Order Code RL33172

The Supreme Court's Overruling of Constitutional Precedent: An Overview

November 29, 2005

name redacted
Legislative Attorney
American Law Division

The Supreme Court's Overruling of Constitutional Precedent: An Overview

Summary

As a general rule, the Supreme Court adheres to precedent, citing the doctrine of *stare decisis* ("to stand by a decision"). The general rule of *stare decisis* is not an absolute rule, however, and the Court recognizes the need on occasion to correct what are perceived as erroneous decisions or to adapt decisions to changed circumstances. In deciding whether to overrule precedent the Court takes a variety of approaches and applies a number of different standards, many of them quite general and flexible in application. As a result, the law of *stare decisis* in constitutional decision making can be considered amorphous and manipulable, and it is difficult to predict when the Court will rely on *stare decisis* and when it will depart from it. This report cites instances in which the Court has overruled precedent as well as instances in which it has declined to do so, and sets forth the rationales that the Court has employed.

Contents

The Supreme Court's Overruling of Constitutional Precedent: An Overview

In General

The Supreme Court has overruled 228 of its own decisions over the years, and the most controversial of these decisions involved constitutional interpretation.[1] How the Supreme Court explains its reversals of direction in constitutional interpretation is the subject of this report.[2]

As a general rule, the Supreme Court adheres to precedent, citing the doctrine of *stare decisis* ("to stand by a decision"). This means that, when the Court has laid down a principle in deciding a case, ordinarily it will apply that same principle in future cases with substantially similar facts.[3] The general rule of *stare decisis* is not an absolute rule, however; the Court recognizes the need on occasion to correct what are perceived as erroneous decisions or to adapt to changed circumstances. In deciding whether to overrule precedent the Court takes a variety of approaches and applies a number of different standards, many of them quite general and flexible in application. As a result, the law of *stare decisis* in constitutional decision making has been called amorphous and manipulable, and has been criticized as incoherent.[4]

---

[1] "Supreme Court Decisions Overruled by Subsequent Decisions," in CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, 2387-2399 (CRS 2002; 2004 Supplement) (listing 225 overruled decisions through the end of the 2003 Term; the Court overruled three more decisions during its 2004 Term).

[2] Different issues confront lower courts, which lack authority to overrule Supreme Court precedent and are obligated to follow it.

[3] An alternative approach is to distinguish or narrow a precedent. A less charitable view is that "[t]he alternative to disavowing precedent is manipulating it." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 424 (1988).

[4] "[I]t is quite clear to any observer that the Court has no coherent or stable conception of the appropriate role of precedent in constitutional adjudication," and this fact creates the impression that "the doctrine is invoked only as a mask hiding other considerations." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753, 743 (1988). "We do not have – never can have – a comprehensive theory of precedent." Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988).

Adherence to precedent is a fundamental principle of jurisprudence that promotes certainty in the law and uniformity in the treatment of litigants, and thereby prevents arbitrariness.[5]

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.[6]

Stare decisis is not a constitutional command; as Justice Frankfurter wrote, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision."[7] The doctrine reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[8] A safety valve is deemed necessary, however. In some instances it becomes important to the Court to correct an earlier interpretation that it views as erroneous or no longer viable. Although most Justices agree that error correction should be the exception to the rule, defining the circumstances under which a decision should be overruled is a difficult task. An inconsistent approach by the Court in resolving the tension between the opposing goals of continuity and error correction can itself create uncertainty and unpredictability.

The Court often explains that it is less reluctant to overrule a decision that involves constitutional interpretation rather than interpretation of a statute.

> [I]n 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 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.[9]

---

[5] "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." The Federalist No. 78, at 502-03 (Alexander Hamilton) (Robert Scigliano ed., 2001).

[6] *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (citing BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)). Put other ways, "to change the concept of the law every other month makes a mockery of its majesty and a yo-yo of its practice." Gweszcz Appeal, 206 Pa. Super. 397, 213 A.2d 155, 159 (1965) (dissenting opinion of Judge Watkins); frequent overruling of precedent can "bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Justice Roberts dissenting).

