

THE CONFLICT BETWEEN STARE DECISIS AND OVERRULING IN CONSTITUTIONAL ADJUDICATION

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INTRODUCTION

Stare decisis—a court’s duty to follow precedents—sometimes gives way to a court’s power to overrule them. When this should

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happen, however, is a mystery. We need a sound theory of overruling to unravel the mystery. But we simply do not have one.¹

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

The need for a theory comes to the fore in dramatic constitutional cases, such as *Citizens United v. Federal Election Commission*² and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³ In *Citizens United*, the Supreme Court overruled two constitutional precedents that blocked the path to its notorious holding. Two opinions, Justice Kennedy’s for the Court and Chief Justice Roberts’s concurrence for himself and Justice Alito, included passages expressing their authors’ views on *stare decisis* and overruling.⁴ Despite all that has been written on *Citizens United*, however, these passages have not been the subject of scholarly scrutiny. In *Casey*, by contrast, the Court declined to overrule *Roe v. Wade*.⁵ A central part of the Court’s reasoning, as reflected in Justices Kennedy, O’Connor, and Souter’s joint opinion, rested upon *stare decisis*. Much has been written on this aspect of *Casey*; however, none of it amounts to a theory of overruling.⁶

This Essay analyzes the conflict between *stare decisis* and overruling in constitutional adjudication before the Supreme Court.⁷ It

¹ Originalist scholars have made a few attempts at a theory of overruling, but their attempts are seriously flawed. See *infra* notes 14–20 and accompanying text, 95, 100; see also Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003)).

³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (declining to overrule *Roe v. Wade*, 410 U.S. 113 (1973)).

⁴ *Citizens United*, 558 U.S. at 362–66; *id.* at 373, 377–79 (Roberts, C.J., concurring).

⁵ 410 U.S. 113 (1973).

⁶ See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81–84 (2000) (criticizing *Casey*); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1147 (2008) (echoing *Casey*) (quoted *infra* at text accompanying note 29).

⁷ An implication of the argument to follow is that the Constitution also constrains common law overruling. There are, however, some differences flowing from a legislature’s power to correct judicial errors in common law cases. Another implication is that the

also makes a proposal that resolves the conflict. Part I presents and criticizes the three common approaches to overruling, each of which has been endorsed by Justices of the Supreme Court and scholarly commentators. These approaches hold that the Court has unbridled discretion to overrule. The third of these approaches, Justice Sotomayor's concurrence in *Alleyne v. United States*,⁸ points the way to a better theory, but it retains a discretionary character rather than one of constitutional obligation. Part I concludes that unbridled discretion renders stare decisis nugatory, and that this is undesirable.

Part II suggests that the Fifth Amendment's Due Process Clause requires a constitutional law of overruling that constrains the Court's power to overrule. Moreover, it proposes a law that does so and resolves the conflict. The Court should be bound to respect stare decisis by following its constitutional precedents, subject to a condition: Stare decisis should lapse when a precedent is incompatible with certain components of the Rule of Law, constitutionalized in the Due Process Clause. Hence, the Court should employ a two-step analysis. The first is governed by law: The Court may *consider* overruling only when stare decisis has lapsed. The second involves lawmaking: The Court may overrule only when a precedent is mistaken, stare decisis has lapsed, and there is a better alternative. Part II also argues that the proposed law is conceptually sound and constitutionally required. Its conceptual soundness rests on our concept of legal authority, as it underlies common judicial and legal practices. Its deeper constitutional justification rests on the conjunction of *Marbury v. Madison*, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia*, together with the "case or controversy" limitation on the Judicial Power.⁹

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

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

Constitution constrains state court overrulings of state constitutional precedents. Exploring the argument's consequences in these different contexts must be left for another day.

⁸ 133 S. Ct. 2151, 2164–66 (2013) (Sotomayor, J., concurring). Justices Ginsburg and Kagan joined the opinion.

⁹ U.S. CONST. art. III, § 2; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

I. THE PROBLEM: UNBRIDLED DISCRETION TO OVERRULE

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

Whether [stare decisis] shall be followed or departed from is a question entirely within the discretion of the court . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.¹⁰

This theme runs throughout the two common approaches to overruling, though they usually do not assert such unrestrained power so boldly. One, the “mistake approach,” is most evident in the two passages in *Citizens United* that speak to overruling, and in the work of some originalist constitutional scholars. The other, the “prudential approach,” is represented by the joint opinion of Justices Kennedy, O'Connor, and Souter in *Casey*.¹¹ A third, the “special justification” approach, advanced most recently by Justice Sotomayor, points the way toward a better approach, though her view, too, leaves the Court with much discretion. A critical review of these approaches indicates that unbridled discretion to overrule is unacceptable in principle.

