment cases. One reason the Court feels obligated to clarity is the reliance lower courts place on Supreme Court decisions. The Court in *Mapp v. Ohio* also talk about this concept. Justice Black continued :

> The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the Boyd doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.[98]

The Supreme Court assumes their precedent as binding to lower courts, and conflicting precedents cloud the lower courts' ability to make consistent decisions throughout the country. Thus, the Court chose to overturn the source of confusion.

---

[96] Mapp v. Ohio, 367 U.S. 643, 666 (1961).
[97] Wolf v. Colorado, 338 U.S. 25, 33 (1949).
[98] Mapp, 367 U.S. at 666.

Six years later in 1967, in *Afroyim v. Rusk,* the Court overruled *Perez v. Brownell* by deciding that section 401(e) of the 1940 Nationality Act violated both the Fifth Amendment and the Fourteenth Amendment. In Justice Black's majority decision, he cited *Perez* as, "That case, decided by a 5-4 vote almost 10 years ago, has been a source of controversy and confusion ever since…"[99] Because the Court determined that *Perez* caused "controversy and confusion," they decided to revisit the ruling of the case. Though the Court did not cite confusion as the reason for overturning *Perez*, it is the basis of the decision to reconsider its adjudication.

Obeying Public Opinion

The Warren Court also cites the familiar principle of public disdain for a decision as a reason for its invalidation. In that same case, *Afroyim v. Rusk,* Justice Black discussed the role *Perez*'s public unpopularity played in its re-examination. He said, "…many commentators, have cast great doubt upon the soundness of Perez. Upon these circumstances, we granted certiorari to reconsider it."[100] Though Justice Black mentioned other considerations, such as subsequent Supreme Court decisions, his specific mention of commentators and the controversy caused by *Perez* indicates the importance of public acceptance.

Justice Harlan used a similar reasoning two years prior in 1965 in *Swift & Co. v. Wickham*. The decision in this case overturned *Kesler v. Department of Public Safety* in part. In his majority decision, Justice Harlan said, "Not only has [Kesler] been uniformly

[99] Afroyim v. Rusk, 387 U.S. 253, 255 (1967).
[100] Id., 256.

criticized by commentators, but lower courts have quite evidently sought to avoid dealing with its application or have interpreted it with uncertainty."[101] Justice Harlan echoes the reliance on public opinion that many other prior Courts cited in their reasoning to overturn precedent. The public's disapproval of Kesler and the lower court's unwillingness to apply or doubting of Kesler indicates that the three-year-old precedent was made incorrectly, and it should be reconsidered.

Conclusion

The Warren Court's decided to overturn precedent at a much higher rate than any iteration of the Supreme Court preceding it. During his sixteen years as Chief Justice, Earl Warren's Court used thirty-six cases to overturn fifty-one Supreme Court precedents. Despite this unprecedented use of judicial power, the Warren Court mentioned precedents and explained its reasoning for overturning precedent in much more detail than prior Supreme Courts. In fact, most decisions were formatted by the Court first analyzing the precedent and its decisions for overturning the prior case, and then, delving into the merits of the case. This decision structure indicates the binding nature of precedent more so than any other previous Supreme Court. The Courts serving from 1789 to 1953 often only mention precedent as an afterthought or formality. Despite criticisms of judicial activism, the Warren Court unprecedently reveals the Supreme Court's thought process of prior precedent.

[101] Swift & Co. v. Wickham, 382 U.S. 111, 124 (1965).

CHAPTER 6

The Burger Court (1969-1986)

The Burger Court, which endured for seventeen years from 1969 to 1986, maintained similar reasons for overturning prior precedent as Warren's Court. Much like the types of cases presented to the Supreme Court during this time period, the decisions in this era that overturn precedent look, more often than not, like a random amalgamation of reasonings instead of a consistent jurisprudence regarding *stare decisis*.

Abandoning Poor Policy

Though not as dominant as in the Warren Court, policy considerations made their way into this more conservative Court's jurisprudence. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770* in 1970, the Court overruled *Sinclair Refining Co. v. Atkinson* decided in 1962. By doing so, the Supreme Court granted the judiciary the ability to provide injunctive relief when a union staged a strike despite the union's collective bargaining agreement with the company that required any dispute be resolved through arbitration. Although the Court provided many justifications for overturning *Sinclair*, the Court mentioned policy considerations multiple times in their decision. Justice Brennan wrote, "Furthermore, in light of developments subsequent to Sinclair, in particular our decision in Avco Corp. v. Aero Lodge, it has become clear that the Sinclair decision does not further but rather frustrates realization of an important goal of our national policy."[102]

[102] Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970).

Sinclair's hindrance of the nation's labor policy motivated the Court to overturn it. However, the Court uses this justification at a significantly lower rate than the Warren Court.

Obeying Congressional Power

Unlike its extensive use of policy as justification for disobeying *stare decisis*, the Warren Court discussion of Congress' role in overturning precedent continued in this era. In Justice Brennan's majority decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, he said:

> Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to Sinclair on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '(i)t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction has been taken as acceptance of Sinclair, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision.[103]

While decisions of prior Courts revealed the Supreme Court's reliance on Congress's action or inaction as evidence of their approval or disapproval of a certain statutory or constitutional interpretation,[104] this Court drastically changes this tradition of considering Congress. In fact, according to this decision, Congress' inaction does not prove any opinion of a prior decision.

On the other hand, Congress' action may prove helpful in discerning their true intention with respect to the statute in question. For example, in *Braden v. 30th Judicial Circuit Court of Kentucky*, the Supreme Court expanded the district courts' jurisdiction

---

[103] Id.
[104] Green v. Neal's Lessee, 31 U.S. 291, 299 (1832); The Genessee Chief, 53 U.S. 433, 458 (1851).

on writs of habeas corpus due to Congress' amendments to the habeas corpus statute. In Justice Brennan's majority opinion, he cited two changes to the habeas corpus statute that explicitly expands a prisoner's right to petition for a writ of habeas corpus in a different district than where he is confined. Justice Brennan used this as evidence of congressional disapproval of their previous interpretation of the judiciary's jurisdiction over writs of habeas corpus in *Ahrens v. Clark*. In his decision, he wrote:

> In enacting these amendments, Congress explicitly recognized the substantial advantages of having these cases resolved in the court which originally imposed the confinement or in the court located nearest the site of the underlying controversy. And Congress has further challenged the theoretical underpinnings of the decision by codifying in habeas corpus statute a procedure we sanctioned in Walker v. Johnston, whereby a petition for habeas corpus can in many instances be resolved without requiring the presence of the petitioner before the court that adjudicates his claim.[105]

Congress' clear expansion of habeas corpus through their amendments made after *Ahrens* acts as a clarification of their intent and desire for the habeas corpus statute. Despite the United States' unique separation of powers scheme, the Supreme Court seems dependent on the other two branches for its institutional legitimacy. More specifically, when the Court's ideology strays from that of the other two branches, the Court is less likely to overturn federal statutes enacted by Congress.[106] In this case, the Supreme Court likely decided in favor of a newly enacted congressional statute over their own judicial precedent to maintain legitimacy among the political turmoil in 1973.

---

[105] Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 497-98 (1973).
[106] Jeffrey A. Segal, Chad Westerland, and Stefanie A. Lindquist, "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model," *American Journal of Political Science* 55, no. 1 (January 2011): 90.

Abandoning Eroded Decisions

Another familiar justification that is mentioned frequently in the Burger Court cases is the undermining by subsequent decisions. Even the above paragraphs allude to some reliance on more recent precedent over more distant ones. For example, in *Andrews v. Louisville & Nashville Railroad Co.*, the Court overturned *Moore v. Illinois Central* heavily supported by the fact that subsequent decisions did not adhere to *Moore*. In Justice Rehnquist's majority opinion, he said, "The related doctrine expressed in Moore and Koppal, that a railroad employee's action for breach of an employment contract is created and governed by state law, has been likewise undercut by later decisions."[107] Justice Rehnquist goes on to cite three Supreme Court decisions from 1957, 1963, and 1965 that held that arbitration clauses, as other employment contracts, are enforceable, which directly contradicts *Moore*, which was decided in 1941. When the Court has to decide between two conflicting Supreme Court decisions, the more recent precedent likely implicitly overruled the earlier one. However, the later cases illustrated the unsettled nature of the law, which required the Court to expressly overturn *Moore* in 1972.

In 1978, the Court more directly revealed their preference for more recent precedent. In *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies*, the Court overturned *Puget Sound Stevedoring Company v. State Tax Commission* and *Joseph v. Carter & Weekes Stevedoring Companies*. Through this decision, the Court determined that State tax laws that taxed companies conducting

[107] Andrews v. Louisville &. N.R. Co., 406 U.S. 320, 323 (1972).

interstate commerce did not violate the Commerce Clause. In Justice Blackmun's majority opinion, he wrote:

> Because the tax in the present case is indistinguishable from the taxes at issue in *Puget Sound* and in *Carter & Weekes*, the *Stevedoring Cases* control today's decision on the Commerce Clause issue unless more recent precedent and a new analysis require rejection of their reasoning. We conclude that *Complete Auto Transit, Inc. v. Brady* … requires such rejection.[108]

The Court used a verdict decided the year prior as a tool to reject the decisions in *Puget Sound* and in *Carter & Weekes*. A more recent precedent that contradicted a prior decision, though did not expressly overrule it, is synonymous with a new legal analysis. Thus, when the Supreme Court is forced to decide between two contrasting precedents, the more recent precedent will more likely than not win out. In fact, a precedent of this kind "requires" it.