[7] *Helvering v. Hallock*, 309 U.S. 109, 119 (1940).

[8] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (Justice Brandeis dissenting).

[9] *Burnet*, 285 U.S. at 407 (Justice Brandeis dissenting). *Stare decisis* "has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (Justices Stone and Cardozo concurring). "Our willingness to reconsider our earlier decisions has been particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe of Fla. v.*

(continued...)

Nonetheless, when justifying an overruling the Court usually looks for something in addition to its belief that a case was wrongly decided. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification."[10]

"Special justification" can be one or more of several different considerations, and how strong a justification the Court requires can vary with the importance of the precedent as well as with the importance the Court attaches to overruling it. The decision whether to adhere to a constitutional decision "is a complex and difficult one . . . that must account for a variety of often competing considerations."[11] In reexamining a constitutional precedent, the Court looks to "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[12] The Court has looked to the following general considerations in overruling precedent.

> [We] may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to the kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g., United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 173-174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g., Burnet, supra*, at 412 (Brandeis, J. dissenting).[13]

Applications

All of these possibilities may be examined when the Court is asked to overrule a decision at the heart of a major national controversy.[14] In considering and rejecting

---

[9] (...continued)
Florida, 517 U.S. 44, 63 (1996). The converse, of course, is that the Court "give[s] great weight to *stare decisis* in the area of statutory construction [because] 'Congress is free to change this Court's interpretation of its legislation.'. . . Congress, not this Court, has the responsibility for revising its statutes." *Neal v. United States*, 516 U.S. 295-96 (1996) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)).

[10] *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

[11] Church of the *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 573 (1993) (concurring opinion of Justice Souter).

[12] *Planned Parenthood v. Casey*, 505 U.S. at 854. References to *Casey* are to the opinion of the Court, not to the plurality opinion of Justices O'Connor, Kennedy, and Souter, or to other opinions.

[13] *Casey*, 505 U.S. at 854-55.

[14] It is not often that the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." It has (continued...)

a request that it overrule its landmark abortion decision, *Roe v. Wade*,[15] the Court looked to the following factors.

> [W]e may inquire whether *Roe*'s central rule has been found unworkable, whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.[16]

Finding none of these factors present, the *Casey* majority saw no basis for overruling *Roe*. In their view, *Roe* had not proven unworkable; there was reliance of a sort ("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");[17] "no erosion of principle going to liberty or personal autonomy" had undermined "*Roe*'s central holding"; because *Roe*'s holding was viewed as consistent with other personal liberty decisions, reliance on *Roe*'s precedent was viewed as unlikely to lead to erroneous decisions; and, although "time [had] overtaken some of *Roe*'s factual assumptions," no changed circumstances had undermined *Roe*'s central holding.[18] The *Casey* Court emphasized that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[19]

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.[20]

Societal changes were important – albeit somewhat different – considerations in two major overruling decisions of the Twentieth Century, *West Coast Hotel v.*

---

[14] (...continued)
done so "twice in our lifetime, in the decisions of *Brown* and *Roe*." *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

[15] 410 U.S. 113 (1973).

[16] 505 U.S. at 855.

[17] Reliance is more commonly associated with commercial interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

[18] 505 U.S. at 860-61.

[19] 505 U.S. at 864.

[20] 505 U.S. at 864 (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Justice Stewart dissenting)).

Parrish (1937)[21] and *Brown v. Board of Education* (1954).[22] In *West Coast Hotel*, the Court overruled its 1923 decision in *Adkins v. Children's Hospital*,[23] which had invalidated a state minimum wage law for adult women. *West Coast Hotel* was not a narrow ruling, but rather in effect reversed the whole line of *Lochner* decisions premised on acceptance of laissez-faire economics and relying on employers' liberty of contract to restrict social welfare legislation.[24] The nation's experience during the Great Depression had changed perceptions between *Adkins* and *West Coast Hotel*. As the Court put it, reconsideration was "imperative" due in part to "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered."[25] Although also grounding its decision in due process doctrine and in correcting what it viewed as an erroneous interpretation in *Adkins*, the Court took judicial notice of "the unparalleled demands for relief which arose during the recent period of depression," and concluded that a state could legislate to prevent the exploitation of a class of workers who were "relatively defenseless" and who might become dependent upon the community for support.[26]