A. *The Mistake Approach to Overruling*

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

Stare decisis is not . . . a universal, inexorable command, especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to

¹⁰ 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (citation omitted), *overruled in part by* *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *see Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (noting that “[o]ur history does not impose any rigid formula to constrain the Court” when considering overruling precedent); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 3 (1979) (“[T]he received tradition among most Justices and commentators denies that members of the Court are or should be meaningfully constrained by stare decisis.”); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006) (referring to “the Supreme Court’s well-settled doctrine that it has unfettered power to overrule its own prior decisions”).

¹¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–61 (1992) (plurality opinion).

reconsider constitutional interpretations that “depar[t] from a proper understanding” of the Constitution.¹²

This view seems to be most popular with originalists. Thus, Justice Thomas has written, “*Cruikshank* is not a precedent entitled to any respect. The flaws in its interpretation of the Privileges or Immunities Clause are made evident by the preceding evidence of its original meaning, and I would reject the holding on that basis alone.”¹³

Originalist scholars take a similar view. Professor Lawson has argued that “the reasoning of *Marbury* thoroughly de-legitimizes precedent.”¹⁴ Professor Paulsen has argued that stare decisis is unconstitutional.¹⁵ As a generalization, these originalists appear to believe that precedents which depart from the original understanding of the Constitution do not qualify as “interpretations” of the document and, therefore, stand apart from it. The Court, they say, has no power to remake the Constitution.¹⁶

¹² *Id.* at 954–55 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (alterations in original) (citation omitted) (internal quotation marks omitted). Chief Justice Rehnquist was not altogether consistent in this regard. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“[E]ven in constitutional cases, [stare decisis] carries such persuasive force that [the Court] [has] always required a departure from precedent to be supported by some special justification.” (quoting *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)) (internal quotation marks omitted)). For other statements by the Court, see *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (“[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (“We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause.” (footnote omitted)); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (“In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”).

¹³ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3086 (2010) (Thomas, J., concurring in part and concurring in the judgment); see *id.* at 3062–63 for Justice Thomas’s discussion of stare decisis.

¹⁴ Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 28 (1994). Professor Lawson reconsidered aspects of his position in Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).

¹⁵ Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291, 298 (2006).

¹⁶ See, e.g., Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 311 (2005) (framing the issue as precedent or text); *id.* at 327 (opposing case law to the Constitution’s text); Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987) (“[H]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.” (quoting 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 470–71 (1923)) (internal quotation marks omitted)). For a somewhat similar contrast between the constitutional document and the Court’s doctrine, see Amar, *supra* note 6, at 81–83.

However, not all originalists endorse such a strong version of the mistake approach. Most originalists concede that the Court should follow some precedents, sometimes called “superprecedents,” that are not based on original understandings.¹⁷ Superprecedents include *Brown v. Board of Education*,¹⁸ which almost everyone agrees is law for the Court, binding via stare decisis, as well as for others. Accordingly, most originalist scholars are loath to endorse a constitutional theory that does not recognize superprecedents.¹⁹

They have not, however, succeeded in distinguishing superprecedents from ordinary precedents.²⁰ The originalist argument allows the Court to treat one or another precedent as a superprecedent whenever it wishes. In addition, originalists have identified some superprecedents decided in the past, but have not said whether the Court may set a new superprecedent for the future. Consistency with originalism would seem to require that the Court refrain. In that case, from the standpoint of 1954, the Court could not have decided *Brown* as it did. This renders the superprecedent move untenable.

Not all who take the mistake approach are brazen about it. In *Citizens United*, for example, Justice Kennedy (for the Court) and Chief Justice Roberts implicitly endorsed the mistake approach. Both of their opinions called stare decisis a “principle of policy and not a mechanical formula of adherence to the latest decision.”²¹ “Principle of policy,” perhaps a malapropism, indicates that the Court considers stare decisis a matter of discretion. Policies, by contrast with law, do not give rise to duties.

Remarkably, moreover, Justice Kennedy turned stare decisis on its head by a subtle sleight of hand. He opened the relevant passage by announcing a balancing approach that loads the scales *in favor of* stare decisis: “Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.”²² He later considered an argument that the Court should refrain from overruling *Austin* due to reliance on it.²³ He rejected this

¹⁷ See, e.g., Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1236 (2006); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 729 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

¹⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁹ E.g., Monaghan, *supra* note 10; Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1730–31.