Similarly, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, the Court unanimously upheld North Dakota's permitting requirements for pharmacists. In Justice Douglas' majority opinion, he wrote that:

> Liggett, decided in 1928, belongs to that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise. Liggett has to date not been expressly overruled. We commented on it disparagingly, however, in Daniel v. Family Security Life Ins. Co., which concerned the constitutionality of a state statute providing that life insurance companies and their agents may not operate an undertaking business and undertakers may not serve as agents for life insurance companies.[109]

The Court's move away from Liggett and similar cases has been documented in their more recent decisions. Justice Douglas hints at the slow process of overturning a decision, which starts with a distinction or the disparagement of the prior decision.

---

[108] Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 745 (1978).
[109] North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164 (1973).

Justice Douglas further emphasized the bigger influence of more recent decisions over a current decision than older decisions. He wrote, "The Liggett case was a creation at war with the earlier constitutional view of legislative power, and opposed to our more recent decisions."[110] While the Court clearly places a premium on more recent decisions, Justice Douglas justified his decision by juxtaposing it with "the earlier constitutional view of legislative power." Even though more distant decisions are clearly discounted, relying on older views and principles provided legitimacy to the overturning of forty-five-year-old precedent.

Obeying Tradition

As the Court alluded to in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, the Court will often overturn precedent if it broke with prior Supreme Court decisions or precedent. For example, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court rejected *U.S. v. Arnold, Schwinn & Company* because it departed from traditional standards. Justice Powell wrote, "Schwinn itself was an abrupt and largely unexplained departure from White Motor Co. v. United States, where only four years earlier the Court has refused to endorse a per se rule for vertical restrictions."[111] Despite the Court's practice of generally abiding by more recent precedent than its predecessor, the Court appealed to tradition. In fact, according to Professor Rebecca Brown at Vanderbilt Law School, "tradition…has been an important source of authority for almost all schools of

[110] Id., 167.
[111] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977).

constitutional interpretation."[112] The Court's use of tradition, ironically, lent it legitimacy in abandoning *stare decisis*.

Abandoning Equal Treatment Between Constitutional and Statutory Cases

The Burger Court also emphasized the differences between overturning a constitutional decision as opposed to a statutory decision. In *Edelman v. Jordan* in 1974, the Supreme Court ruled that the Eleventh Amendment of the Constitution prohibited the federal court from ordering retroactive payments of disability to citizens that had been wrongfully withheld. In his majority decision, Justice Rehnquist said, "Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law."[113] As noted previously, the Court is more able to overturn established constitutional doctrines because Congress is less able to correct the Court's misinterpretation because it can only be done through amendment, which is a lengthy and often unsuccessful process. However, Justice Rehnquist's wording also implies that, while the Court is freer to respond to constitutional questions without the hindrance of stare decisis, the Court is more inhibited by precedent when answering general statutory questions. In his opinion, Justice Rehnquist also footnotes Justice Brandeis' famous quote about *stare decisis.* He wrote:

> In the words of Mr. Justice Brandeis: 'Stare decisis is usually the wise policy, because in most matters it is important that the applicable rule of law be settled than that it be settled right…This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience

[112] Rebecca L. Brown, "Tradition and Insight," *The Yale Law Journal* 103, no. 1 (October 1993): 178.
[113] Edelman v. Jordan, 415 U.S. 651, 671 (1974).

> and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[114]

While this footnote reiterates the Court's reasoning for giving *stare decisis* less consideration in constitutional cases, it also depicts the Supreme Court as more pragmatic than idealistic. The Supreme Court understands the American system and its political barriers. Professor Mark Kende at Drake University Law School defined constitutional pragmatism as "[acknowledging] that the traditional modalities of constitutional interpretation do not answer the hardest constitutional questions."[115] In fact, he explained that, "pragmatism does a better job of describing how the influential, and at times revolutionary, U.S. Supreme Court decides cases than either originalism or living constitutionalism—two of the more popular theories."[116] Thus, when the practice of *stare decisis* cannot solve the practical problems of society, the Court veers from precedent.

Obeying Societal Change

Another large justification used in the Burger Court's overturning of precedent is social change. In other words, society looks vastly different than when the statute or constitutional doctrine was first interpreted; thus, the Court must adjust to reflect that societal change. For example, in *Taylor v. Louisiana*, the Court held that the Louisiana State Constitution provision that barred women from serving on juries unless they had previously expressed their desire to serve on a jury violated a person's Sixth Amendment

---

[114] Id., n. 14.
[115] Mark S. Kende, "Constitutional Pragmatism, the Supreme Court, and the Democratic Revolution," *Denver University Law Review* 89, no. 3 (2012): 636.
[116] Id.

right to be tried by a jury of their peers. In Justice White's majority opinion, the Court reasoned that, "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties."[117] The Court further explained the rationale in the decision made fourteen years prior that women were often seen "as the center of home and family life;"[118] however, the Court goes on to cite statistics that show how that is no longer true. In this footnote, the Court explained that the number of women entering the workforce is increasing substantially. According to the Court, the exclusion of women on juries was upheld for the benefit of the family, but with women working at the rate they are, their absence in the home is no longer regarded as detrimental to the home. The Court further explained that, while they are overturning *Hoyt v. Florida*, it was not necessarily wrongly decided. Justice White wrote, "If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."[119] The Court conceded that this decision may not have been erroneous in 1961, but in 1975, it cannot be upheld as good law.

Even in dissenting decisions that advocate against the overturning of precedent indicate that societal change is a necessary aspect of proving the need to abandon *stare decisis*. In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Company* in 1977, Justice Marshall, in his dissenting opinion stated, "Yet today's majority does not contend either that circumstances have changed since 1973 or that experience has shown Hughes and Bonelli to be unworkable. Nor does the majority attempt to explain why a

---

[117] Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975).
[118] Id., n. 17.
[119] Id., 537.

result it find so clearly commanded by our earlier cases was almost unanimously rejected by this Court twice in the last decade."[120] Justice Marshall laid out justifications for overturning such young precedent, including its incompatibility with the current decision or a circumstantial shift since the decision. He argued that because there had not been any significant societal change in the three years since *Hughes* or *Bonelli*, and because the majority had not explained why their decision was entirely inconsistent with the prior decision, these precedents should not be overturned.

Obeying Public Opinion

As with other Supreme Court eras, the Burger Court constantly relied on public opinion and the lower courts' opinion to determine whether their prior decision was erroneous. For example, in *National League of Cities v. Usery*, the Court frequently cited the lower court's decision as justification for the precedent's illegitimacy. In the Court's majority decision, Justice Rehnquist quoted the District Court's initial opinion:

> The District Court stated it was 'troubled' by the appellants' contentions that the amendments would intrude upon the States' performance of essential governmental functions. The Court went on to say that it considered their contentions 'substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of [*Maryland v. Wirtz*]; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the Wirtz opinion as it stands.'[121]

Although the District Court applied *Wirtz*, it only did so because of vertical *stare decisis* doctrine. It spoke negatively of the *Wirtz* decision, but left the judgment on its reversal to the Supreme Court. The Supreme Court took the District Court's clear disapproval of

---

[120] Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 384 (1977).
[121] National League of Cities v. Usery, 426 U.S. 833, 839 (1976).

Maryland v. Wirtz into consideration when deciding whether or not to overturn it. While the District Court upheld *Wirtz* in its opinion, it urged the Supreme Court to revise Congress' role in regulating the minimum wages of state employees. The District Court's plea to the Supreme Court indicated their belief that *Wirtz* was wrongly decided.

The Court similarly cites lower courts' disdain for their precedent in *United States v. Reliable Transfer Company, Inc.* In a unanimous decision for the Court, Justice Stewart wrote, "While the lower federal court originally adhered to the divided damages rule, they have more recently followed it only grudgingly, terming it 'unfair,' 'illogical,' 'arbitrary,' 'archaic and frequently unjust.'…Some courts, even bolder, have simply ignored the rule."[122] The lower courts' unwillingness and refusal to abide by the precedent set out by the Supreme Court acted as a signal that the prior decision was erroneously decided. The lower courts' behavior defeats the purpose of *stare decisis* of consistency and predictability in the law. Thus, *stare decisis* was irrelevant in the consideration of *The Schooner Catharine v. Dickinson*. Furthermore, this decision reveals that vertical *stare decisis* is not as strong as its perceived to be.