In *Brown v. Board of Education*, the Court arguably forced social change more than it responded to it.[27] The Court abandoned its interpretation of the Equal Protection Clause as allowing "separate-but-equal" treatment of the races, and held that racial segregation in the public schools was inherently unequal.[28] The Court justified its changed interpretation by changing its conclusion about the stigmatizing effects of segregation. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that racial segregation stigmatizes minority children] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[29] The Court cited

---

[21] 300 U.S. 379 (1937).

[22] 347 U.S. 483 (1954).

[23] 261 U.S. 525 (1923).

[24] The reference is to *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court relied on liberty of contract theory to invalidate a New York law restricting the hours of labor in bakeries.

[25] 300 U.S. at 390.

[26] 300 U.S. at 399.

[27] The *Brown* Court did not address, but necessarily rejected, South Carolina's *stare decisis* societal reliance argument that a whole social order rested on the separate-but-equal interpretation. Brief for Appellees on Reargument at 59-60, *Briggs v. Elliott*, 347 U.S. 483 (1954). (*Briggs* was one of the cases consolidated with *Brown*.)

[28] The separate-but-equal doctrine derived from *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court upheld racial segregation in transportation. *Plessy* was overruled in 1956 when the Court summarily affirmed a decision applying *Brown*'s principles to transportation. *Gayle v. Browder*, 352 U.S. 903 (1956).

[29] 347 U.S. at 494-95.

academic studies, rather than general societal acceptance or experience, for the "modern authority" from which its "psychological knowledge" was derived.[30]

As the *Casey* Court synthesized *Brown* and *West Coast Hotel*, "[e]ach rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions." Because "each case was comprehensible as the Court's response to facts that the country could understand," the decisions were also "defensible, not merely as the victories of one doctrinal school over another by dint of numbers . . . , but as applications of constitutional principle to facts as they had not been seen by the Court before."[31]

A divisive social issue was also implicated in 2003 when the Court, overruling a 1986 decision, struck down a state law that prohibited private, consensual, homosexual sodomy. *Lawrence v. Texas*,[32] unlike *Brown* and *West Coast Hotel*, did not purport to rest on changed facts or a changed understanding of facts. Rather, the Court in *Lawrence* asserted that the Court in *Bowers v. Hardwick*[33] had misread its own precedent and had too narrowly defined the liberty interest at stake. The Court justified its departure from *stare decisis* by concluding that the "foundations" of *Bowers* had been "eroded" by subsequent decisions,[34] that the "weakened" precedent of *Bowers* had been subjected to "substantial and continuing criticism,"[35] and that there had been "no individual or societal reliance . . . of the sort that could counsel against overturning its holding."[36] Dissenting Justice Scalia challenged these conclusions, and suggested that *Roe* "satisfies these conditions to at least the same degree as *Bowers*."[37]

---

[30] 347 U.S. at 494 n.11. The lower court in *Brown*, though bound by the Supreme Court's separate-but-equal doctrine, had made similar findings that segregation branded minority children as inferior. Id. at n.10.

[31] *Casey*, 505 U.S. at 863-64. The fact that *Brown* was a unanimous decision also undermined the argument that one doctrinal school had triumphed over the other by "dint of numbers" or by changed membership on the Court.

[32] 539 U.S. 558 (2003).

[33] 478 U.S. 186 (1986).

[34] 539 U.S. at 576 (relying principally on *Casey* for its description of a broad liberty interest in defining one's personal relationships, and on *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a Colorado provision that denied homosexuals protection under anti-discrimination law).

[35] 539 U.S. at 576.

[36] 539 U.S. at 577.

