IN DEFENSE OF STARE DECISIS

BY MICHAEL GENTITHES†

I. INTRODUCTION

> The tribunate is not a constituent part of the city, and should have no share in either legislative or executive power, but this very fact makes its power the greater: for, while it can do nothing, it can prevent anything from being done. It is more sacred and more revered, as the defender of the laws, than the prince who executes them, or the Sovereign which ordains them.[1]

The argument for a rule of stare decisis that frequently controls Supreme Court jurisprudence is often entangled with the controversial issues the Court faces when it must choose to either invoke or ignore the doctrine. But those issues distract attention from the centrality of stare decisis to democratic governments' vitality. By taking a unique, systemic perspective this article demonstrates that stare decisis, though not a strict rule of constitutional construction, plays a vital role in the preservation of democracy. Respect for the Supreme Court's prior decisions lends legitimacy to a body with a transitory membership. It assures citizens that the Court's decisions are not merely the whims of Justices' personalities, and renders the Court "strong" in the sense that it can issue decisions in the country's most pressing controversies that both the parties and society at large consider final. I will apply this new perspective to the Court's current stare decisis doctrine and analyze its effectiveness. Finally, I will suggest original factors that the Court should consider when applying stare decisis by looking not just backward to the decision potentially being overruled, but also forward to the decision which may replace it.

This article proceeds in four parts. Following this introduction, Part II uses examples of recent political turmoil in several nations to

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1. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762), *reprinted in* THE SOCIAL CONTRACT AND DISCOURSES 121-22 (G. D. H. Cole trans., E. P. Dutton & Co., Inc. 1950).

explain why a "strong" high court whose decisions garner citizens' respect is of such importance to successful democratic governance. Part III describes the necessary role stare decisis plays in establishing such strength in the Court, and why stare decisis is therefore not a mere guiding principal but rather an imperative element in the Supreme Court's legal analysis. Part IV proceeds in two sections. The first uses this original justification for stare decisis to clarify the doctrine's terms, with the Supreme Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] as a starting point for the analysis. The second section suggests alternative factors to include in stare decisis analysis, both those that look backward to the opinion that may be overruled and forward to the new opinion that may be adopted. Part V offers a brief conclusion.

II. WHY THE STRENGTH OF A COUNTRY'S HIGHEST COURT IS VITAL TO PRESERVING A DEMOCRATIC SYSTEM

Below, I argue that stare decisis allows the Supreme Court to earn the respect of the people and the coordinate branches of government. But a discussion of how the Court maintains popular respect is only relevant when framed by the significance of that respect itself. The judiciary's strength, meaning its ability to render decisions that are respected throughout the country, is absolutely paramount to successful democracy. This point can be illustrated by a comparison of recent political history in the United States, Pakistan, and Kenya.

The 2000 presidential election cycle was unique in American history. As time pressed on and no official winner was declared, supporters of Democrat Al Gore and Republican George Bush grew more fervent in their determination to capture the White House. Ultimately, Bush turned to the Supreme Court in search of a definitive ruling on the recount procedures ordered by Florida's Supreme Court.[3] In a per curiam opinion that reflected deep division, the Court held that Florida's recount procedures violated the Equal Protection Clause.[4] Despite the divided nature of the Court's opinion, Al Gore quickly announced his respect for the Court's ruling and his decision

2. 505 U.S. 833 (1992).

3. *See* Bush v. Gore, 531 U.S. 98 (2000).

4. *Id.* at 104–11.

to concede the election to Bush.[5] Although he disagreed with the decision, Gore "accepted the finality of [the] outcome" and offered his concession "for the sake of our unity as a people and the strength of our democracy."[6] Gore emphasized that this election was just another in America's long history of fierce political contests, and noted that "each time, both the victor and the vanquished have accepted the result peacefully and in a spirit of reconciliation."[7]

Compare this with recent political turmoil in Pakistan. In March of 2007, President Pervez Musharraf faced potential constitutional challenges to his bid for reelection given his desire to retain his position as army chief of staff.[8] In a move he insisted was based on complaints of misconduct, Musharraf attempted to obtain the resignation of the Chief Justice of the Supreme Court of Pakistan, Iftikhar Muhammad Chaudhry, a long-time political opponent with a willingness to "take on cases challenging [Musharraf's] government"[9] and a likely vote against Musharraf. When Chaudhry refused to resign, Musharraf dismissed him.[10] But the story did not end there; Chaudhry challenged his dismissal and won reinstatement in a case heard by the Pakistani Supreme Court's remaining members.[11] Although spokesmen for Musharraf initially signaled that he would respect the decision and pledged that "any judgment the Supreme Court arrives at will be honoured, respected and adhered to,"[12] a mere twenty days later Musharraf appeared on the brink of declaring a state of emergency in Pakistan which would allow him to "curtail the activities of the courts" and disobey its ruling.[13] Despite heavy

5. Al Gore, 2000 Presidential Concession Speech (Dec. 13, 2000), http://www.americanrhetoric.com/speeches/algore2000concessionspeech.html.

6. *Id.*

7. *Id.*

8. Salman Masood & Carlotta Gall, *Pakistan's Suspended Justice Tells of Facing Down Musharraf*, N.Y. TIMES, May 30, 2007, at A3, *available at* http://www.nytimes.com/2007/05/30/world/asia/30pakistan.html.