Abandoning Decisions That Have Unforeseen Consequences

The Burger Court reasoned that a precedent could be overturned if the decision carried the potential for unintended, negative consequences. For example, in *Perez v. Campbell,* the Supreme Court overturned *Kesler v. Department of Public Safety* because it could lead to nullification. Justice White wrote:

[122] United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 404 (1975).

> Apart from the fact that is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. In view of the consequences, we certainly would not apply the Kesler doctrine in all Supremacy Clause cases.[123]

In *Kesler v. Department of Public Safety*, the Supreme Court held that Utah's refusal to restore Mr. Kesler's license and vehicle registration after he had failed to pay his judgment even though he had filed for bankruptcy was constitutional. The holding in *Kesler* allowed Utah to abandon the federal Bankruptcy Act when it rivaled Utah's Motor Vehicle Safety Responsibility Act. In *Perez,* the Court recognized that allowing states to abandon federal legislation in pursuance of their own state laws set a bad example for other states and frustrated the purpose of the Bankruptcy Act. Justice White quoted the dissent in *Kesler*. He said:

> Whatever the purpose of the Utah Act, its 'plain and inevitable effect [was] to create a powerful weapon for collection of a debt from which [the] bankrupt [had] been released by federal law. Such a result, they argued, left 'the States free to impair an important and historic policy of this Nation embodied in its bankruptcy laws.'[124]

Upholding *Kesler* would allow states to nullify federal laws, even ones that advance important national ideals. This reasoning builds off of the social detriment justification presented in the Warren Court. Instead of merely relying on the experience of applying a precedent, this Court anticipates potential societal damage caused by the application of precedent, though it had not manifested yet.

---

[123] Perez v. Campbell, 402 U.S. 637, 652 (1971).
[124] Id., 650-51.

The Supreme Court similarly used a precedent's consequences in order to overturn it in *Batson v. Kentucky*. This case overturned *Swain v. Alabama*, which held that the defendant must prove overwhelming evidence of purposeful racial discrimination on a jury selection. Imperfect racial representation on a jury was not enough to void a trial jury. Seven members of the Court agreed that the consequences of *Swain* were too severe to uphold the decision. In Justice Powell's majority decision, he said, "Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."[125] The Court recognized the impracticability of the initial decision, and used this social detriment as justification for *Swain* 's reversal.

Conclusion

The Burger Court did not present many new justifications for overturning precedent. Instead, it built on prior iterations of the Supreme Court's reasonings. However, the Burger Court overturned more precedents than any prior Court. However, the Burger Court's abandonment of *stare decisis* was instrumental in the advancement of American society. Law Professor Albert Altschuler, said, "Burger Court rulings, like the Warren Court, contributed to important transformations in American life."[126] However, just as the Burger Court advanced society, it also reflected American society's "post-Vietnam, post-

[125] Batson v. Kentucky, 476 U.S. 79, 92 (1986).
[126] Albert W. Altschuler, "Failed Pragmatism: Reflections on the Burger Court," *Harvard Law Review* 100, (1986): 1436.

Watergate sense of drift."[127] The Burger Court uniquely revealed how Supreme Court decisions affect society and how societal developments impact Supreme Court decisions.

[127] Id., 1437.

CHAPTER 7

Rehnquist Court (1986-2005)

The Rehnquist is criticized more than any other iteration of the Supreme Court for its treatment of prior decisions. Justice Rehnquist's leadership of the Supreme Court has been subject of scathing condemnations from legal scholars for "overruling democracy"[128] and, ironically, for judicial activism.[129] While the Rehnquist Court did not overturn the greatest number of cases, it included the most significant discussion of *stare decisis* by far. It discussed its reasonings for abandoning precedent in more depth and more consistently than any prior Supreme Court. However, the Rehnquist Court did not break with prior Court's reasonings for overturning precedent. Rather, the Court built and expanded on the justifications. The Court discussed familiar reasonings including a case's abandoning of prior decisions, its erosion by subsequent decisions, case subjects, congressional power, public opinion, and societal change.

Obeying Tradition

One justification for abandoning *stare decisis* that the Rehnquist Court maintains from previous eras is the precedent's departure from prior Supreme Court decisions and philosophies. For example, in *U.S. v. Dixon,* Justice Scalia explicitly overturned *Grady v. Corbin,* and he cited its divergence from prior Supreme Court decisions such as *Gavieres*

---

[128] Linda Greenhouse, "William H. Rehnquist, Chief Justice of the Supreme Court, is Dead at 86," *The New York Times*, 4 Sept. 2005, https://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html.

[129] Liane Hansen and Nina Totenberg, "The High Court After Rehnquist," *NPR*, 4 Sept. 2005, https://www.npr.org/2005/09/04/4832013/the-high-court-after-rehnquist.

v. United States. In his decision, he said, "The 'same-conduct' rule [*Grady v. Corbin*] announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."[130] In addition to the decision in *Grady v. Corbin* departing from a prior Supreme Court decision, it also digressed from the general understanding of double jeopardy. Traditionally, the Fifth Amendment protection against double jeopardy prohibits the government from prosecuting an individual for a crime twice. In *Grady v. Corbin,* the Supreme Court ruled that an individual could not endure a prosecution for a greater charge after the defendant plead guilty to a lesser charge. In this case decided only three years prior to *Dixon,* Justice Scalia dissented and said that Double Jeopardy has been largely understood to prevent double prosecution for the same offense, not the same action. Justice Scalia's majority opinion in *Dixon* implies that a decision's violation of prior precedent does not necessarily hinder the Court from affirming the decision. However, its noncompliance with the general understanding of the law causes the court to overturn the more recent decision in favor of prior precedent.

Something that is clearer in the decisions of the Rehnquist Court than from prior courts is their inherent trust of older decisions, which drives this inclination to overturn cases that abandon older decisions. For example, in *Adarand Constructors, Inc. v. Peña* in 1995, the Supreme Court decided to overturn *Metro Broadcasting v. FCC* based on prior decisions relating to the Due Process Clause of the Fifth Amendment. In her majority decision, Justice O'Connor wrote:

> Remaining true to an 'intrinsically sounder' doctrine established in prior cases serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would

[130] United States v. Dixon, 509 U.S. 688, 704 (1993).

> simply compound the recent error and would likely make the unjustified break from previously established doctrine complete.[131]

Although Justice O'Connor distinguishes between sound and less sound cases, she makes a point to mention the cases' age as implications of legitimacy. In the same case, she goes on to say "We do not face a precedent [that has engendered substantial reliance], because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it."[132] The Court felt that by overturning such a recent precedent, they did not incur the same damage as overturning an older, and more relied upon precedent would cause. The Court places an inherent value on older decisions.

Abandoning Eroded Decisions

The Rehnquist Court's high view of older decisions is sharply contrasted with its overturning of precedent on the basis that it has been eroded by subsequent decisions. For example, in *Agostini v. Felton* in 1997, the Court overturned its 1984 decision, *Aguilar v. Felton*, which determined that New York City's use of federal Title I funding toward parochial school employees' salaries was a violation of the Establishment Clause. In her majority opinion, Justice O'Connor justified the overturning of *Aguilar* by saying, "The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions."[133] According to Justice O'Connor, the more recent decisions delineate a

---

131 Adarand Constructors Inc. v. Peña, 515 U.S. 200, 231 (1995).
132 Id., 233-34.
133 Agostini v. Felton, 521 U.S. 203, 235 (1997).

"change in, or subsequent development of, our constitutional law."[134] These statements, however, starkly contrast with her earlier statements made in *Adarand Constructors, Inc. v. Peña* that *stare decisis* requires the Court to overturn more recent cases that

However, the Court also makes the usefulness of subsequent decisions clear in their opinions. For example, in 1989, the Court overruled the 1969 decision *North Carolina v. Pearce*, which ruled that the Due Process Clause of the Fourteenth Amendment prevents the courts from increasing a prisoner's sentence on retrial on the basis that it is considered vindictive. *Alabama v. Smith*, however, reverses this due to subsequent cases. Chief Justice Rehnquist's opinion reasons that, "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness '[do]es not apply in every case where a convicted defendant receives a higher sentence on retrial.'"[135] Later Supreme Court decisions, such as *Texas v. McCullough*,[136] proved to the Court that judicial vindictiveness is not inherent in the judiciary's decision to impose a greater sentence after retrial. Subsequent cases with slightly different facts can reveal the unanticipated complexities in a prior case's ruling.

Similarly, in *Hudson v. United States* in 1997, the Supreme Court unanimously overruled *United States v. Halper*, which was a unanimous opinion decided in only 8 years prior. The Court initially ruled that imposing significant civil damages on an

---

[134] Id., 236.
[135] Alabama v. Smith, 490 U.S. 794, 799 (1989).
[136] In Texas v. McCullough, 475 U.S. 134 (1986), the Supreme Court upheld the Texas state court's imposition of a greater sentence on retrial because different facts were presented in the second trial. Thus, the court distinguished this case from *North Carolina v. Pearce*, did not violate McCullough's Due Process right under the Fourteenth Amendment.

individual who had already been criminally charged and convicted, constituted a violation of the constitutional protection against double jeopardy. However, according to Chief Justice Rehnquist:

> We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable. We have since recognized that all civil penalties have some deterrent effect.[137]

The Supreme Court used earlier cases, such as *Department of Revenue of Montana v. Kurth Ranch* and *United States v. Ursery* to illustrate its doubt of *Halper*'s punitive test. In *Halper*, the Supreme Court determined that any fines unrelated to sustained damages such as those in pursuance of retribution or deterrence were to be considered punitive. However, the Court later recognized the impracticality of this holding.