²⁰ See Fallon, *supra* note 6, at 1148–50.

²¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 363 (2010) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (internal quotation marks omitted)); *id.* at 377–78 (Roberts, C.J., concurring) (same).

²² *Id.* at 362 (majority opinion).

²³ The argument was that legislatures had relied on *Austin* by enacting bans on corporate indirect expenditures believing that those bans were constitutional. *Id.* at 365.

argument because the relevant reliance interest “is not a compelling interest for *stare decisis*.”²⁴ Requiring a compelling interest also involves a loaded balancing test. Here, however, the opinion loads the scales *against* *stare decisis*. Together, the two statements amount to a contradiction, enabling the Court to pick and choose howsoever it wishes. Neither, therefore, constrains the Court’s power.

The Chief Justice’s opinion also was sly. He wrote: “[*Stare decisis*] counsels deference to past mistakes, but provides no justification for making new ones.”²⁵ In any case, however, following a mistake would be repeating it. The statement effectively writes *stare decisis* out of the law. Nothing is left to constrain the court.

In addition, the Chief Justice wrote:

[T]he validity of *Austin*’s rationale . . . has proved to be the consistent subject of dispute among Members of this Court [Citing concurring and dissenting opinions of a total of three Justices over three cases.] The simple fact that one of our decisions remains controversial undermine[s] the precedent’s ability to contribute to the stable and orderly development of the law.²⁶

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

B. *The Prudential Approach to Overruling*

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

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in

²⁴ *Id.*

²⁵ *Id.* at 384 (Roberts, C.J., concurring).

²⁶ *Id.* at 380 (citations omitted). This passage is almost unprecedented. In *Payne v. Tennessee*, 501 U.S. 808, 827–30 (1991), however, Chief Justice Rehnquist relied on similar considerations. For criticism that would apply to both, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 113 (1991) (arguing that deferring less to precedents where there was a vigorous dissent is antithetical to the Rule of Law).

defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.²⁷

In *Citizens United*, Justice Stevens wrote a dissenting opinion in which he took a similar tack: “[T]here are powerful prudential reasons to keep faith with our precedents.”²⁸ Some scholars have echoed this view. For example, Professor Fallon has written: “[A]n ultimate [Hartian] rule of recognition authorizes the Justices to treat otherwise erroneous precedents either as binding or not on the basis of case-by-case considerations, some of which are ‘pragmatic’ and ‘prudential.’”²⁹

Prudence and pragmatism, of course, do not treat precedents as law or recognize any duty to follow them. They simply do not constrain the exercise of the unbridled discretion that is presupposed. Under this approach, at best, the Court gives itself some advice about overruling.³⁰ The *Casey* joint opinion, in the quotation above, thus lists a number of factors for the Court to consider as it “gauge[s] the respective costs [and benefits?] of reaffirming and overruling a prior case.”³¹ The factors are not grounded in the Constitution or other law. There is no suggestion that the list is authoritative or exhaustive.³² Consequently, prudence and pragmatism leave the Court with unbridled discretion to overrule together with some advice.

²⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion) (citations omitted).

²⁸ *Citizens United*, 558 U.S. at 393, 405, 408–14 (Stevens, J., concurring in part and dissenting in part).

²⁹ Fallon, *supra* note 6, at 1147.

³⁰ For an analysis of advice, see *infra* text accompanying notes 78–83.

³¹ See *supra* note 27 and accompanying text.

³² The Court’s list of factors varies considerably from case to case. Thus, in *Montejo v. Louisiana*, the Court considered whether the precedent had proven to be unworkable, its antiquity, reliance on it, and, most important, the strength of its reasoning. 556 U.S. 778, 791–97 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). Writing for the Court, Justice Scalia balanced these factors to determine whether the precedent’s marginal benefits exceeded its costs. *Id.*; see also *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion) (“[W]hen governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)) (internal quotation marks omitted)). In *Citizens United*, Chief Justice Roberts’s concurring opinion considered a yet different set of factors:

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

Citizens United, 558 U.S. at 378 (Roberts, C.J., concurring) (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944)).