[37] 539 U.S. at 586. While agreeing that *Romer* had eroded the foundations of *Bowers*, Justice Scalia asserted that *Washington v. Glucksberg*, 521 U.S. 702 (1997), had similarly eroded the foundations of *Roe* and *Casey*. *Roe* and *Casey*, of course, had, like *Bowers*, been subjected to "unrelenting criticism." As for reliance, the Justice suggested that there had been "overwhelming" societal reliance on *Bowers* that far exceeded the reliance that the *Casey* Court found to have been placed on *Roe*. Id. at 588-91.

Other recent overruling decisions that received considerable public attention barred application of the death penalty to mentally retarded persons and to juveniles. In 1989 the Court had refused to hold that execution of a mentally retarded individual,[38] or of an individual who was 16 or 17 at the time of his offense,[39] violated the Eighth Amendment; in 2002, however, the Court reversed its conclusion about execution of the mentally retarded,[40] and in 2005 it did so for juveniles.[41] These decisions shed little light on general principles governing departures from *stare decisis*, however, because they were controlled by the unique language of the Eighth Amendment's prohibition against "cruel and *unusual* punishment."[42] Basically, the Court determined that, although execution of the mentally retarded or of juveniles had not been "unusual" in 1989, it had become so by 2002 and 2005, respectively.[43]

Often, especially if no major social issue such as abortion or racial segregation is at issue, society's understanding of the precedent is not implicated, and the Court may change and narrow its focus. Other factors, such as reliance or workability, may carry the day. For example, lack of workability was the principal reason cited by the one Justice whose changed vote required the Court to reverse itself on a federalism issue for the second time in less than a decade. Justice Blackmun, writing for a five-to-four majority in *Garcia v. San Antonio Metropolitan Transit Authority*,[44] declared that the test the Court had formulated nine years earlier for determining whether Congress could impose the minimum wage and overtime requirements of the Fair Labor Standards Act on state governments – insulating states when performing "traditional governmental functions" – was not only a misinterpretation of the Constitution, but had proved "unworkable."[45] Lower courts had struggled without success to apply the test, the Court itself had disclaimed a "static, historical"

---

[38] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[39] *Stanford v. Kentucky*, 492 U.S. 361 (1989).

[40] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[41] *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

[42] Recognition of evolving societal standards is found in some judicial constructs of substantive due process as well as in the language of the Eighth Amendment. *Compare, e.g., Trop v. Dulles*, 356 U.S. 86, 100-01(1958) (plurality opinion) (the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society)" with *Rochin v. California*, 342 U.S. 165, 172, 173 (1952) (due process is violated by official conduct that "shocks the conscience"; states in their prosecutions must "respect certain decencies of civilized conduct").

[43] The Court reached its 2005 conclusion about the juvenile death penalty in spite of the fact that in 2002 it had contrasted the national consensus said to have developed against executing the mentally retarded with what it then saw as a lack of consensus regarding execution of juveniles. *Atkins*, 536 U.S. at 315 n.18.

[44] 469 U.S. 528 (1985). *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Usery* had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968).

[45] 469 U.S. at 531.

approach to defining "traditional" governmental functions,[46] and the Court had abandoned a somewhat analogous tax immunity distinction between governmental and proprietary functions.[47]

The other side of the coin, of course, is that if a decision has proved workable in practice (and if its theoretical underpinnings have not been eroded), Justices may be unwilling to overrule it despite disagreement on the merits. For example, in refusing to overrule its landmark decision in *Miranda v. Arizona*,[48] the Court in *Dickerson v. United States*[49] pointed to the fact that *Miranda* warnings had become "embedded in routine police practice to the point where the warnings have become part of our national culture."[50] Chief Justice Rehnquist's opinion for the Court stated that "principles of *stare decisis* weigh heavily against overruling" *Miranda* "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance."[51]

Reliance interests can sometimes tip the scales against overruling. In declining to overrule a 25-year-old precedent interpreting the Commerce Clause as prohibiting a state from collecting use taxes on out-of-state mail order businesses that do not have a physical presence within the state, the Court stated that the rule had "engendered substantial reliance and has become part of the basic framework of a sizeable industry."[52]

Occasionally the Court overrules precedent with only minor emphasis on "special circumstances" justifying departure from *stare decisis*. In *Payne v. Tennessee*,[53] for example, the Court overruled two relatively recent decisions[54] that had barred consideration of victim impact statements during capital sentencing. The *Payne* Court asserted that departure from precedent is justified "when governing

---

[46] 469 U.S. at 539, citing *Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982).