Although the Court constantly changes its favor of older versus more recent precedent, the Court is able to reconcile the seeming contradiction between preferring older precedent and subsequent decisions in *Hudson v. United States*. Chief Justice Rehnquist said, "the analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine…"[138] Thus, the Court applies the value of older precedent and more recent precedent as justifications for overturning a lone deviating opinion.

Abandoning Equal Treatment Between Constitutional and Statutory Cases

Additionally, the Rehnquist Court builds upon prior courts' distinction between case subjects. The Court reinforces the difference in approach between constitutional and

[137] Hudson v. United States, 522 U.S. 93, 101-02 (1997).
[138] Id., 101.

statutory cases. In *Seminole Tribe of Florida v. Florida*, Chief Justice Rehnquist wrote, "Our willingness to reconsider our earlier decision have been 'particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[139] The Court legitimizes its abandonment of prior precedent due to the difficulty of overturning it through any other legal means. The Court further reinforces prior iterations of the Court by placing an increased scrutiny on statutory cases. Justice Scalia argued this in his dissent in *Hohn v. United States* in 1998. He wrote, "Of course even if one accepts that the two factors off the Court alludes to (procedural ruling plus absence of full briefing or argument) reduce *House*'s *stare decisis* effect, one must still acknowledge that its *stare decisis* effect is *increased* by the fact that it was a statutory holding."[140] For the same reason the Court considers itself less bound by *stare decisis* in constitutional cases, it considers *stare decisis* to be more rigid in statutory cases: Congress is more able to fix the Supreme Court's erroneous decisions in statutory cases than in constitutional ones.

The Rehnquist Court makes further distinctions between cases, namely procedural and antitrust cases. In 1993, Michael Gaudin was charged and convicted with making false statements on federal loan documents. The District Court, however, determined that the court was to decide materiality of facts, such as whether Gaudin's false statements were significantly related to the Housing and Urban Development's decisions. The Supreme Court overruled this decision, thereby, overruling *Sinclair v. United States* and *Kungys v. United States*. In a unanimous decision, Chief Justice Rehnquist said,

---

[139] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63 (1996).
[140] Hohn v. United States, 524 U.S. 236, 261 (1998).

> We do not want to minimize the role that *stare decisis* played in our jurisprudence. That role is somewhat reduced, however, in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior. It is reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution. And we think *stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court.[141]

According to the Supreme Court, depriving the jury from considering materiality violated the defendants Fifth and Sixth Amendment rights to due process and to a jury trial, respectively. The Court's foundation of the materiality procedure in the Constitution allows the Court to more freely ignore the doctrine of *stare decisis*.

Additionally, the Rehnquist Court further distinguished antitrust cases from other statutory cases. In *State Oil Co. v. Khan*, the Court overruled the 1968 decision *Albrecht v. Herald Co.*, which prohibited price-fixing entirely. In her unanimous decision, Justice O'Connor wrote, "Although the rule of *Albrecht* has been in effect for some time, the inquiry we must undertake requires considering ' 'the effect of the antitrust laws upon vertical distributional restraints in the American economy today.' '"[142] Antitrust laws are purposed to encourage economic competition; thus, the Court considers an antitrust law's effect on the economy. Because of economic fluctuations, *stare decisis* is not as strong as in traditional statutory cases. This new distinction breaks with the Court's traditional justification for differentiating types of cases when determining the strength of *stare decisis*. Unlike constitutional cases, antitrust laws are much easier to correct through congressional action. According to traditional judiciary practice, *stare decisis* is considerably weaker in constitutional cases than in statutory cases. According to Brian

---

[141] United States v. Gaudin, 515 U.S. 506, 521 (1995).
[142] State Oil Co. v. Khan, 522 U.S. 3, 21-22 (1997).

Kalt, a legal scholar and professor at Michigan State School of Law, "the court is the institutional actor best to fix [wrongly decided constitutional cases]."[143] He also notes the incredible strength *stare decisis* has in statutory cases.[144]

Obeying Congressional Power

The Court affirms this view that congressional issues require unique consideration of *stare decisis*. For example, in *Quill Corporation v. North Dakota By and Through Heitkamp*, Justice Stevens justified the Court's decision to uphold a potentially erroneous precedent because of Congress' ability to reverse the Court's decision through legislation. In this nearly unanimous decision, the Court refused to entirely overturn *National Bellas Hess v. Illinois*. In his majority opinion, Justice Stevens said that deciding to maintain the rule set out in *Bellas Hess* "is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."[145] In his concurring opinion, Justice Scalia detailed Congress's ability to easily overturn Supreme Court decisions through legislation. He said, "Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remained free to alter what we have done.'"[146] Because the Court recognizes Congress' ability to overturn erroneous

---

143 Brian C. Kalt, "Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases," *Texas Review of Law and Politics* 8, no. 2 (2003-2004): 278.
144 Id., 279.
145 Quill Corporation, Inc. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 318 (1992).
146 Id., 320.

precedent, the Rehnquist Court does not believe it should act on behalf of Congress and assume what they believe Congress wants the law to be.

Although the Court declines to fully overturn *Bellas Hess* in *Quill Corporation v. North Dakota*, Justice White, who partially concurred and partially dissented explained that the Court :

> [R]epudiates that aspect of our decision in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, which restricts, under the Due Process Clause of the Fourteenth Amendment, the power of the States to impose use tax collection responsibilities on out-of-state mail-order businesses that do not have a 'physical presence' in the State.[147]

So, although the Court did not entirely overturn *Bellas Hess*, it strongly dismantled the core of decision. When the Court considers whether to overturn a statutory precedent, they often question Congress' lack of action. The Rehnquist Court determined that "in recent years Congress has considered legislation that would 'overrule' the *Bellas Hess* rule. Its decision not to act in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes…"[148] The Court does not consider Congress' inaction as evidence of their approval of *Bellas Hess*. Although the Court gave Congress the freedom to decide whether to overturn *Bellas Hess*, by pointing out and discussing its erroneous merits, they urged Congress to overturn it.

This refusal to step in for what the Court believed to be a congressional power sharply contrasts with the prior Courts' view of congressional inaction. In *James v. United States*, Chief Justice Warren wrote:

---

147 Id., 321.
148 Id., 318.

> We believe Wilcox was wrongly decided and we find nothing in congressional history since then to persuade us that Congress intended to legislate the rule. Thus, we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it.[149]

Although *Wilcox* engendered significant reliance, was a statutory concern, and Congress did not intend to change the Court's initial decision, the Court found that its erroneous opinion should be corrected. Congress was unable to fix the Court's erroneous decision; thus, the Court took it upon itself to restore good law.

Similarly, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, Justice Brennan recognized that congressional inaction does not connote approval of the decision. In his majority opinion, he said:

> We [cannot] agree that conclusive weight should be accorded to the failure of Congress to respond to Sinclair on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '(i)t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction has been taken as acceptance of Sinclair, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision.[150]

The Warren, Burger, and Rehnquist Courts all consider congressional inaction to be indicative of their approval of a decision; however, they took different approaches to congressional nonintervention. The Warren Court took it upon itself to overturn cases *because* Congress refused to act; the Burger Court, while not using congressional inactivity as a reason for overturning, did not let their inaction prevent the Court from reconsidering prior precedent. The Rehnquist Court, on the other hand, used congressional inaction to support a change in legislation.

---

[149] James 366 U.S. at 221.
[150] Boys Markets, Inc. 398 U.S. at 241.

Obeying Public Opinion

The Rehnquist Court continues to follow its antecedents by valuing the opinion of legal scholars and lower courts. In his unanimous majority decision in *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, Justice Thurgood Marshall comments on the Court's consideration of public opinion. He said:

> [T]he lower federal courts have repeatedly lambasted the *Enelow-Ettelson* doctrine. The rule has been called 'a remnant from the jurisprudential attic,' 'an anachronism wrapped up in an atavism,' and a 'Byzantine peculiarit[y].' With the exception of the Federal Circuit, which apparently has not yet confronted an *Enelow-Ettelson* appeal, every Circuit is on record with criticism of the doctrine. One Circuit Judge has urged his court to reject the doctrine outright. Although a majority of the panel declined to do so, it agreed that the *Enelow-Ettelson* rule was 'artificial,' 'medieval,' and 'outmoded.' Another Circuit Judge, in a majority opinion, recently wrote an extensive and scholarly critique of the doctrine and concluded only with great reluctance that repudiating the doctrine would be improper.[151]

The Court used the abundant criticisms from lower courts of the Court's precedent to build the case in favor of abandoning it. Justice Marshall goes on to discuss the criticisms of the doctrine from prominent legal scholars such as Professor James William Moore of Yale Law School and Professor Charles Alan Wright of University of Texas, Austin Law School. Harsh criticisms from these distinguished and well-known scholars lent credibility to the Court's argument against their own precedent. By relying on the opinions of other legal scholars and a significant majority of lower courts, the Supreme Court demonstrates their sound decision-making that does not draw on their political preferences or ideological leanings.