C. The “Special Justification” Approach to Overruling

Justice Sotomayor’s concurring opinion in *Alleyne* developed a third approach to overruling. Though not a common one, it is not unprecedented.³³ It recognizes the deficiencies of the mistake approach by requiring a “special justification” for overruling. Her approach, however, does not rest on constitutional grounds that constrain the Court’s discretion. Rather, she advances the special justification approach as a “self-governing principle within the Judicial Branch.”³⁴

Justice Sotomayor wrote: “We generally adhere to our prior decisions, even if we question their soundness, because doing so promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”³⁵ Accordingly, she continued, “we require a ‘special justification’ when departing from precedent.”³⁶ She did not, however, say what a “special justification” consists in. Presumably, it is a good reason for overruling in addition to a conviction that a precedent was mistaken.

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

D. Some Problems with Unbridled Discretion to Overrule

There are many problems with unbridled discretion to overrule.³⁷ The most salient for the moment is that such discretion negates stare decisis altogether. Originalists, for example, generally take the view that the Constitution, as a document, should be interpreted as required by the founding generation’s understanding. An originalist mistake approach to overruling suggests that cases employing any other interpretive method, and reaching results contrary to the original

³³ See *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (requiring a special justification for overruling); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (requiring the same).

³⁴ *Alleyne v. United States*, 133 S. Ct. 2151, 2164–66 (2013) (Sotomayor, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)) (internal quotation marks omitted).

³⁵ *Id.* at 2164 (quoting *Payne*, 501 U.S. at 827) (internal quotation marks omitted).

³⁶ *Id.* (citing *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

³⁷ On the constitutional problems, see *infra* Part II.A, C, E.

understanding, should be overruled. This is evident in the above quotation from Justice Thomas and in the originalist credo that the Court has no power to change the Constitution.³⁸ Hence, it would appear to follow, each Justice should apply the Constitution directly, for this reason alone, irrespective of Supreme Court precedent.

Yet, as Justice Sotomayor recognized, if *stare decisis* means anything at all, it means that the Court should follow some mistaken precedents.³⁹ The Court *never* should overrule a precedent it does not believe to be mistaken. But it does not follow that the Court *always* should overrule a precedent it does believe to be a mistake. The key is to distinguish mistaken precedents that should and should not be overruled. In the present context, the role of *stare decisis* is to identify those precedents that, whether or not mistaken, should *not* be overruled.

There are three clusters of reasons for following some mistaken precedents in the constitutional context. First, as in other contexts, *stare decisis* fosters Rule of Law values.⁴⁰ These include consistency and equal treatment, stability, and predictability at any one time and over time. Following precedent, moreover, saves lawyers and judges from having to rethink every legal question from the ground up whenever a question arises.⁴¹ And precedent affords lawyers and lower court judges common points of reference from which to engage productively.

³⁸ See *supra* text accompanying notes 14–20.

³⁹ *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (plurality opinion); FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 60 (2009) (“[S]tare decisis becomes meaningless if a court feels free to overrule all of those previous decisions it believes to be wrong.”); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570–71 (2001) (“The force of [stare decisis] thus lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.”); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 508 (2000) (“Norms of precedent have decisive force precisely when the court would have come out the other way had it not been following precedent.”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2 (2001) (“[C]onventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision.”). Thus, the Court declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), on *stare decisis* grounds. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (following *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”). The Court took a contradictory view in *Arizona v. Gant*, 556 U.S. 332, 351 (2009), where Justice Stevens wrote, “[t]he doctrine of *stare decisis* does not require us to approve routine constitutional violations.”

⁴⁰ For a philosophical analysis of one key aspect of the Rule of Law and *stare decisis*, see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012). For a comment on Waldron, see Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37 (2013).

⁴¹ *Casey*, 505 U.S. at 853 (plurality opinion); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989) (*stare decisis* enables judges “to avoid having to rethink the merits of particular legal doctrine” in many cases).

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

Third, stare decisis fosters legitimacy, which requires the Court to have, and be perceived as having, adequate legal justifications for its decisions.⁴² Justifications flowing from the Court's precedents tend, at the least, to be so perceived. Even when the Justices disagree, the disagreement will be perceived to be one about the law when all of them reason from the same starting points. To the extent possible, the Constitution and precedents interpreting it should form a coherent corpus of law, widely perceived and practiced as such.

Some, including Chief Justice Rehnquist, would counter that stare decisis should not control in constitutional cases because constitutional precedents can be changed only by overruling or constitutional amendment.⁴³ It is so difficult to amend the Constitution, the counterargument continues, that stare decisis should not stand in the way of overruling. As the Court often says, however, "[s]tare decisis is not . . . [a] universal inexorable command."⁴⁴ But it is a command that should have some effect in the absence of a "special justification" for disregarding it:⁴⁵ It should count at the least as a reason to follow a precedent, though this reason may be overridden in some cases by other reasons.