9. *Id.*

10. *Id.*

11. Somini Sengupta, *Musharraf Loses Fight Over Suspension of Judge*, N.Y. TIMES, July 21, 2007, at A1, *available at* http://www.nytimes.com/2007/07/21/world/asia/21pakistan.html. Chaudhry's chief counsel, Aitzaz Ahsan, described the decision as "a big blow the Musharraf regime [and] a big blow to dictatorship." *Id.*

12. Ahmed Hassan, *Musharraf Will 'Respect' Verdict*, DAWN, July 21, 2007, http://www.dawn.com/2007/07/21/top2.htm.

13. Carlotta Gall & Salman Masood, *Facing a Furor, Pakistan Rejects Emergency Rule*, N.Y. TIMES, Aug. 10, 2007, at A1, *available at* http://www.nytimes.com/2007/08/10/world/

pressure from American and European governments,[14] Musharraf declared a state of emergency in early November, ordered the justices of the supreme court to take an oath promising to abide by a "provisional constitutional order" in lieu of the existing constitution, and dismissed those justices, including Chaudhry, that failed to do so.[15] Although Musharraf would later step aside as Pakistan's leader amidst threats of impeachment,[16] the stains to the court's legitimacy remain; political leaders considered the court illegitimate after Musharraf's replacement of the sitting justices with those of his own choosing.[17] Many in Pakistan continued to view the supreme court as illegitimate into 2009, as political wrangling in the post-Musharraf era began.[18] Chaudry was eventually reinstated in March 2009 after an extended campaign by Pakistan's lawyers, but whether he can effectively stabilize the judiciary and restore faith in its decisions remains to be seen.[19]

Another example from sub-Saharan Africa demonstrates the inherent danger of a judiciary that lacks the confidence of the people and coordinate democratic branches. In late 2007, Kenyan president Mwai Kibaki declared victory over rival Raila Odinga in a closely

asia/10pakistan.html. Only a "gathering storm of media, political and diplomatic pressure" convinced Musharraf to temporarily scrap his plans. *Id.*

14. Salman Masood, David Rohde & Jane Perlez, *Musharraf Is Asked to Resist Emergency Rule*, N.Y. TIMES, Nov. 2, 2007, *available at* http://www.nytimes.com/2007/11/02/world/asia/02musharraf.html.

15. David Rohde, *Pakistani Sets Emergency Rule, Defying the U.S.*, N.Y. TIMES, Nov. 4, 2007, at A1, *available at* http://www.nytimes.com/2007/11/04/world/asia/04pakistan.html.

16. Perlez, *Musharraf Set to Resign in Days, Officials Assert*, N.Y. TIMES, Aug. 15, 2008, at A1, *available at* http://www.nytimes.com/2008/08/15/world/asia/15pstan.html.

17. Laura King, *Pakistan Supreme Court Steps in to Sharif's Election Dispute*, L.A. TIMES, June 25, 2008, *available at* http://articles.latimes.com/ 2008/jun/25/world/fg-pakistan26 ("[Politician Nawaz] Sharif himself had refused to appeal to the nation's Supreme Court, a body he considers illegitimate because President Pervez Musharraf last year replaced defiant justices with jurists loyal to the president."). *See also* Jane Perlez, *Pakistan Court Bars President's Rival from Office*, N.Y. TIMES, February 26, 2009, at A6, *available at* http://www.nytimes.com/2009/02/26/world/asia/26pstan.html?_r=1&scp=4&sq=sharif&st=cse.

18. Protests intended to force Chaudhry's reinstatement also continued. Jane Perlez, *Pro-Sharif Demonstrations Spread Across Punjab*, N.Y. TIMES, Feb. 26, 2009, *available at* http://www.nytimes.com/2009/02/27/world/asia/27pstan.html ("After the ruling on Wednesday, Mr. Sharif said he would join a protest by the lawyers' movement on March 12 intended to force the reinstatement of the former chief justice.").

19. Carlotta Gall, *Reinstatement of Pakistan's Chief Justice Ends a Crisis, but It Might Lead to Another*, N.Y. TIMES, March 17, 2009, at A9, *available at* http://www.nytimes.com/2009/ 03/17/world/asia/17judge.html?_r=1.

contested election that Western observers believed was rigged.[20] As political pressure mounted, Odinga insisted that the conflict could only be resolved by a recount of the votes and refused to seek relief from Kenya's court system because he believed it was "controlled by President Kibaki."[21] After an extended delay that saw violence sweep the countryside, and only after significant external political pressure was applied, Kibaki and Odinga agreed to form a coalition government that required amendments to the constitution to create new executive positions.[22] Kenya's high court was unable to play any role in resolving the turmoil.

Of course, the particular historical, political, and cultural background of these countries had a role in their leaders' actions; indeed, these were likely the most influential factors. Correlation is not causation after all, and the lack of respect that leaders in these countries harbored for the courts may not have directly caused political and social unrest. But the weakened structure of the judiciary at least played an enabling role.[23] Leaders in the highest levels of government sought more power by flouting the law in ways that simply would not have been possible with a strong, effective judiciary respected by the country's citizens. When even leaders disregarded their country's legal system, other actors with potential claims were unable or unwilling to turn to courts for which they and their opponents had little respect.

With this in mind, the authority with which decisions of the Supreme Court are viewed should not be taken lightly. If the integrity of the Court was openly questioned and its opinions disrespected, the

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20. Jeffrey Gettleman, *Disputed Vote Plunges Kenya into Bloodshed*, N.Y. TIMES, Dec. 31, 2007, at A1, *available at* http://www.nytimes.com/2007/12/31/world/africa/31kenya.html.

21. Stephen Ndegwa, *Raila Calls for Vote Recount*, THE EAST AFRICAN STANDARD (NAIROBI), Dec. 30, 2007, http://allafrica.com/stories/printable/200712300020.html. *See also* Farid Abdi Mohamed Omar, *Electoral Fraud Could Spell Doom for Kenya*, FARIDNET, Dec. 30, 2007, http://omarfarid.blogspot.com/2007/12/electoral-fraud-could-spell-doom-for_964.html.

22. *Kenya: A Peace Deal at Last*, THE ECONOMIST, Mar. 1, 2008, at 63, *available at* http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=10768374. The distribution of power in the coalition government remained unclear well into 2008, leaving "a vacuum of leadership" at the top of the government. *Kenya: When Not Imploding is Not Enough*, THE ECONOMIST, Sept. 6, 2008, at 62, *available at* http://www.economist.com/world/africa/displaystory.cfm?story_id=12059310.