---

[151] Gulfstream Aerospace v. Mayacamas, 485 U.S. 271, 286-87 (1988).

Obeying Reliance Interests

The Rehnquist Court also amplifies the effect reliance has on the judicial decision-making process. Reliance is one of the most prevalent considerations for respecting a prior decision.[152] In *Adarand Constructors, Inc. v. Peña*, the Court examined how its precedent, *Metro Broadcasting, Inc. v. FCC*, amassed public reliance. In Justice O'Connor's majority opinion, she wrote, "We also note that reliance on a case that has recently departed from precedent is likely minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event."[153] Because the Court determined that *Metro Broadcasting* had recently departed from prior decisions, namely *Richmond v. J.A. Croson Co.*, they rejected the idea that the public heavily relied on the standards set out in *Metro Broadcasting*. However, the Court's mentioning of the lack of reliance on *Metro Broadcasting* reinforces the importance of reliance when the Court considers overturning precedent.

In the same vein, the Court has argued significant reliance on precedent as the main or sole reason for obeying *stare decisis*. For example, in *Quill Corporation v. North Dakota By and Through Heitkamp*, the Court distinguished between an overturned precedent, *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric, Co.*, and a similar case, *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, that was brought into question. Justice Stevens said:

> Second, unlike the *Attelboro* rule, we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound. Finally, again unlike the *Attleboro* rule, the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry. The 'interest in

[152] Randy J. Kozel, "Precedent and Reliance," *Emory Law Journal* 62, (2013): 1460.
[153] Adarand Constructors Inc., 515 U.S. at234.

> stability and orderly development. Of the law' that undergirds the doctrine of *stare decisis*, therefore counsels adherence to settled precedent.[154]

Lower courts, as well as the public and commercial industries, have relied significantly on the Court's decision in *Bellas Hess*. One purpose of *stare decisis* is to promote predictability within the law. The public, as well as businesses, should reasonably expect that similar cases be treated similarly by the courts.[155] For that reason alone, the Court upholds the *Bellas Hess* decision on interstate commerce grounds.

Similarly, the Court upheld *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* due the public's expectation of their rights under the law. In Justice O'Connor's majority opinion, she said:

> While [*Roe v. Wade*] has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant.[156]

Casey expands the reliance approach to precedent because it discusses the reliance of society as a whole instead of specific parties, such as those who have made similar contracts. The nineteen years between *Roe v. Wade* and *Casey*, women had grown accustomed to female agency that had been established in *Roe*. It had created a societal norm of female decision-making that an entire generation, specifically women, had come to expect. The Court would harm society by reversing a precedent that a whole

---

154 Quill Corporation, Inc., 504 U.S. at 317.
155 Jordan Wilder Connors, "Treating like Subdecisions Alike: The Scope of *Stare Decisis* as Applied Judicial Methodology," *Columbia Law Review* 108, no. 3 (April 2008): 688.
156 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992).

generation, and much of the American public, had relied upon. Without predictability, the public would not have the ability to structure their lives.[157]

Obeying Societal Change

According to Professor Heather K. Gerken of Yale Law School, "the best way to understand the relationship between politics and law, then, is as interlocking gears moving us forward."[158] Just as the Supreme Court aids social movements, so do social movements impact the Supreme Court's jurisprudence. For example, in *Atkins v. Virginia*, the Supreme Court overturned *Penry v. Lynaugh*, which allowed the capital punishment of a mentally disabled individual. In his analysis, Justice Stevens used the fact that states have incrementally outlawed the sentencing of a mentally incapacitated person to death. He wrote:

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.[159]

The changed societal views and growing compassion for the mentally handicapped individuals significantly impacted the Court's decision against the capital punishment of such persons. However, the Eighth Amendment is uniquely dynamic. In 1958, the Court

---

157 Hillel Y. Levin, "A Reliance Approach to Precedent," *Georgia Law Review* 47, no. 4 (Summer 2013): 1054.
158 Heather K. Gerken, "The Supreme Court is a Partner in Transformation, Not its Sole Agent," *The New York Times*, 7 July 2015, https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-partner-in-transformation-not-the-sole-agent.
159 Atkins v. Virginia, 536 U.S. 304, 315-16 (2002).

wrote in *Trop v. Dulles* that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[160] The right from cruel and unusual punishment evolves as society's perception of what is cruel and unusual evolves. The meaning of "cruel" and "unusual" is constantly changing because it "[signifies] something different than what is generally done,"[161] and what is normally done is continuously changing.

The Court used similar logic in *Lawrence v. Texas* in 2003. The Court overruled *Bowers v. Hardwick,* which permitted the criminalization of homosexual conduct. However, societal views of homosexuality changed drastically in the 17 years since *Bowers*. Justice Kennedy's majority opinion stated, "In our own constitutional system, the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in *Bowers* decision are reduced now to 13 of which 4 enforce their laws only against homosexual conduct."[162] In the 17 years after the Court's initial decision in *Bowers*, the number of states with laws prohibiting homosexual conduct dwindled. Just as in *Atkins v. Virginia,* state conduct demonstrated significant changes in societal views. These changes informed the Court's change in interpretation.

Conclusion

The Rehnquist Court builds significantly on justifications for abandoning precedent put forward by prior iterations of the Court. By doing so, it reveals the enduring aspects

---

[160] Trop v. Dulles, 365 U.S. 86, 101 (1958).
[161] Id., n. 32.
[162] Lawrence v. Texas, 539 U.S. 558, 573 (2003).

of the Court's jurisprudence with respect to *stare decisis*. The Rehnquist Court consistently emphasizes the importance and strength of societal acceptance on precedent. It paints society's influence on a decision's success as more dominant than any other justification. Ultimately, it reinforces the theory that public opinion plays a significant role in the Supreme Court's jurisprudence and decision-making process, especially when considering the reversal of a precedent.

CHAPTER 8

Roberts Court (2005-present)

The Roberts' Court has faced significant criticism for its apparent flippant overruling of precedent. Many critics perceive the current Supreme Court to be partisan and political. In particular, the media has framed every high-profile Supreme Court case as ideologically split and politically motivated. The media has latched on to the Court's overturning of precedent as evidence for its clear partisanship.[163] However, as of 2018, the Roberts' Court has overturned fewer than 1 case per year.[164] Although the reasonings the Roberts Court put forward for doing so build off of previous courts' rationales, it also discusses new justifications such as reliance interests, settled expectations, and technological advancements.

Obeying Settled Expectations

The Roberts Court does give several reasons for abandoning *stare decisis* in certain circumstances. Since 2005, the Court most frequently cites reliance, or lack thereof, as a valid justification for overturning a prior decision. According to Professor Randy Kozel of Notre Dame Law School, reliance interests are a compelling reason for obeying *stare decisis*. He wrote that, "stakeholder reliance should occasionally persuade judges to accept interpretations of the law they would otherwise reject."[165] In *Pearson v. Callahan*,

---

[163] Andrew Chung, "Conservative U.S. Justices Draw Criticism by Overruling Precedent Again," *Reuters*, 21 June 2019. https://www.reuters.com/article/us-usa-court-precedent/conservative-u-s-justices-draw-criticism-by-overruling-precedent-again-idUSKCN1TM27G

[164] According to the Congressional Research Service, there have been 8 cases that expressly overturn a prior Supreme Court decision, and my own research indicates 2 cases in 2018. Thus, the Roberts Court has used 10 cases to overturn a prior decision in its 13 years (as of 2018).

[165] Randy J. Kozel, "Precedent and Reliance," *Emory Law Journal* 62 (2013): 1460.

the Court overruled a strict two-pronged rule set out in *Saucier v. Katz* for evaluating a government official's qualified immunity claim after considering potential reliance interests on the precedent. The qualified immunity doctrine protects government officials from being sued when acting within their capacity as a government official unless they clearly violated a citizen's constitutional or statutory right.[166] In the decision for a unanimous Court, Justice Alito wrote, "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."[167] The Court said its reevaluation of *Saucier* is appropriate because changing the way in which courts assess a government official's imposition on an individual's rights does not change any settled expectations of previous or future parties. One of the main purposes of *stare decisis* is to protect the litigants' plausible anticipations of consistency throughout the legal system.[168]

The Court put forward a similar analysis in *Montejo v. Louisiana* in 2009. In this case, the Court overruled *Michigan v. Jackson*, which held that any evidence obtained by the police after a suspect's invocation of his right to counsel was inadmissible in court. In Justice Scalia's majority opinion, he wrote:

> Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. The first two cut in favor of abandoning *Jackson*: The opinion is only two decades old, and eliminating it would not upset expectations.[169]

---

[166] "Qualified Immunity," *Legal Information Institute* at *Cornell Law School*, https://www.law.cornell.edu/wex/qualified_immunity

[167] Pearson v. Callahan, 555 U.S. 223, 233 (2009).