Both stare decisis and overruling are constitutionally vital. For the reasons to be given below, the Constitution requires the Court to practice stare decisis.⁴⁶ It is necessary to the Court's unifying mission, and it is a stabilizing force in a constitutional system under the Rule of Law. In addition, the Rule of Law entails the Court's duty to follow its constitutional precedents: The Court has a duty to follow the law; such precedents are parts of the law; therefore, the Court has a duty to follow such precedents.

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

⁴² *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, J., concurring); *Casey*, 505 U.S. at 864–69 (plurality opinion).

⁴³ See *supra* text accompanying note 12.

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

⁴⁵ See *supra* text accompanying notes 33–36; *infra* text accompanying note 60.

⁴⁶ See *infra* Part II.A, E.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁴⁷

Similarly, H.L.A. Hart questioned “the strange moral alchemy which treats the fact that evil has been done in the past as a moral reason for doing it now.”⁴⁸

So, the law should not jettison either stare decisis or overruling. A conflict follows: The Court’s power to overrule constitutional precedents appears to make its duty to follow them hollow. In any case, the Court can exercise this power to relieve itself of stare decisis. The Court, however, should not be able to pick and choose between the sides howsoever it wishes.

II. A PROPOSED CONSTITUTIONAL LAW OF OVERRULING

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

A. *Due Process of Law*

Discretionary approaches to overruling are constitutionally untenable as a matter of principle.⁴⁹ Under them, no precedent is

⁴⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (discussing law in general).

⁴⁸ H.L.A. HART, *ESSAYS ON BENTHAM* 152 (1982) (discussing law in general).

⁴⁹ For the philosophically inclined, note that the following argument is premised at a deeper level on H.L.A. Hart’s “incorporationist” jurisprudence, rather than Joseph Raz’s “sources thesis” or Ronald Dworkin’s “law as integrity.” See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994); Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 315–20 (1985). For another version of incorporationism, see JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001). Accordingly, the structural argument in this Part, the conception of the Rule of Law that is embedded in the Due Process Clause, presented *infra* Part II.C, and the arguments supporting the Essay’s proposed law, given *infra* at Part II.C, E, rest on constitutionalized normative principles.

immune to overruling. In fact, this approach abandons stare decisis in constitutional adjudication at the Supreme Court, even though the Court commonly reasons from precedent.

The Supreme Court's power to overrule is formidable. For the same reasons that every other governmental power is constrained by the Constitution, the exercise of this power should be subject to a check, if only by a subsequent Court. For constitutional precedents, the only available checks are by overruling or constitutional amendment. The prospect of constitutional amendment is too remote to be effective.⁵⁰ There should be a check by overruling that is subject to a constitutional law that constrains the checkers.

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

⁵⁰ Only four constitutional amendments have overturned Supreme Court precedents. See *Oregon v. Mitchell*, 400 U.S. 112 (1970), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI and *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amends. XIII and XIV; *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

⁵¹ On the constitutional history, see *infra* note 101.

⁵² See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment). In *Stop the Beach*, a plurality held that judicial action could be a "taking" under the Takings Clause of the Fifth Amendment. *Id.* at 2601–02 (plurality opinion). The analogy to a "deprivation" under the Due Process Clause is a close one. See also *Griffin v. Griffin*, 327 U.S. 220, 232 (1946); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855).

⁵³ U.S. CONST. amend. V.

⁵⁴ Here, "law" is emphasized in a juridical sense that encompasses minimal components of the Rule of Law. See *infra* Part II.C. This sense is sharply different from the one in *Dred Scott*, 60 U.S. (19 How.) 393, which read what we now call substantive due process into that word. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 110–12 (2008).

⁵⁵ 381 U.S. 479 (1965).

generalize, the text of the Due Process Clause requires overruling to comply with due process of *law*.⁵⁶

Accordingly, the Clause requires a constitutional law that obligates the Court to follow precedent but allows it to overrule in appropriate cases. Such a law should guide and constrain the Court, as do most laws, especially those within constitutional law.⁵⁷ To guide, a law of overruling should pinpoint the pertinent issues, provide suitable standards, and identify distinct sets of reasons for deciding each issue. To constrain, each set of reasons should include relevant reasons and exclude others from the Court's deliberations. It is not necessary for the law to determine a single correct answer by the force of its logic.⁵⁸ Few laws do.⁵⁹ The law, however, should do more than proclaim the Court's unbridled discretion or smuggle it in.