23. Others have highlighted the role that courts' failure to apply the law in predictable ways plays in the lack of long-term investment. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 276 (2005).

same structure enabling leaders in other countries to flout their highest court's rulings would be present in the United States:

> When we look at the problems of emerging democracies, we can see that two of the most important functions courts can perform are resolving legal disputes in an impartial manner, and assuring that executive officials adhere to the law. A restrained judiciary is in a much stronger position to perform these functions, because such a judiciary can claim to be doing no more or less than what it always does—enforcing established legal principles.[24]

Thus, any doctrine that fosters respect for the Court itself, and allows the Court to resolve legal problems in a way that both the parties and coequal branches will respect as final, plays a vital role in maintaining a democratic system because it enables the Court to effectively curb abuses by coequal branches. Below, I contend that stare decisis can play precisely this role.

III. WHY A ROBUST FORM OF STARE DECISIS IS IMPERATIVE FOR AN EFFECTIVE, WELL-RESPECTED JUDICIARY CAPABLE OF ADEQUATELY SUPPORTING DEMOCRACY

The argument for at least some form of stare decisis is often tied to its relationship with the consistent rule of law,[25] without which our government lacks both coherence and the respect of citizens. Commitment to precedent contributes to the respect, if not reverence, that the decisions of the U.S. Supreme Court enjoy.[26] This vital role for stare decisis is the basis of the doctrine's position as an inherent constitutional imperative.

Justices often face a difficult problem in reviewing new challenges to precedent: Is it more important to allow the earlier decision to resolve the conflict definitively—even if the Justice suspects it misapplies the Constitution—or to reach conclusions the Justice honestly believes are constitutional? The perspectives of

24. *Id.* at 277. Merrill added that "the maintenance of these rule of law values is probably the most important contribution the judiciary makes to society." *Id.*

25. "Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the cardinal virtues." THOMAS HOBBES, LEVIATHAN 66 (Everyman's Library 1965) (1651), *available at* http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII (last visited Mar. 14, 2009).

26. "[Tribunals'] decisions should be preserved; they should be learned, so that one judges there today as one judged yesterday and so that the citizens' property and life are as secure and fixed as the very constitution of the state." MONTESQUIEU, THE SPIRIT OF THE LAWS 72 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge University Press 1989) (1748).

some political theorists shed light on the balance that Justices should seek. Thomas Hobbes believed that the force of law is derived solely from the authority of its author:

> I grant you that the knowledge of the Law is an Art, but not that any Art of one Man or of many how wise soever they be, or the work of one and more artificers, how perfect soever it be, is Law. It is not Wisdom, but Authority that makes a Law.[27]

Montesquieu argued that law derives its power from its precision, and from avoiding the perception that law is merely the opinion of the judge.[28] To be effective, "judgments should be fixed to such a degree that they are never anything but a precise text of the law. If judgments were the individual opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted."[29]

But what makes the law appear to be more than the individual opinion of the judge, and instead seem authoritative and precise? A plausible argument can be made that the ultimate source of authority in constitutional jurisprudence is the Constitution itself, and any decision that deviates from that text must be eradicated to inspire the utmost confidence in the Court's integrity.[30] Critics emphasize that the Constitution's text contains no allusions to the necessity of stare decisis.[31] Any form of the doctrine is therefore fundamentally corrupting because, under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Constitution is the ultimate source of law, not the Court's decisions: "If the Constitution is not alterable whenever the judiciary shall please to alter it, then 'a [judicial precedent] contrary to the constitution is not law.'"[32]

However, such critiques assume that, in all cases, the Constitution provides clear answers. Professor Michael Stokes

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27. THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 55 (Joseph Cropsey ed., The University of Chicago Press 1971) (1681).

28. MONTESQUIEU, *supra* note 26, at 158.

29. MONTESQUIEU, *supra* note 26, at 158.

30. *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2732 (2003) [hereinafter Paulsen, *Marbury*]; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) [hereinafter Paulsen, *Precedent*].

31. *See, e.g.*, Paulsen, *Marbury*, *supra* note 30, at 2731–32.

32. *Id.* at 2732 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). *See also* Paulsen, *Precedent*, *supra* note 30, at 291.

Paulsen asserts that the legitimacy of the Court "rests on its ability to render *non*-political legal judgment in accordance with principles of interpretation that stand outside the judges' personal sense of what is expedient, practical or desirable as a policy matter."[33] But often, in cases where strong arguments exist on both sides and the nation's attention is drawn, Justices must decide controversies whether or not there exist any clear legal conclusions based on principled constitutional interpretations. In the closest cases, it is likely that several Court members will reach opposite conclusions from their interpretive principles. In those cases—which often draw the most public attention and are the most controversial—the key to legitimacy cannot be either side's claim to a correct interpretive framework, for both sides can make such a claim. Instead, the Court must derive legitimacy by resisting political pressure to change decisions already rendered, especially as its membership changes. To do otherwise suggests that the Court is a political football kicked by the other branches of government through the appointment process, since decisions are dictated only by the particular Justices sitting at a given time. As discussed above, such apparent malleability can have disastrous consequences.[34]

Another problem with Paulsen's view is the assumption that Justices can rely on principles of interpretation devoid of their own policy preferences. To be sure, Justices should avoid relying on policy prerogatives; as Lewis F. Powell noted, "[t]he respect given the Court by the public and by the other branches of government rests in large part on the knowledge that the Court is not composed of unelected judges free to write their policy views into law."[35] However, it seems unlikely that in all cases, or even in a significant majority, Justices can wholly remove their personal policy preferences from their decisional calculus, especially in those cases where constitutional meaning is not abundantly clear. Stare decisis, rather than acting as a corrupting influence on a Justice's theory of interpretation, provides the Justice much needed humility and

33. Michael Stokes Paulsen, *Book Review: The Constitution in Conflict*, 10 CONST. COMMENT. 221, 230 (1993).

34. *See* discussion *supra* Part II.

35. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286–87 (1990). Powell added that "the Court is a body vested with the duty to exercise the *judicial power* prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions." *Id.* at 287.

restraint in tough cases. Leaders of the other branches of government will find themselves much less inclined to follow the decisions of a Supreme Court that proves itself, over time, to shift with the preferences of a constantly changing bench. The rule of law would be undermined by such an "explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."[36]

To the average citizen, and indeed even to most professors, the meaning of key provisions of the Constitution remain open to debate. If the opposite were true, there would be little reason for Justices to hear oral arguments or take any time in considering their opinions. Given the lack of clarity, a Court with Justices inclined to follow their own interpretations blindly, irrespective of precedent, is almost certain to appear driven by policy preferences, even if the Justices' views are not. The powerful weapon of overruling a prior decision should be wielded infrequently.

Granted, the decisions on which the Justices of today rely may have been influenced by the policy preferences of those that came before them. But in most cases it is better to rely on those decisions than to appear to allow present political pressure to influence modern jurisprudence. Although many celebrated decisions have made marked breaks from past jurisprudence, the infrequency of such deviations from established precedent contributes to the reverence those decisions warrant, and it is only because the Court has refrained from creating fractures more often that its legitimacy has withstood the social unrest those rare breaks have triggered.

If rational citizens concluded that political pressure influenced the Court, they might seek relief from prior decisions simply because of its inconsistency with a new Justice's approach. Such relief can be a destructive force.[37] It implies that the Court can manipulate the Constitution at will, and therefore a rational citizen has little reason to respect the decisions of the Court interpreting the Constitution until they find the current interpretation agreeable. The citizen would be motivated to either ignore the Court's edict or perpetually litigate their own interpretation until the Court is persuaded or new appointees adopt their view. And the more the Court and its decisions appear arbitrary, the more real becomes the danger of not just a

36. *Id.* at 288.

37. "For when one is obliged to turn to the tribunals, it must be because of the nature of the constitution and not because of the inconsistency and uncertainty of the laws." MONTESQUIEU, *supra* note 26, at 73.

citizen ignoring it, but rather an entire branch of government. As noted by Thomas W. Merrill, "If judges are restrained, that is, if they adhere to the jurisprudence of no surprises, then the proponents of social change through law will have to look elsewhere in order to achieve their reforms."[38] Thus, stare decisis holds great value in its ability to avoid the problems of perpetual litigation and afford a necessary finality to the Court's decisions.

The advantages of stare decisis are also clear in cases that draw significant public scrutiny. In those cases, perpetual litigation is the norm and parties refuse to concede any perceived gains they have made towards their positions. Once a decision has been reached, that decision should be final, so as to avoid drawn-out uncertainties that have arisen in some political controversies.[39]

One might respond that the need for consistency is overblown; instead, and especially in those cases which are most hotly contested and fiercely debated, reaching a correct resolution should be even more important than in trivial disputes.[40] My response is simply that, were such clearly "correct" resolutions possible, it would certainly seem right to favor them. But both at the time of the original controversy and in later cases which present similar or identical issues, the correct outcome is seldom obvious. Further, each decision that can be described as a "correction" of earlier jurisprudence proclaims the Court's fallibility, and alternatively suggests that the Court's interpretation of the Constitution is driven by the personalities that happen to occupy its bench. A decision that "corrects" prior jurisprudence risks altering a holding that may not clearly be "wrong" or "right," and does so with the potential cost of the Court's legitimacy and the respect which citizens and other branches of government ascribe to the institution—a tremendous risk.

In Federalist No. 78, Alexander Hamilton arguably supports stare decisis directly when he says that courts "should be bound down

38. Merrill, *supra* note 23, at 276. Similarly, Antonin Scalia has noted that "[j]udges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989). This suggests that in close cases, even if one side or the other thinks they understand the Constitution's meaning significantly better than the other, the Court may be better served by avoiding the temptation to allow popular unrest to alter their decisions.

39. *See* discussion *supra* Part II.

40. *See, e.g.*, Paulsen, *supra* note 33, at 229–31.

by strict rules and precedents."[41] However, commentators have rightly pointed out that this phrase comes in the context of Hamilton's suggestion that judges should receive lifetime appointments given the laborious task of studying voluminous precedents, which will then serve "primarily an 'information' function rather than a 'disposition' function."[42] Hamilton's work does not directly state his support for adherence to prior decisions simply because they were earlier in time. But he does recognize the importance of "integrity and moderation" in the judiciary:

> Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper [of integrity and moderation] in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.[43]

Hamilton's position supports any means through which judges can broaden the respect that the public and opposing branches of government hold for their government. Given the modern evidence of the destructive role of a judiciary lacking in popular esteem, Hamilton would support the stability inherent in stare decisis and the confidence in the Court that the doctrine engenders. The doctrine merits support because of its stabilizing role in society.

IV. THE MECHANICS OF STARE DECISIS: EXTRAPOLATING THE CHARACTERISTICS OF AN EFFECTIVE DOCTRINE

If the case for some respect for precedent is compelling, the next logical inquiry is just how much respect is owed. Let me be clear: precedent should have more than a suggestive, guiding role, one which deserves binding effect in some cases, even where a Justice's interpretive framework leads them to truly believe it was wrongly decided. But Justices should maintain a pragmatic calculus in deciding when to overturn a prior decision. Properly constructed, this calculus will lead Justices to sometimes adhere to previous decisions

41. THE FEDERALIST NO. 78, at 442 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987).

42. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L. J. 1535, 1573 (2000).

43. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41, at 441.

that they otherwise feel are wrong. The proper mechanics of such a rule are difficult to devise; I make an effort to do so below. But an effort to formulate such a rule is necessary. If applied sloppily, stare decisis is just as likely to destabilize the judiciary by creating the impression that the Justices' policy preferences guide decisions, rather than a guiding respect for precedent. However, a simple, bright-line "inexorable command"[44] might go too far in restricting the Court's ability to decide new, challenging controversies. The question thus becomes: assuming that some adherence to precedent is required to establish a strong judiciary capable of sustaining a democratic system, what factors should the Court look to in implementing the doctrine?

A. Factors Drawn from Current Supreme Court Jurisprudence

The Supreme Court often purports to apply the doctrine, but typically includes little discussion of the appropriate mechanics. The Court's clearest illustration came in its *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision, which outlined four factors justices should consider when deciding whether to apply the doctrine.[45] I use these factors to guide my discussion. It is important to note that I do not intend to craft a doctrine that fits with the current state of Supreme Court jurisprudence. One of the primary motivations for this article was the difficulty in understanding and predicting when the Court would apply stare decisis. The Court's decisions provide a useful starting point for the inquiry, but it is the very inconsistency of the Court's application of the doctrine that requires clarification to allow it to best achieve the desired results.

1. Whether the Rule Had Proven to Be Intolerable Simply in Defying Practical Workability[46]

The workability of a prior decision refers primarily to the ease with which judges can apply that decision. Taken this way,

44. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

45. 505 U.S. 833, 854–55 (1992). The opinion also contains an extended discussion justifying stare decisis as a whole, which Professor Paulsen has helpfully nicknamed the "judicial integrity" justification. Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1198–99 (2008). I do not treat it as a separate factor in the analysis, as it touches on many of the justifications for the doctrine discussed earlier.

46. *Planned Parenthood*, 505 U.S. at 854.

"workability" does little to lend the Court the social capital required to resolve difficult conflicts. In order for the Court to maintain a democratic system, its decisions need not be easy for judges to apply; they simply must be respected. Complex rules can fit within a jurisprudence that gains the trust and respect of actors within the system.

However, taking a view more focused on the rational actor's perception of the Court's authority, there is a point at which decisions become so vague as to lose citizens' respect. Complex rules are not inherently harmful, as long as the rules do not lead to inexplicable, sudden shifts in jurisprudence or create uncertainty as to their application. In those situations, rational citizens may believe that judges intentionally maintain overly complex systems unintelligible to the layperson simply so they can manipulate that jurisprudence at will through rhetorical flourish. Clearer opinions, on the other hand, make the Court more accessible. If workability is taken to mean a jurisprudence that allows laypersons to predict and apply it, actors within the system will almost certainly hold the Court in higher regard and more readily accept the Court's power to ultimately decide controversies if its decisions are workable.

But the difficulty comes in defining and consistently applying this factor. As Professor Paulsen highlights, the Court has indicated a willingness to both maintain decisions that could fairly be called "unworkable" and overturn decisions with holdings that were simple to apply.[47] But workability is not a threshold for the Court's stare decisis analysis, nor should it be. Cases that have no meaning whatsoever because their rules are susceptible to interpretations that are polar opposites may, on workability grounds alone, be overturned. But such cases are rare. More often, Justices will find a particularly complex line of jurisprudence unwieldy, one which the average citizen would certainly have difficulty using to predict future decisions and applying to their lives.[48] What this suggests is only that the presence of a workability problem should lead the Justice to consider restructuring the rules. Decisions need not be unworkable to be overturned, but workability problems should alert the Justice that

47. Paulsen, *supra* note 33, at 1175–77.

48. Admittedly, Supreme Court Justices may not be the best evaluators of average citizens' capabilities. But they can certainly determine when applying precedent is a strain on their own faculties, and it seems a safe assumption that in those cases average citizens would struggle as well.

she can avoid a stare decisis argument against change. Again, complex rules may be maintained, and those that are unworkable, as I have defined the term, may at times be a necessary evil. But at a minimum, such decisions should be closely examined for possible overruling, especially when other stare decisis factors that counsel in favor of reversal are present.

2. Whether the Rule is Subject to a Kind of Reliance that Would Lend a Special Hardship to the Consequences of Overruling and Add Inequity to the Cost of Repudiation[49]

With this factor of stare decisis, the Court comes closest to describing the importance of citizens' reliance interests. That people are able to rely on the decisions of the Court seems to be inherently required for the coherence of our legal system; for the Court and the country to function, people must have faith in the Court's opinions.[50] But this factor is susceptible to inconsistent application. The difficulty arises in deciding which cases have induced the type of reliance that would counsel against overruling and which do not. If stare decisis is valuable in part as a means to promote a positive perception of the Court that induces citizens' and government actors' reliance upon its decisions, it is circular to suggest that only some decisions induce a "special" type of reliance that requires application of the doctrine in the first place. The doctrine is designed to create this very reliance upon the Court's decisions. If it is functioning properly, all of the Court's decisions should induce reliance. The distinction between those that citizens rely on especially and those that they chose to rely on less should dissolve, then, under the logic that justifies stare decisis in the first place.

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49. *Planned Parenthood*, 505 U.S. at 854.

50. Justice Scalia has recognized the importance of predictability, and has noted that, at times, "a bad rule is better than no rule at all." Scalia, *supra* note 38, at 1179. The Court has indicated that this sort of reliance interest is at its zenith in cases involving contractual obligations between parties that form the basis of investment-backed expectations for the parties. *See* Paulsen, *supra* note 30, at 1178 (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)). Jean-Jacques Rosseau also acknowledged that, as the law grows old it must continue to acquire strength, for with each day that precedent remains valid, the sovereign power of the government has tacitly consented to that law's validity. ROUSSEAU, *supra* note 1, at 88–89. Given the Court's power to revoke a prior decision if it was incorrect, the simple fact that a particular legal interpretation remained valid for so long implies that the Court has believed in its excellence, giving the people the right to rely upon it. *Id.* ("[N]othing but the excellence of old acts of will can have preserved them so long: if the Sovereign had not recognized them as throughout salutary, it would have revoked them a thousand times. . . . [T]he precedent of antiquity makes [the laws] daily more venerable . . . .").