[168] John M. Walker, Jr., "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effects?" *China Guiding Cases Project* at *Stanford Law School*, Feb. 29, 2016, https://cgc.law.stanford.edu/commentaries/15-john-walker/.

[169] Montejo v. Louisiana, 556 U.S. 778, 792-93 (2009).

According to the majority, the Court believed that the public did not actively rely on the protections set out in *Jackson*, which eliminates the hindrance of reliance from the Court's consideration.

In 2018, the Court continued the discussion of reliance interests in *South Dakota v. Wayfair*. In this case, a reliance interest was at stake and stood as an obstacle for the Court. In the decision, the Court overturned *Quill Corporation v. North Dakota* and *National Bellas Hess v. Department of Revenue of Illinois*, which dictated that corporations must be physically present in a state in order to be taxed by that state. Companies, and particularly e-commerce companies, understandably rely on this physical presence doctrine for their operations. The Court recognized that, "[r]eliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."[170] This statement in Justice Kennedy's majority opinion implies that even a flawed or erroneous decision could be upheld if reliance interests are significant, as explained by Professor Kozel. However, Justice Kennedy and his irregular majority[171] distinguished between valid and invalid reliance interests. The Court concluded that:

> But even on its own terms, the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced. And, importantly, *stare decisis* accommodates only 'legitimately reliance interest[s].' Here, the tax distortion created by *Quill* exists in large part because consumers regularly fail to comply with lawful use taxes.[172]

According to the Court, online business' and consumers' reliance interest in avoiding taxation is an illegitimate reliance interest; thus, the influence of *stare decisis* does not

---

[170] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).
[171] The majority in *South Dakota v. Wayfair* consisted of Justice Kennedy, Justice Gorsuch, Justice Alito, Justice Ginsburg, and Justice Thomas.
[172] South Dakota, 138 U.S. at 2098.

bind the Court to its decision in *Quill*. So, while, reliance interests can outweigh a potentially wrong decision, it must be valid in that the change in the law would justifiably harm a person or their livelihood.

Abandoning Equal Treatment Between Constitutional and Statutory Cases

Based on this reliance doctrine, the Court differentiated the strength of *stare decisis* in certain types of cases such as contractual and procedural. The Court has traditionally decided that constitutional cases are less bound by precedent than cases regarding congressional statutes. The Roberts Court, however, further applied the burden of *stare decisis* to contractual or property cases. In Justice Alito's majority decision in *Pearson v. Callahan*, he wrote, "'Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases …involving procedural and evidentiary rules' that do not produce such reliance."[173] Justice Alito extracted this difference between property and contract cases and procedural and evidentiary cases from the reliance doctrine. In other words, the fact that the public understandably relies on decisions regarding a person's right to property or contract. Thus, *stare decisis* is particularly strong in those cases. On the other hand, the general public does not tend to rely on the rules regarding court procedure or evidence; therefore, *stare decisis* is not necessarily applied or upheld. Justice Alito further expanded upon the differences in arguments depending on type of case. He said:

> Respondent argues that the *Saucier* procedure should not be reconsidered unless we conclude that its justification was 'badly reasoned' or that the rule has proved to be 'unworkable' but those standards, which are appropriate when a

[173] Pearson, 555 U.S. at 233.

> constitutional or statutory precedent is challenged, are out of place in the present context.[174]

Because *Pearson* questions a procedure as opposed to a constitutional or statutory precedent, it is held to a lower standard of *stare decisis*. Thus, the traditional reasons for upholding precedent, such as workability or erroneousness, are not as relevant in this case.

On the other hand, *stare decisis* cannot entirely be abandoned simply because the case does not concern a congressional statute. In Justice Stevens' dissent in *Citizens United v. FEC*, he argued that precedent should not be flippantly reevaluated simply because it concerns a constitutional interpretation. He wrote "*Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion."[175] He emphasized the importance of maintaining *stare decisis* in constitutional cases, even though the Court generally considers precedent to be less binding in cases regarding the Constitution.

Obeying Societal Change

A new justification the Court uses for overturning prior decisions is that advancements in technology requires an adjustment to the law. For example, in *Citizens United v. FEC*, Citizens United argued that its movie that criticized Hillary Clinton was electioneering communications, and the Bipartisan Campaign Finance Reform Act that limited campaign contributions for electioneering communications was unconstitutional under the First Amendment. The Supreme Court agreed that limiting corporate campaign

---

[174] Id., 234.
[175] Citizens United v. Federal Election Commission, 558 U.S. 310, 411 (2010).

contributions violated the corporations' protected right to free speech. In Justice Kennedy's majority opinion, he wrote:

> Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message.[176]

In other words, the change in how speech is conducted, namely through television ads and potentially through blog posts, and social media, necessarily requires the Court to reevaluate their traditional stance on free speech and its speakers.

Similarly, in *South Dakota v. Wayfair*, the Court was faced with determining the taxation policy for e-commerce companies. In deciding to allow States to tax e-commerce business with no physical presence in the State, the Court overruled a 1992 decision, *Quill Corporation v. North Dakota*. In the Court's majority decision, the Court weighed the technological differences between 1992 and 2018 in its consideration for overturning *Quill*. Justice Kennedy wrote:

> Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans has Internet access. Today that number is about 89 percent. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller. The Internet's prevalence and power have changed the dynamics of the national economy.[177]

Although the technological changes between 1992 and 2018 did not change the erroneous nature of the decision, the increase in Internet access and increase in e-commerce businesses made the decision more clearly wrong. The growth of the Internet made the

---

[176] Id., 364.
[177] South Dakota, 138 S. Ct., 2097.

tax loss suffered by States more evident; thus, it has become more imperative to overturn such an overtly wrong precedent.

Obeying Public Opinion

In the last fifteen years, the Roberts Court has mentioned the public and judiciary's opinion on its decisions, but less so than in previous eras. Only one case mentioned criticism in their decision: *Pearson v. Callahan*. In Justice Alito's majority decision, he said, "Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weight in favor of reconsideration."[178] The Supreme Court's doubts in addition to the lower court's hesitancy to apply the principle or outright condemnation of the decision in *Saucier v. Katz* indicates a potential wrong decision. Justice Alito further emphasizes the importance of lower courts' approval of the decision due to their "firsthand experience bearing on its advantages and disadvantages."[179] In this particular case, the lower courts have seen the effects of enforcing the strict principle dictated in *Saucier*, and they can speak more extensively on its flaws. Thus, the Supreme Court trusted the opinion of the lower court when it criticized "*Saucier*'s 'rigid order of battle.'"[180] Decisions such as Justice Alito's in *Pearson* confirm the theory that lower courts can influence Supreme Court decisions in a myriad of ways. Although this decision directly quotes and points to decisions of the lower court, studies have shown that the Supreme Court often uses language from lower court decisions

[178] Pearson, 555 U.S., 235.
[179] Id., 231.
[180] Id., 234.

Obeying Tradition

When overturning a precedent, the Roberts Court often mentions the precedent's disruption of prior precedent. Therefore, by overturning the precedent, the Court is returning to the Court's tradition. For example, in *Citizens United v. FEC*, the Court alluded to its reliance on Supreme Court decisions and principles before its controlling precedent. In his majority decision, Justice Kennedy wrote, "No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin*, Congress had enacted legislation for this purpose, and the Government urged the same proposition before this court."[181] The cases, congressional and governmental actions prior to *Austin v. Michigan Chamber of Commerce* proved the case to be inconsistent with the practices of the government. Justice Kennedy further explained that "These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*."[182] Ironically, the precedent's lack of reliance on *stare decisis* causes the Court to reject it as a controlling precedent. The Court rejects *Austin* because it represented a departure from *Buckley*, *Bellotti*, and the clear intention of the government as seen through congressional actions.

The Court viewed older precedent as controlling as opposed to more recent precedent in *Alleyne v. United States* in 2013. *Alleyne v. United States* overruled *Harris v. United States*, a decision from 2002 that determined that judicial factfinding, or the judge's

[181] Citizens United, 558 U.S. at 348.
[182] Id., 363.

sentencing for acquitted or uncharged conduct,[183] on top of a minimum sentence did not violate the Sixth Amendment right to a trial and sentencing by jury. In *Harris*, the majority distinguished between *Harris* and *Apprendi v. New Jersey*, though it did not overturn *Apprendi*. In his majority decision in *Alleyne*, Justice Thomas wrote, "*Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. We conclude that this distinction is inconsistent with our decision in *Apprendi v. New Jersey*, and with the original meaning of the Sixth Amendment."[184] Unlike the Court in 2002, the 2018 Court determined that *Harris* and *Apprendi* could not coexist peacefully. Thus, according to the Court's reading of the Sixth Amendment, *Apprendi* perpetrates the true meaning of the Sixth Amendment, and should, thus, be maintained as the controlling precedent over *Harris*.