B. *The Proposal*

This Essay proposes that constitutional *stare decisis* be understood to require the Court to follow an indistinguishable constitutional precedent *conditionally*. The condition is that the precedent in question does not significantly impair the constitutionalized Rule of Law, which will be explained in the next Section. This condition calls for a "special justification" to overrule, a Rule of Law justification by contrast with a justification based on the precedent's substantive or procedural merits.⁶⁰ So, when the condition is met, the precedent binds the Court unconditionally. When it is not, *stare decisis* (as applied) lapses for the Court, which then is free to overrule.

To elaborate, the starting assumption is that an indistinguishable precedent is in question. The proposal is that the Constitution should be construed to require the Court to follow it conditionally. The proposal

⁵⁶ The Clause might be construed in this context to require due process of law only when overruling would deprive a person of life, liberty, or property that is protected by a precedent. On that approach, overruling precedents that concern the allocation or scope of governmental powers might not be so constrained. Such a conclusion, however, would rest entirely on the literal meaning of the constitutional text. Structural considerations still would support a check on this judicial power. Hence, for the sake of consistency, the Clause should not be construed so literally.

⁵⁷ See *infra* Part III; see also Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576–89 (1987) (discussing the common law).

⁵⁸ See generally STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992); *infra* Part III.

⁵⁹ To constrain by the force of a law's logic, the law would have to apply whenever one fact in a case supports a sufficient reason for deciding one way. However, laws rarely take this form. Instead, they apply on the basis of more than one reason, opening the door to judicial judgment whenever the reasons cut in different directions. Accordingly, "constraint" should be understood as a limit on judicial deliberations to a legally-sanctioned subset of reasons. See *infra* Part III.

⁶⁰ See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

thus poses and orders two distinct questions.⁶¹ The first is whether the Court should even *consider* overruling the precedent (the “threshold question”). A negative answer makes stare decisis unconditional, and the Court must follow the precedent. The Court should consider overruling when, and only when, the answer is affirmative. Stare decisis then lapses for the Court. The second question is whether the Court should overrule (the “overruling question”). It should do so only when stare decisis has lapsed, the precedent in question is mistaken, and a better alternative is available. So, the proposed standard for answering the threshold question is: *Does the precedent in question significantly impair the constitutionalized Rule of Law?* This standard requires some explanation.

C. *The Constitutionalized Rule of Law*

I suggest that certain basic components of the political Rule of Law are embedded in the Due Process Clause (again, “due process of *law*”).⁶² That is, some components are “constitutionalized.” The evident purpose of the due process requirement is to prohibit the state from depriving individuals of life, liberty, or property arbitrarily or tyrannically. The baseline purpose of the Rule of Law is the same.⁶³ Accordingly, in his *Citizens United* concurrence, Chief Justice Roberts wrote that the “greatest purpose” of stare decisis is “to serve a constitutional ideal—the rule of law.”⁶⁴ Similarly, Justices Kennedy, O’Connor, and Souter wrote in their joint opinion in *Casey*: “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”⁶⁵ A law of overruling provides for due process if, and only if, it makes an apt version of the Rule of Law central.

The political Rule of Law can be understood in many ways.⁶⁶ Friedrich von Hayek, for example, extolled the virtues of the Rule of

⁶¹ If the Court overrules a precedent, a further issue would be whether the overruling should have retrospective or only prospective effect. See generally Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); James O. Freedman, Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

⁶² The same interpretation of due process applies to the Fourteenth Amendment’s clause, but that is not within the scope of this Essay. See *supra* note 7.

⁶³ See LON L. FULLER, *THE MORALITY OF LAW* 33–41, 197–224 (rev. ed. 1969).

⁶⁴ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring).

⁶⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion); see *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring); *id.* at 847–56 (Marshall, J., dissenting) (relating stare decisis to the Rule of Law).

⁶⁶ The literature is vast. For a sample of recent views, see RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND*

Law as a protector of individual liberty. The Rule, he wrote, requires that “government in all its actions [be] bound [in advance] by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances.”⁶⁷ Whether or not this is an adequate political conception, however, the Due Process Clause encompasses transparency (reasonable notice and predictability) and more. Tyrants may use transparent laws arbitrarily and as instruments of their tyranny, as did South Africa under apartheid. But the Constitution’s Preamble makes explicit that which is obvious: The Constitution was adopted “in [o]rder to . . . establish Justice . . . [and to] provide for the . . . general Welfare.”⁶⁸ So, the Due Process Clause should be construed to distinguish American laws and legal practices from arbitrary and tyrannous laws and legal practices.