3. Whether Related Principles of Law Have So Far Developed as to Have Left the Old Rule No More than a Remnant of Abandoned Doctrine[51]

First, it is important to note that, on one understanding of the phrase, "related principles of law" are simply subsequent decisions of the Court that eviscerate older jurisprudential rules.[52] As Professor Paulsen highlighted, the Court's recent jurisprudence suggests such a definition. In its *Lawrence v. Texas*[53] decision, the majority argued that *Bowers v. Hardwick*[54] had been undermined by the Court's more recent decision in *Romer v. Evans*,[55] and thus could more readily be ignored.[56] Arguably, the Court's recent campaign finance decision, *FEC v. Wisconsin Right to Life*,[57] was designed to render other campaign finance jurisprudence similarly obsolete, allowing the Court to repudiate those decisions entirely in the future.[58]

As these examples illustrate, this factor taken to its logical conclusion allows the Court to slowly overrule past decisions simply by demonstrating that the doctrines espoused in them have been degraded in subsequent opinions. This can be dangerous; if allowed to continue, and if taken to its logical conclusion by the Roberts Court, this type of subtle, time-consuming overruling will lead rational actors to perpetually challenge those decisions to which they are most opposed, no matter how stridently the Court repeatedly rejects those challenges, in the hopes of chipping away at the doctrine to which they are opposed until it is abolished.

As this article touched on earlier, such perpetual litigation is unfortunate in many respects.[59] If this strategy succeeds it could

51. *Planned Parenthood*, 505 U.S. at 855.

52. *See* Paulsen, *supra* note 30, at 1184–92.

53. 539 U.S. 558 (2003).

54. 478 U.S. 186 (1986).

55. 517 U.S. 620 (1996).

56. Paulsen, *supra* note 30, at 1186.

57. 127 S. Ct. 2652 (2007).

58. For instance, some argue that Wisconsin Right to Life effectively overruled McConnell v. FEC, 540 U.S. 93 (2003) in an opinion that purported to follow it, ascribing the Court's hesitation to directly overrule McConnell to the political motivations of its newest members. Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right To Life, 92 MINN. L. REV. 1064, 1089–91 (2008). Another plausible explanation for the Court's opinion is its desire to stay within the constraints of *Casey* by first undermining McConnell's doctrine, then declaring that doctrine an "abandoned remnant" in future cases. This would allow the Court to subtly overrule McConnell without violating its stated stare decisis doctrine.

59. *See supra* text accompanying notes 37–39.

undermine the Court's legitimacy by making it appear manipulable by those wealthy and determined enough to engage in perpetual litigation. Whether conservative actors can litigate abortion repeatedly until the Court comes to adopt their position piece by piece or liberal thinkers, through continuous litigation, can chip away at the Court's recent Second Amendment decision[60] until their interpretation of the right to bear arms comes to prevail, the results will be similar. Such litigation will signal to rational actors throughout the country—and more specifically in other branches of government—that the Court is not to be taken at its word. To allow the Court to be persuaded, over time and with changes to the bench, to adopt a position because certain parties fought vociferously for it is to admit that the Court's jurisprudence is a function of Justices' personalities. Such a conclusion can be devastating when an issue that threatens the strength of our union as a whole is presented.

Steven G. Calabresi has argued that in many cases where the Court purports to adhere to precedent, the rule to which it adheres is itself a departure from prior precedent, and that the entire history of English and American law weighs more heavily in favor of abandoning a ruling which may have only been decided fifty years ago.[61] Thus, in certain cases an apparently fundamental decision properly ought to be overruled in favor of one consistent with more longstanding traditions.[62] Such a conclusion assumes that it will consistently be clear whether a modern decision is faithful to our legal history and traditions; in many, if not most, cases, this is a difficult conclusion for judges and scholars to reach. Without such certainty, it becomes difficult to discern cases where a subsequent decision that overrules a modern break from our legal traditions is accurately overruling such a break, or is instead inserting a notion of those traditions that is just as misguided as that which it purports to correct. Allowing decisions to be made on this basis carries with it the same risks that apply when rational actors come to believe that the Court cannot be taken at its word.

Legal thinkers are by their nature conservative, and as such

60. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

61. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 331 (2005) ("Sometimes preserving continuity with our fundamental values means displacing wayward practices and precedents that have grown up like barnacles on the pristine language of the constitutional text.").

62. *Id.*

might seek the greatest number of escape hatches from the possibly devastating results of an incorrectly analyzed issue. But in creating such escape hatches to discard remnants of abandoned doctrines, the Court is not appropriately conservative with respect to its own legitimacy. This safety valve is simply too damaging to that legitimacy to justify a place in correcting wayward jurisprudence, and should be abandoned as part of the doctrine.

4. Whether Facts Have So Changed, or Come to Be Seen So Differently, as to Have Robbed the Old Rule of Significant Application or Justification[63]

This factor is designed to allow Justices to acknowledge the vast cultural shifts that occur outside the walls of their chambers. Primarily, it justified decisions such as *Brown v. Board of Education*,[64] which overruled *Plessy v. Ferguson*.[65] But to say that the *Brown* decision, or any other that requires a departure from stare decisis, can rely on a "changed" underlying factual assumption or one that has come to be "seen differently" is not really different from saying that the original decision was simply "wrong." Surely, the sociological facts that surround a case may change. But the Court's decisions are not purportedly driven by sociology, but rather by application of the Constitution to the bare facts before it, regardless of context. Changing precedent on this basis suggests that a new member of the Court can shift jurisprudence at will to meet their preferences. Further, to allow the Court to overrule precedent due to changed facts suggests that "an awful case was not in fact awful when decided; it simply would be awful to adhere to it now."[66]

It is difficult to discern when the facts have so "changed" that a decision that was formerly thought to adhere to the Constitution no longer does so. One measurement could be the stringent requirements for amendment itself.[67] The clearest way to proceed in cases where the sociological facts surrounding a case have made that decision appear invalid is to amend the Constitution's text to make that change clear, rather than rely on Justices to assess those facts and craft

63. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992).