In *Pearson v. Callahan*, in addition to its lack of reliance interests, its procedural nature, and criticisms drawn from the judiciary, the Court further reasons that it broke with prior precedent. Justice Alito wrote, "Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel 'not to pass on questions of constitutionality…unless such adjudication is unavoidable.'"'[185] Although *Saucier* did not directly contradict a prior Supreme Court decision, the decision broke with the Supreme Court's tradition of allowing lower courts to decide procedures and customs independently.

---

[183] Michael A. Foster, *Judicial Fact-Finding and Criminal Sentencing: Current Practice and Potential Change* (CRS Report No. LSB10191), 24 Aug. 2018, Retrived from Congressional Research Service Website: https://fas.org/sgp/crs/misc/LSB10191.pdf
[184] Alleyne v. United States, 570 U.S. 99, 103 (2013).
[185] Pearson, 555 U.S. at 241.

Abandoning Eroded Decisions

While adhering to tradition and prior precedent certainly lends the Court legitimacy, the Court also often found subsequent decisions more controlling. For example, in *Alleyne v. United States*, Justice Sotomayor's concurring opinion added to Justice Thomas's majority opinion, which lacked substantial discussion of *stare decisis*. She explained that, "In this context, *stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law."[186] Later decisions tended to avoid applying the principles set out in *Harris v. United States* without expressly overturning it by distinguishing the cases on its facts, thus, establishing differing and somewhat contradictory principles. By doing so, the Court necessarily required that it would decide between the two principles in a later decision. The Court found that the subsequent principles became more controlling, therefore, eroding the decision in *Harris*.

Abandoning Decisions That Have Unforeseen Consequences

Lastly, the Court considers the threat of potential negative consequences when determining the strength of a precedent. In *Citizens United v. FEC*, the Court argued that upholding *Austin v. Michigan Chamber of Commerce* would eventually spiral to the extreme limitation of free speech. Justice Kennedy wrote "*Austin*'s anti-distortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations."[187] The decision in *Austin v. Michigan*

[186] Alleyne, 570 U.S. at 119.
[187] Citizens United, 558 U.S. at 350.

Chamber of Commerce held that limiting corporations' funding to independent expenditures was constitutional because it attempted to eradicate the distortion caused in campaign success from corporate funding. In 2010, the Court found that this "anti-distortion rationale" could eventually eliminate media corporations from spending for political purposes because their support distorts campaign success. While not a significant reason in its decision, the Court uses potential consequences of upholding precedent to bolster its decision to abandon it.

Similarly, in *South Dakota v. Wayfair*, the Court decided to allow State taxation of e-commerce businesses because of the consequences faced by States without this income. Justice Kennedy wrote:

> This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Now estimates range from $8 to $33 billion. The South Dakota Legislature has declared an emergency, which again demonstrates urgency of overturning the physical presence rule.[188]

Because States have already faced severe negative consequences as a result of the expansion of Internet businesses with no physical presence in any state, the Court feels compelled to address the results of their own decisions in *Quill Corporation v. North Dakota* and *National Bellas Hess v. Department of Revenue of Illinois*. Justice Kennedy further alludes to a potential increase in losses suffered by States if the Court does not overturn its precedents. While, again, the Court does not rely entirely on potential consequences as a reason for abandoning *stare decisis*, its acts as a catalyst for action due to potential harm suffered at the hands of the Court's inaction.

---

[188] South Dakota, 138 S. Ct. at 2097.

Conclusion

Although the Roberts Court had fewer cases than the Courts before it, it presented many justifications for overturning precedent. All cases, except for *Obergefell v. Hodges*, presented several arguments for abandoning its revered doctrine of *stare decisis*. Interesting, this era also presents the most discussion of *stare decisis* as an abstract doctrine. With the exception of *Obergefell*, every case mentions its philosophy behind *stare decisis*, and why it is not as relevant in the present case as it normally would. As the Courts become more and more recent, it mentions its motivations and justifications in more depth. This could be a result of many things, but two reasons that I find convincing are 1) the publication of the Court's decisions and 2) the increasing scrutiny of the Court as an institution. Both of these reasons hint at the Court's metamorphosis as an institution as a result of public criticism. In fact, empirical research from lead political scientists and legal scholars, Lee Epstein, William Landes and Adam Liptak, confirms that Supreme Court Justices take the criticisms of prior precedent or their own precedents seriously.[189] However, my prior chapters demonstrates that this is not a novel, nor an unjustified concern.

[189] Lee Epstein, William M. Landes, and Adam Liptak, "The Decision to Depart (or not) from Constitutional Precedent: An Empirical Study of the Roberts Court," *New York University Law Review* 90, (October 2015): 1146.

CONCLUSION

My research reveals five main findings. Firstly, the theory of *stare decisis* appears very differently than the practice of it. For example, vertical *stare decisis* is seldomly, if ever, questioned by legal scholars. It is often thought to be a nonquestion: lower courts must obey the decisions adjudicated by higher courts. However, my research into horizontal *stare decisis* shows this to be less accurate than originally believed. Many Supreme Court decisions that overturn a prior ruling indicate that the lower courts' negative opinions of or sometimes outright refusal to abide by Supreme Court decisions as a factor in their decision to overturn the negatively viewed precedent.

Secondly, the Supreme Court highly values the acceptance of their decisions into society. If a decision disobeys the values and traditions of society, public opinion can, and often does, persuade the Court to overrule it. Each modern iteration of the Supreme Court (Warren through Roberts) mentioned the opinions of legal scholars and public criticisms as justifications for overturning precedent.

Thirdly, the doctrine of *stare decisis* is often viewed as a tool of convenience by the Justices. Many Justices appear inconsistent on their views of *stare decisis*. Justices rarely make their evaluations of precedent clear and continue to abide by those criteria in future cases.

Fourthly, however, the Supreme Court Justices clearly understand the strength of *stare decisis*. In fact, the Supreme Court most frequently cites precedent, whether it be prior to the overruled one or subsequent to it, as justification for reversing precedent. Precedent is clearly a persuasive argument to abandon a prior Supreme Court decision to the public and to the Justices themselves.

Lastly, the relationship between the Supreme Court's precedent and its legitimacy is important in the Supreme Court's decision-making process. According to Professor Tara Grove of William and Mary Law School, the Supreme Court is well-aware of the public's impact on its legitimacy and power.[190] Perhaps the Court's knowledge of the fact that its legitimacy rests largely on public opinion drives the use and strength of *stare decisis* as a doctrine within the Supreme Court's jurisprudence. However, that does not deprive the doctrine of its other strengths. *Stare decisis* has the ability to reduce divisiveness within the Court and preserve the legitimacy of an essential American institution that balances the inherently political nature of the other two governmental branches.

[190] Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," review of *Law and Legitimacy in the Supreme Court*, by Richard H. Fallon, *Harvard Law Review*, 1 Jun. 2019.

BIBLIOGRAPHY

Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995).

Afroyim v. Rusk, 387 U.S. 253 (1967).

Agostini v. Felton, 521 U.S. 203 (1997).

Alabama v. Smith, 490 U.S. 794 (1989).

Alleyne v. United States, 570 U.S. 99 (2013).

Altschuler, Albert W. "Failed Pragmatism: Reflections on the Burger Court." *Harvard Law Review* 100, (1986): 1436-1456.

Andrews v. Louisville &. N.R. Co., 406 U.S. 320 (1972).

Atkins v. Virginia, 536 U.S. 304 (2002).

Barrett, Amy C. "Precedent and Jurisprudential Disagreement." *Texas Law Review* 91 (2013): 1711-1737.

Batson v. Kentucky, 476 U.S. 79 (1986).

Black, Ryan C. and James F. Spriggs II. "The Citation and Depreciation of U.S. Supreme Court Precedent." *Journal of Empirical Legal Studies* 10, no. 2 (2013): 325-358.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).

Brown, Rebecca L. "Tradition and Insight." *The Yale Law School Journal* 103, no. 1 (October 1993): 177-222.

Cass County v. Johnston, 96 U.S. 360 (1877).

Chung, Andrew. "Conservative U.S. Justices Draw on Criticism by Overruling Precedent Again." *Reuters*, 21 June 2019. https://www.reuters.com/article/us-usa-court-

precedent/conservative-u-s-justices-draw-criticism-by-overruling-precedent-again-idUSKCN1TM27G.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

Coaston, Jane. "Polling Data Shows Republicans Turned Out for Trump in 2016 because of the Supreme Court." *Vox*. 29 Jun. 2018. https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire.

Connors, Jordan W. "Treating like Subdecisions Alike: The Scope of *Stare Decisis* as Applied Judicial Methodology." *Columbia Law Review* 108, no. 3 (April 2008): 681-715.