Other scholars, by contrast, would project onto the Rule of Law all of the values embraced by their political philosophies. Ronald Dworkin, for example, once wrote that the Rule of Law requires a community to be ruled “by an accurate public conception of individual rights.”⁶⁹ The Due Process Clause, however, requires much less than this. Other constitutional clauses protect individual rights; other rights are matters for statutory protection; and yet other rights are matters for the common law.

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

In this context, minimal or colorable justifications rule out arbitrary and tyrannous precedents while allowing less serious mistakes to stand. Precedents like *Plessy v. Ferguson*, for example, do not rest on minimal or colorable justifications, from a present standpoint looking forward.⁷⁰ That case held that a blatantly racist law was constitutional

MORALITY 210–32 (2d ed. 2009) [hereinafter RAZ, AUTHORITY]; THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

⁶⁷ FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 72 (1944).

⁶⁸ U.S. CONST. pmbl.

⁶⁹ RONALD DWORKIN, A MATTER OF PRINCIPLE 11–12 (1985).

⁷⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (separate but equal), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) and subsequent per curiam decisions.

despite the oppression it wreaked. Whatever may have been considered a constitutional justification when the Court decided that case, there is now no justification for including it in the constitutional corpus. Other precedents may be minimally or colorably justified even though, when decided, they were erroneous interpretations of the Constitution. The Court, for example, might have balanced the right reasons but attached too much or too little weight to some of them, producing a mistaken result. The question should be whether the present Court finds a minimal or colorable justification on its own, whether or not it agrees with the precedent's holding.

The justification judgment thus should require substantial deference to the Court that decided the precedent. Deference, however, is an elastic concept, a matter of degree. It is difficult to draw a sensible and firm line. Guidance, however, is possible. One source is by analogy to the Court's practice of deferring to Congress or a state legislature when reviewing the constitutionality of legislation. A "minimal or colorable justification," however, is not meant to mimic rational basis or intermediate scrutiny review. Another is the standard's purpose or rationale. Thus, when deciding whether a precedent has a minimal or colorable justification, the Court should balance the needs for constitutional unity and stability against constitutionality in the specific context of the precedent in question.

The constitutionalized Rule of Law generates several factors that bear on the proposed standard for deciding the pivotal question. To reconstruct the Court's overruling cases, for they are not coherent, a special justification should depend on several factors, notably: (1) notice and predictability;⁷¹ (2) legal developments that make the precedent anomalous;⁷² (3) the precedent's workability;⁷³ (4) reliance on the precedent;⁷⁴ (5) the quality of the precedent court's reasoning;⁷⁵ and (6)

⁷¹ *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (stare decisis "promotes . . . predictability").

⁷² In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229–32 (1995) (overruling *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990)), the Court focused on how the precedent in question was inconsistent with fifty years of prior equal protection jurisprudence. In *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 152–54 (1976) (overruling *Int'l Union, U.A.W., A.F. of L., Local 232 v. Wis. Emp't Rel. Bd.*, 336 U.S. 245 (1949)), the Court focused on subsequent legal developments that had eroded the precedent's authority.

⁷³ *Montejo v. Louisiana*, 556 U.S. 778, 779 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."). For a critique of the workability factor, see Lauren Vicki Stark, Note, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005).

⁷⁴ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989)) (Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions.").

changes in factual circumstances that erode the precedent's justification.⁷⁶ These factors do not just inform an unbridled discretionary judgment or offer the Justices advice. The basis for minding them is constitutional.

To elaborate, the constitutionalized Rule of Law requires a precedent to be capable of guiding conduct and minimally or colorably justified. To guide conduct, the precedent must be transparent, which is the Court's aim in its factor of "notice and predictability." It must be coherent, which is the upshot of the Court's factor of "legal developments that make the precedent anomalous." The precedent must be reliable, which corresponds to the Court's "reliance" factor. The "quality of a precedent court's reasoning" rests mainly on the value of a minimal or colorable justification, as does the Court's "changes in factual circumstances," though this part of the constitutionalized Rule of Law should look to the present and future. Thus, a justification may peter out as the legal or factual context of its operation evolves. So understood, the constitutionalized Rule of Law requires *stare decisis*.⁷⁷

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

The conditional structure of the two questions, and the threshold standard upon which they pivot, are novel. They define the limits of *stare decisis*. They make the conflict between *stare decisis* and overruling vanish. When a precedent does not significantly impair the constitutionalized Rule of Law, *stare decisis* governs. When a precedent does significantly impair, *stare decisis* expires. There then is no conflict when the Court considers the question of overruling. And the threshold

⁷⁵ In *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)), the Court emphasized that "*Bowers* was not correct when it was decided, [and it] is not correct today."