[47] 469 U.S. at 540-44.

[48] 384 U.S. 436 (1966). *Miranda* held that as a general rule statements by suspects in custodial interrogation are admissible at trial only if police first warned the suspect of his right to remain silent and to be represented by counsel.

[49] 530 U.S. 428 (2000).

[50] 530 U.S. at 443. The Court also noted that *Miranda*'s "doctrinal underpinnings" had not been eroded. Id.

[51] 530 U.S. at 443.

[52] *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992) (refusing to overrule *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), on Commerce Clause grounds). The Court in *Quill Corp.* did overrule *Bellas Hess*'s alternative holding, that imposition of use taxes violated the Due Process Clause, and thereby opened the possibility that Congress, in exercise of its commerce power, could authorize state taxation of mail order businesses. Id. at 318-19.

[53] 501 U.S. 808 (1991).

[54] *Booth v. Maryland*, 482 U.S. 496 (1987); and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

decisions are unworkable *or* are badly reasoned."[55] The Court went on to distinguish property and contract rights cases "where reliance interests are involved" from "cases such as the present one involving procedural and evidentiary rules," and pointed to the fact that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents."[56]

Making more of an effort to pay homage to *stare decisis*, the Court in *Adarand Constructors v. Pena*[57] asserted that correcting error can itself sometimes be a "special circumstance" that justifies overruling precedent. That occasion arises, Justice O'Connor asserted for the Court, when the precedent at issue was a departure from "intrinsically sounder" and well-established principles – when the Court "cannot adhere to our most recent decision without colliding with an accepted and established doctrine."[58] The decision that *Adarand* overruled, *Metro Broadcasting, Inc. v. FCC*,[59] had held, in effect, that Congress had greater leeway than the states in adopting remedial racial preferences; this interpretation, the *Adarand* Court asserted, "undermined important principles . . . established in a line of cases dating back over 50 years."[60]

The theory that departure from well-established doctrine renders a precedent subject to overruling was not new with *Adarand*. Rather, the *Adarand* opinion found support in several earlier decisions said to rest on the same principle.

> In *United States v. Dixon*, 509 U.S. 688 (1993), we overruled the case of *Grady v. Corbin*, 495 U.S. 508 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon*, *supra*, at 704, 712. In *Solorio v. United States*, 483 U.S. 435 (1987), we overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960." *Solorio*, *supra*, at 439-441, 450-451. And in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), we overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), which was an abrupt and largely unexplained

---

[55] 501 U.S. at 827 (emphasis added).

[56] 501 U.S. at 828-29. Citing a single state court decision in which the judges disagreed on how to interpret *Booth*, the Court also asserted that the decisions had "defied consistent application by the lower courts." Id. at 830. The blunt dissent by Justice Marshall asserted that the only change in the four years since *Booth* was in "the personnel of this Court," not in the law or the facts. Id. at 844. Between *Booth* and *Payne*, Justice Kennedy had replaced Justice Powell, author of the *Booth* opinion, and Justice Souter had replaced Justice Brennan, who had voted in the majority in *Booth* and had written the Court's opinion in *Gathers*. Both of the new Justices joined the *Payne* majority.

[57] 515 U.S. 200 (1995).

[58] 515 U.S. at 231, 232.

[59] 497 U.S. 547 (1990).

[60] 515 U.S. at 231.

> departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical."[61]

It may be, however, that *Payne* and *Adarand* put greater emphasis on the precedent's departure from well-established doctrine, and less emphasis any other justifications for overruling.[62]

Both *Dixon* and *Adarand* overruled relatively recent decisions. As Justice O'Connor pointed out in her concurring opinion in *Adarand*, a quick overruling of a precedent that departed from its antecedents does not "depart from the fabric of the law [but rather] restore[s] it," and also minimizes the opportunity for reliance that could deter overruling.[63]

Although the newness of a precedent is sometimes seen as reducing its immunity from overruling, the oldness of a precedent does not always prevent its overruling. For example, the Court in *Erie Railroad v. Tomkins*[64] overruled *Swift v. Tyson*,[65] a decision then almost 100 years old, on the basis that its recognition of a federal common law was unconstitutional, and had led to undesirable results in commercial activities. There are numerous other instances of the Court's overruling of hoary precedent.[66] Indeed, the older a precedent is, the more possibility there is that its doctrinal underpinnings will have been eroded through developments in the law.[67]

Age of a precedent can provide the opportunity for its reinforcement as well as for its erosion. A precedent "that has become integrated into the fabric of the law" is more likely to have engendered reliance interests, and its overruling may even

---

[61] 515 U.S. at 232-33 (also citing *Payne v. Tennessee* and two other decisions).

[62] The *Dixon* Court concluded that *Grady* "'contradicted an unbroken line of decisions,' contained 'less than accurate' historical analysis, and ha[d] produced 'confusion.'" 509 U.S. at 711. The *Solorio* decision emphasized the "confusion" and unworkablitly of *O'Callahan*'s service-connection test as well as its rejection of the "unbroken line of decisions." *See* 483 U.S. at 448-50. The *GTE Sylvania* Court also relied on workability problems, citing the struggles of lower federal courts to interpret and apply *Schwinn*. *See* 433 U.S. at 48 & n.14.

[63] 515 U.S. at 234.

[64] 304 U.S. 64 (1938).

[65] 41 U.S. (16 Pet.) 1 (1842).

[66] E.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), overruling in part *Ward v. Race Horse*, 163 U.S. 504 (1896); *Collins v. Youngblood*, 497 U.S. 37 (1990), overruling *Kring v. Missouri*, 107 U.S. 221 (1883) and *Thompson v. Utah*, 170 U.S. 343 (1898); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), overruling *Coffey v. United States*, 116 U.S. 436 (1886); and *Hughes v. Oklahoma*, 441 U.S. 322 (1979), overruling *Geer v. Connecticut*, 161 U.S. 519 (1896).

[67] *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979), finding that the analysis of *Geer v. Connecticut*, 161 U.S. 519 (1896), had been "eroded to the point of virtual extinction" by the evolution of Commerce Clause interpretation.

damage "the ideal of the rule of law."[68] Under this theory, espoused in the Court's opinion in *Casey*, stronger arguments should be required to overrule a precedent that embodies the Court's reliance on the Constitution to settle a "national controversy."

> [W]hen the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[69]

One of the reasons that there is so little consistency in the Court's approach to overruling decisions is that individual Justices "individually . . . balance their normative views on how the constitutional provision at issue should be interpreted and their perceptions of the practical needs to submerge those views for the sake of certain social or institutional values such as stability, continuity, or consensus."[70] There are a number of implications, not the least of which is the fact that an individual Justice may strike a different balance between *stare decisis* and error correction depending upon what the issue is and how strongly that Justice feels about the "error" side of the balance. And of course individual Justices occasionally change their minds as to the workability of precedents.[71]

Also, a Justice's judicial philosophy can affect the balance. An originalist presumably would favor error correction over preservation of precedent regardless of how well established that precedent is. Justice Thomas recently advocated this approach in construing the "public use" limitation of the Takings Clause.

> Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a

---

[68] *Adarand*, 515 U.S. at 233 (concurring opinion of Justice O'Connor). *See also* Justice Scalia's concurring and dissenting opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989), refusing to join four other Justices in overruling *Hans v. Lousiana*, 134 U.S. 1 (1890), pointing out that numerous cases had followed *Hans* and that 49 Congresses had legislated on the assumption that states were constitutionally insulated from suits in federal courts.

[69] 505 U.S. at 867.

[70] Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 117-18 (1991).