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

Cooper, Charles J. "Stare Decisis: Precedent and Principle in Constitutional Adjudication." *Cornell Law Review* 73, no. 2 (January 1988): 401-410.

Corley, Pamela C., Paul M. Collins, and Bryan Calvin. "Lower Court Influence on U.S. Supreme Court Opinion Content." *The Journal of Politics* 73, no. 1 (January 2011): 31-44. doi: 10.1017/s0022381610000848.

Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978).

DeSilver, Drew. "Proposed Amendments to the U.S. Constitution Seldom Go Anywhere." Pew Research Center. 12 April 2018. https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/.

Edelman v. Jordan, 415 U.S. 651 (1974).

Ely, James W. “Overview: The Genessee Chief v. Fitzhugh.” Oxford Reference. Oxford University Press. https://www.oxfordreference.com/view/10.1093/oi/authority.201108039.

Epstein, Lee, William M. Landest, and Adam Liptak. “The Decision to Depart (or not) from Constitutional Precedent: An Empirical Study of the Roberts Court.” *New York University Law Review* 90, (October 2015): 1115-1159.

Erie R. Co. v. Tompkins, 204 U.S. 64 (1938).

Ford, Matt. “Gorsuch: *Roe v. Wade* is the ‘Law of the Land.’” *The Atlantic*. 22 Mar. 2017. https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425/.

Foster, Michael A. *Judicial Fact-Finding and Criminal Sentencing: Current Practice and Potential Change*. (CRS Report No. LSB10191). 24 Aug. 2018, Retrived from Congressional Research Service Website: https://fas.org/sgp/crs/misc/LSB10191.pdf

Fowler, James H. and Sangick Jeon. “The Authority of Supreme Court Precedent.” *Social Networks* 30 (2008): 16-30.

Garland v. State of Washington, 232 U.S. 642 (1914).

The Genessee Chief, 53 U.S. 433 (1851).

Gerhardt, Michael J. *The Power of Precedent*. New York: Oxford University Press, 2008.

Gerhardt, Michael J. “A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia.” *William & Mary Law School Scholarship Repository* 74, no. 25 (1994): 25-66.

Gerken, Heather K. "The Supreme Court is a Partner in Transformation, Not its Sole Agent." *The New York Times*, 7 July 2015. https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-partner-in-transformation-not-the-sole-agent.

Gideon v. Wainwright, 372 U.S. 335, (1963).

Gordon v. Ogden, 28 U.S. 33 (1830).

Green v. Neal's Lessee, 31 U.S. 291 (1832).

Greenhouse, Linda. "William H. Rehnquist, Chief Justice of the Supreme Court, is Dead at 86." *The New York Times*. 4 Sept. 2005. https://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html.

Grove, Tara L. "The Supreme Court's Legitimacy Dilemma." review of *Law and Legitimacy in the Supreme Court*, by Richard H. Fallon. *Harvard Law Review*, 1 Jun. 2019.

Gulfstream Aerospace v. Mayacamas, 485 U.S. 271 (1988).

Hamilton, Alexander. *Federalist* No. 78, in *The Federalist Papers*, ed. Gary Wills (New York: Bantam Classics, 1982).

Hansen, Liane and Nina Totenberg, "The High Court After Rehnquist." *NPR*. 4 Sept. 2005. https://www.npr.org/2005/09/04/4832013/the-high-court-after-rehnquist.

Harper v. Virginia State Board of Education, 383 U.S. 663 (1966).

Hart, Henry M. "The Relations between State and Federal Law." *Columbia Law Review* 54, no. 4 (1954): 489-542. doi:10.2307/1119546.

Helvering v. Hallock, 309 U.S. 106 (1940).

Higginbottom, Patrick. “Text and Precedent in Constitutional Adjudication.” *Cornell Law Review* 73, no. 2 (January 1988): 411-417.

Hohn v. United States, 524 U.S. 236 (1998).

Hudson v. United States, 522 U.S. 93 (1997).

“Incorporation Doctrine.” *Law Library – American Law and Legal Information*. 2020 https://law.jrank.org/pages/7578/Incorporation-Doctrine.html.

“Incorporation Doctrine.” Legal Information Institute. *Cornell Law School*. 2020 https://www.law.cornell.edu/wex/incorporation_doctrine.

Jackson v. Denno, 378 U.S. 368 (1964).

James v. U.S., 366 U.S. 213 (1961).

Johnson, Timothy R., James F. Spriggs II, and Paul J. Wahlback. “The Origin and Development of Stare Decisis at the U.S. Supreme Court.” *Law Explorer*, November 9, 2015. https://lawexplores.com/the-origin-and-development-of-stare-decisis-at-the-u-s-supreme-court/.

Kalt, Brian C. “Three Levels of Stare Decisis: Distinguishing Common-Law, Constitutional, and Statutory Cases.” *Texas Review of Law and Politics* 8, no. 2 (2003-2004): 277-281.

Katz v. U.S., 389 U.S. 347 (1967).

Kende, Mark S. “Constitutional Pragmatism, the Supreme Court, and the Democratic Revolution.” *Denver University Law Review* 89, no. 3 (2012): 635-670.

Kimberly, Michael. “Symposium: The Importance of Respecting Precedent.” *SCOTUSBlog*. 20 December 2017.

https://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent/.

Kozel, Randy J. "*Stare Decisis* as Judicial Doctrine." *Washington & Lee Law Review* 67, no. 2 (2010): 411-466.

Kozel, Randy J. "Precedent and Constitutional Structure." *Northwestern University Law Review* 122, no. 4 (2018): 789-838.

Kozel, Randy J. "Precedent and Reliance." *Emory Law Journal* 62, (2013): 1459-1507.

Landes, William M. and Richard A. Posner. "Legal Precedent: A Theoretical and Empirical Analysis." *Journal of Law and Economics*. (September 1976).

Lawrence v. Texas, 539 U.S. 558 (2003).

Lee, Thomas R. "Stare Decisis in the Historical Perspective: From the Founding Era to the Rehnquist Court." *Vanderbilt Law Review*, 52 no. (1999): 647- 735.

Levin, Hillel Y. "A Reliance Approach to Precedent." *Georgia Law Review* 47, no. 4 (Summer 2013): 1035-1098.

Mapp v. Ohio, 367 U.S. 643 (1961).

Mason v. Eldred, 73 U.S. 231 (1867).

Montejo v. Louisiana, 556 U.S. 778 (2009).

Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).

National League of Cities v. Usery, 426 U.S. 833 (1976).

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

Nye v. United States, 313 U.S. 33 (1941).

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

"Panel on Originalism and Precedent." in *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi, 199-252. (Washington D.C.: Regnery Publishing, Inc. 2007).

Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476 (1816).

Pearson v. Callahan, 555 U.S. 223 (2009).

Perez v. Campbell, 402 U.S. 637 (1971).

Peyton v. Rowe, 391 U.S. 54 (1968).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Powell, Lewis F. Jr. "Stare Decisis and Judicial Restraint." *Washington & Lee Law Review* 47, no. 2 (Spring 1990): 281-290.

Powell's Lessee v. Green, 2 Peters, 240 (1829).

"Qualified Immunity." *Legal Information Institute* at *Cornell Law School.* https://www.law.cornell.edu/wex/qualified_immunity.

Quill Corporation, Inc. v. North Dakota By and Through Heitkamp, 504 U.S. 298 (1992).

Rehnquist, James C. "The Power That Shall Be Invested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court." *Boston University Law Review* 66, no. 2 (1986): 345-376.

Reid v. Covert, 364 U.S. 1 (1957).

Segal, Jeffrey A., Chad Westerland, and Stefanie A. Lindquist. "Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model." *American Journal of Political Science* 55, no. 1 (January 2011): 89-104.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Smith v. Allwright, 321 U.S. 649 (1944).

Smith v. Evening News Association, 371 U.S. 195 (1962).

South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

Spevack v. Klein, 385 U.S. 511 (1967).

State Oil Co. v. Khan, 522 U.S. 3 (1997).

Stempel, Jonathan. "Justice Thomas urges U.S. Supreme Court to Feel Free to Reverse Precedents." *Reuters*. 17 Jun. 2019. https://www.reuters.com/article/us-usa-court-thomas/justice-thomas-urges-us-supreme-court-to-feel-free-to-reverse-precedents-idUSKCN1TI2KJ.

Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Taylor v. Louisiana, 419 U.S. 522 (1975).

Trop v. Dulles, 365 U.S. 86 (1958).

United States v. Dixon, 509 U.S. 688 (1993).

United States v. Gaudin, 515 U.S. 506 (1995).

United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975).

Walker, John M., "The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effects?" *China Guiding Cases Project* at *Stanford Law School*. Feb. 29, 2016. https://cgc.law.stanford.edu/commentaries/15-john-walker/.

Warren, Brittany. "The Case of the Murdering Wives." *Military Law Review* 212, (Summer 2012): 133-193.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

Wilson v. Daniel, 3 U.S. 401 (1798).

Wolf v. Colorado, 338 U.S. 25 (1949).