64. 347 U.S. 483 (1954).

65. 163 U.S. 537 (1896).

66. Paulsen, *supra* note 2, at 1194.

67. *See* U.S. CONST. art. V.

opinions in concert with them. Thus, changed facts would be a justification for society to amend the Constitution, not for the Court to alter jurisprudence.

This is not to say that other branches of government should be given the power to easily overrule or uphold a precedent. Stephen G. Calebresi argues that "[a]ssessing the costs to society associated with retaining a precedent and weighing those costs against the reliance interests of society . . . is fundamentally an empirical and a political task."[68] Thus, these tasks should be delegated to the political branches, rather than the Court.[69] Though this position has intuitive appeal, such a broad grant of power to those branches limits the Court's fundamental ability to restrain them in times of political turmoil. It does not address those cases where the other branches themselves are a party to the controversy, the very cases which present the greatest threat to the integrity of the democratic system. In those cases, the Court needs to have sufficient capital to follow its own word, rather than other branches' contentions that change is needed. And that form of judicial power cannot coexist with the power of other branches to determine the weight afforded to the Court's decisions. Although "changed facts" should not be the basis for overruling prior precedent, the decision to overrule precedent at all should remain in the Court's hands.

B. Other Considerations

The above discussion may leave one wanting for more in such an important decisional framework. The Supreme Court has provided precious little guidance on the application of stare decisis that withstands close scrutiny. But this does not necessarily mean that stare decisis is doomed. This section suggests several possible bases on which to decide whether a prior decision ought to be overturned outside of the *Casey* analysis, in hopes of suggesting a doctrine with clear applicability and maximum utility. If nothing else, this discussion should renew debate on the appropriate framework of a doctrine which is imperative to the success of the democratic experiment.

One problem with many of the different decisional structures suggested for the doctrine, including the one outlined by the Court

68. Calabresi, *supra* note 61, at 340.
69. *Id.*

itself, is that they are primarily backward-looking; that is, they focus on the characteristics of the previous opinion the Court may modify or overrule. But this ignores a large field of potential analysis. Some part of the decision to invoke or ignore stare decisis should look forward towards the proposed overruling opinion. Justices should consider the characteristics of the new decision, especially its likely effects on the Court's integrity and citizen's perceptions of the Court's reliability. That is not to say that the text of the Constitution should not remain the touchstone of a Justice's legal analysis, as I reaffirm below. But where the outcome of a controversy remains unclear upon consideration of the text, these factors may also help to guide Justices in crafting new decisions where appropriate while avoiding significant damage to the Court's legitimacy through unnecessarily frequent changes of jurisprudential course.

This section proceeds in two parts: First, it considers possibilities for new backward-looking factors in the stare decisis analysis.[70] Then it outlines a few possible forward-looking factors.[71]

1. Backward-Looking Factors

a. Unanimous or Heavy-Majority Opinions Ought to Be Upheld

A prior decision should not be overturned when it came from a heavy-majority or a unanimous opinion. Rational citizens will assume these decisions are not likely to change in the near future. Because the decision appeared definitive, the Court's legitimacy will be compromised should it change course. However, this factor will not be helpful in close cases, and I have argued that Justices ought to pursue policies through which citizens will respect even their closest decisions. Thus, while it seems somewhat obvious that heavy-majority or unanimous decisions should not be overturned easily, the point is of somewhat limited value in practical application.

70. *See infra* pp. 26–29.
71. *See infra* pp. 29–32.

b. When the Prior Decision Builds Upon, Rather than Undercuts, the Analysis of an Even Earlier Decision, Justices Should Hesitate to Reverse It

When the earlier decision is part of a longstanding jurisprudential tradition, such that its analysis is framed in terms of earlier cases within that tradition, Justices should favor upholding it. In essence, this factor forces Justices to adopt an "all or nothing" approach to overruling jurisprudence. Such a conclusion might very well be positive for the bench as a whole. The method of "subtle overruling" described previously would not be viable because by subsequently applying the analysis of a previous decision, even a watered-down version of it, Justices are promoting the viability of that decision's analytical structure, even if their true goal was to eventually discard that structure. Such a policy will promote judicial honesty; it will require Justices that believe a prior case's analytical framework to be so misguided that it warrants overruling to either say so or apply stare decisis wholeheartedly. At the same time, it will foster further respect for and reliance upon the Court. Citizens will be able to rely upon the Court's most recent opinions, even if they appear to cut against prior decisions, as long as those opinions maintain an analytical framework consistent with the entire line of jurisprudence.

It might be argued that this factor supports needless complication in judicial analysis, as it requires further *ad hoc* modification of existing analytical frameworks as time goes on. But two points demonstrate why such arguments are misguided. First, Justices are not entirely prevented from reversing prior analytical doctrine under this rule; they are merely prevented from doing so piecemeal, in ways that over-complicate rules before finally declaring that the entire structure has become too difficult or impractical to apply and should be discarded. Second, as discussed earlier,[72] a rule's complexity does not mean that it necessarily ought to be rejected. What must be avoided is the seemingly arbitrary, unpredictable application of those rules that can dissuade rational citizens from respecting the Court's opinions and relying on them when making choices in their lives. Avoiding the path to "subtle overruling" will not necessarily create instability in the Court's opinions.