[71] *See, e.g.*, Justice Blackmun's opinion for the Court in *Garcia*, *supra* n. 44, changing his position from *National League of Cities* and rejecting as unworkable the test adopted in that case; and Justice Scalia's recent statement in *Tennessee v. Lane*, 541 U.S. 509, 554 (2004) (dissenting), that he will no longer adhere to the "congruence and proportionality" standard the Court had devised for measuring the validity of statutes purporting to enforce the Fourteenth Amendment.

> meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.[72]

Justice Thomas has also questioned the holding of a 1798 case limiting application of the Ex Post Facto Clause to punitive legislation.[73]

It is not just originalists who sometimes question long lines of authority. For example, different groups of four dissenting Justices have long challenged the Court's interpretation of the Eleventh Amendment, set forth in 1890 in *Hans v. Louisiana*,[74] and reinforced in a number of the Court's federalism decisions over the last several decades, as barring federal court jurisdiction over suits brought by citizens against their own state. The Amendment by its terms applies only to suits brought against a state by citizens of another state, but the Court has interpreted the provision as representing a broader recognition of the principle of sovereign immunity. Justice Brennan, joined by three other Justices in 1985, urged reconsideration.

> Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations. Such an inquiry would reveal that the Court . . . has taken a wrong turn.[75]

On the current Court, Justices Stevens, Souter, Ginsburg, and Breyer have continued this argument despite the fact that the Court majority has continued to apply and extend the sovereign immunity principle reflected by *Hans*.[76]

For years Justices Brennan and Marshall voted against imposition of the death penalty on the basis of their views that the death penalty "is in all circumstances cruel

---

[72] *Kelo v. City of New London*, 125 S. Ct. 2655, 2678 (2005) (Justice Thomas dissenting). Similarly, the Justice advocated reconsideration of Commerce Clause jurisprudence in *United States v. Lopez*, 514 U.S. 549, 584 (1995) (concurring): "I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our recent case law and is more faithful to the original understanding of that Clause."

[73] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538-39 (1998) (concurring) (stating a willingness to reconsider *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

[74] 134 U.S. 1 (1890).

[75] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 248 (1985). *See also* Justice Brennan's opinions in *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987); Dellmuth v. Muth, 491 U.S. 223, 233 (1989); and *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 309 (1990).

[76] *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76, 100 (1996) (dissenting opinions of Justices Stevens and Souter, respectively); *Alden v. Maine*, 527 U.S. 706, 760, 814 (1999) (dissenting opinion of Justice Souter) ("I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.")

and unusual punishment," despite the accretion of precedents by which the Court accepted capital punishment as constitutional, and Justice Blackmun later came to hold the same view.[77]

How does one measure the impact of *stare decisis* on the Court's decision making? One extensive study of the subject suggests that the critical question is whether "precedent actually cause[s] justices to reach decisions that they otherwise would not have made."[78] This can be verified if Justices voice disapproval of precedent but nonetheless vote to uphold it.[79] Spaeth and Segal's conclusion is that "in the realm of *stare decisis*, minority will does not defer to majority rule."[80]

Conclusion

This sampling of the Court's practice in adhering to or departing from precedent seems to bear out Justice Souter's observation, quoted above, that the decision whether to overrule precedent involves "a variety of often competing considerations"[81] (including competing perspectives among the Justices). *Stare decisis* is always one such consideration when the Court decides whether to overrule precedent. But because the Court does not appear to have developed a "coherent or stable conception of the appropriate role of precedent in constitutional adjudication,"[82] it is difficult to predict when the Court will rely on *stare decisis* and when it will depart from it.

---

[77] *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Justices Brennan and Marshall concurring separately); *Lockett v. Ohio*, 438 U.S. 586, 619 (1978) (Justice Marshall concurring); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (Justice Brennan, concurring); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Justice Blackmun, dissenting from denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.")

[78] HAROLD J. SPAETH AND JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 7 (1999).

[79] As, for, example, Chief Justice Rehnquist suggested he might have been doing in voting in *Dickerson v. United States* not to overrule *Miranda*. *Supra*, text accompanying n. 51.

[80] Id. at 315.

[81] See text accompanying n. 11.

[82] Monaghan, supra n. 4.