72. *See supra* text accompanying notes 46–48.

c. Dissents from Recently Appointed Justices Should Not Be Adopted as Majority Opinions

If, in close cases, the dissenting opinion comes primarily from justices whose tenure on the Court is relatively short—for instance, less than ten years—the dissenting view should not be subsequently adopted as a new rule of law. Less-experienced justices may perceive a need to repay those who have appointed them by either quickly reversing or suggesting the possible reversal of certain precedents for no other reason than the policy preferences of either the Justice herself or the person or group she credits with supporting her nomination. This is not to say that the opinions of new Justices are worthy of less respect than that of older Justices, and more recent appointees ought to remain free to author opinions that will carry the same weight as all of the Court's decisions. But this will reduce the perception that decisions can be massaged by those that play a pivotal role in securing Justices' appointments.

One might argue that this policy will present the possibility of relitigation once the tenure of certain dissenting Justices extends beyond whatever time period is agreed upon. But even if a Justice's view remains unchanged after that period, this factor would, at a minimum, limit the frequency with which close cases are relitigated, given the need for those espousing the minority view to wait for the maturation of that position's author. It will also give new Justices time to become acclimated before authoring such landmark decisions. And, although I have suggested that Justices should not change their views frequently, it will give them time to better understand the role of stare decisis and perhaps approach definitive breaks with past jurisprudence more cautiously. Additionally, this rule will dissipate any public perception that a Justice's decision was influenced by her appointers, especially given the likelihood that those people will be out of office. Given the relative ease with which this factor can be applied, it is plausibly useful in stare decisis analysis.

2. Forward-Looking Factors

a. Whether the New Decision Is Constitutionally Viable

First, whatever the Court's ultimate decision, it must remain justifiable constitutionally. The Constitution must be at the core of the Court's analysis at all times. This article does not suggest that the Constitution should be ignored, but merely suggests that there is a

problem in allowing Justices' *de novo* interpretations of its text guide the Court's jurisprudence irrespective of precedent. Justices will quickly find it difficult to command respect if they claim to understand the Constitution better than their predecessors, simply because of the inherently debatable nature of much of the text. Again, the Constitution must be a starting point for Justices' analyses. But to the extent that both the old rule and the new rule are arguable points of constitutional law—which I believe should be the Justices' presumption in most cases where a prior decision exists—a further consideration of the decisional criteria for the application of stare decisis is warranted.

b. Whether the Newly Adopted position Is Truly Original

Justices should ask whether the view they are adopting in place of standing precedent has been advocated consistently and repeatedly since the original ruling. If so, adopting that position might again prompt rational actors to perpetually relitigate against opinions with which they disagree. But if instead the new position represents a fresh development in legal thinking, it suggests that thinking within the culture or, more narrowly, the legal community has since changed. This does not require the Court to directly measure some variety of changed cultural or sociological facts through an investigation that could better be performed by legislators. It only requires that Justices avoid adopting positions that are essentially those of previously displeased parties with enough money and will to relitigate. Through something resembling judicial notice, Justices can use the originality of a litigant's position as a means to determine when thinking has changed on an issue and, looking forward beyond the standing precedent, when overruling a prior decision is appropriate.

It is important to temper this point. There may be some positions litigated in the past that require fresh examination after time, and the Court should be able to adopt them when appropriate. But a break from repeated litigation of the same points is not undesirable. At a minimum, it will allow those on both sides of the issue to reexamine the logic of the opposing position, as well as observe the effects of the adopted stance in society. If after time the opposing position is stronger, it can again be argued to the Court, and can still be considered uniquely justified by the ways in which the view has changed, or perhaps been reinforced, through the years of experience while the other view carried the day. This factor will therefore

promote the argument of fresh ideas, reduce perpetual litigation, and allow for the possibility of reargument at a later time

c. Whether the New Decision Definitively Resolves a Long-standing Controversy

Clearly, all cases before the Court involve controversies which the parties find intractable and causes for which litigants have deep passion. But in some cases, earlier opinions did not make clear the full extent of a party's rights.[73] In those scenarios, the Court should not hesitate to write an opinion that uses more sweeping language to fully decide the controversy at issue. Such a decision would analytically and definitively state that the Constitution, as written, will dictate a particular set of results concerning similar situations or litigants.

It may seem that this view will encourage over-broad decisions, rather than restricting opinions to the case before the Court. But to truly settle the string of litigation, such sweeping language is necessary.[74] Further, such opinions encourage those who oppose the decision to seek to overcome the negative ruling through the enactment of legislation or, ultimately, constitutional amendment. Such an outcome relieves the Court of the duty to measure popular unrest with their decisions.[75] If the Court remains reluctant to overturn earlier decisions, it may stimulate actors that favor change to seek other avenues within the democratic process, a not altogether undemocratic or undesirable outcome.

V. CONCLUSION

The line which separates the United States of American from wavering governments such as Pakistan and Kenya is much thinner than many believe. Essentially, each country is led by self-interested individuals that seek the most possible power through the most expedient means within their system, and then seek to preserve that

73. Illustrative are cases concerning homosexuals' Equal Protection rights, which as discussed above have been subject to alternating opinions which have to this point failed to clearly define their full extent. *See supra* text accompanying notes 53–56.

74. Justice Scalia makes some compelling arguments for such clear, broad rule-making in the Court's jurisprudence. Scalia, *supra* note 38, at 1179–80.

75. Professor Merrill highlights the fact that, although a robust form of stare decisis limits the capacity for rapid legal change, "change is not ruled out. The Constitution can be amended, statutes can be enacted, new administrative regulations can be promulgated." Merrill, *supra* note 23, at 276.

power amongst themselves and a hand-picked group of political elites. However, the limitation on this predictable, self-interested behavior comes from the strength of the institutions within each system that define the boundaries of the law for the actors within it. In times of great stress, only a robust respect for the decisions of those institutions can prevent disintegration of the rule of law and, potentially, of the system as a whole. Stare decisis is not an inexorable constitutional command; it is an imperative tool necessary to maintain order in a system built on confrontation and competition.