⁷⁶ In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)), the Court emphasized "recent economic experience," namely, the Great Depression.

⁷⁷ As does the Constitution in a deeper way. See *infra* Part II.E; see also *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) ("[T]he rule of law demands that adhering to our prior case law be the norm."); *Payne*, 501 U.S. at 827 ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.").

standard meets the key challenge: It distinguishes mistaken precedents that should be liable to overruling from those that should not.

D. *The Proposal's Conceptual Basis*

The proposed law rests on conceptual and further constitutional supports, the latter of which will be discussed in the next Section. With respect to the conceptual, the proposal draws on the practice of law and judging. Lawyers and judges routinely refer to precedents, including constitutional precedents, as “legal authorities.” The proposal takes this locution seriously.⁷⁸

To grasp the relevant concept of authority, first consider authoritative advice. Assume that you recognize your lawyer, Anne, as an authority on questions of effective representation and advocacy in criminal cases. You are not such an authority. You have become a “person of interest” in a criminal investigation. You consult her immediately. She asks you a few questions and advises you (emphatically) not to talk about the matter with anyone unless she is present. Should you follow her advice? More important for present purposes, what reasons are relevant when you deliberate about whether to follow it?

You do not treat Anne as an authority if you decide what to do by evaluating the rationale for her advice and making an independent judgment on the merits.⁷⁹ You would not be “following” her advice if

⁷⁸ Practical and theoretical authorities should be distinguished. To be brief, practical authorities concern what people should do, while theoretical authorities concern what people should believe. Thus, practical authorities include moral and legal authorities. Theoretical authorities include scientific authorities. In this Essay, “authority” refers to practical authorities. Practical authorities, in turn, may or may not be legitimate: that is, morally valid and binding. Nothing in this Essay implies that legal authorities, including American legal authorities, necessarily are legitimate in this sense. As Joseph Raz would put it, the law necessarily *claims* legitimate authority without necessarily having it. RAZ, *AUTHORITY*, *supra* note 66, at 30 (“[I]t is an essential feature of law that it claims legitimate authority.”). For criticism of Raz’s claim, see Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1665–76 (2002) (reviewing COLEMAN, *supra* note 49).

The proposed law’s conceptual basis is comparable to Joseph Raz’s account of de facto authority. See generally RAZ, *AUTHORITY*, *supra* note 66, at 3–36; JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–47 (1986). Raz, however, has not said anything about the point at which stare decisis gives way to a court’s power to overrule. For the author’s analogous account of a contract’s authority, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373–78 (1980).

⁷⁹ RAZ, *AUTHORITY*, *supra* note 66, at 21–23. It would be another matter to seek a second opinion from another authority. For example, if a second lawyer disagreed with Anne, you should not choose to follow the advice of the one you agreed with on the merits. Instead, you should consider whether one of the lawyers had greater authority than the other, as relevant. Thus, if the second lawyer had little experience in criminal matters, while Anne was an experienced specialist, you would follow Anne’s advice because of her experience and expertise, not because you agreed with her on the merits of keeping mum. It also would be a different

you act as advised because you agree with her. If you keep mum because you agree, her advice would be superfluous. There would be no reason to have sought it.⁸⁰ You would be contradicting the assumption with which you began, that you recognize Anne as an authority in this matter. By recognizing her authority, you gave up the opportunity to make a decision de novo.

It is a short step from understanding advice in this way to understanding authoritative legal precedents similarly.⁸¹ Authoritative precedents are familiar and ubiquitous phenomena in legal and judicial practice. Judges, for example, routinely cite precedents when justifying their decisions, without reviewing the grounds on which the precedents were or should have been based. When advocates offer propositions of law in briefs or oral arguments, citations to legal authorities are not normally accompanied by their rationales. When case law contains the relevant authorities, judges normally are satisfied with a citation to precedent and, perhaps, a brief statement of the holding, again without considering the precedent's rationale. And judges commonly criticize each others' opinions on grounds of precedent when there are concurring or dissenting opinions, again without reasserting rationales.⁸²

The concept of authority underlying the advice illustration explains why lawyers and judges thus rely on precedents: When they do, they need not rethink everything before doing anything.⁸³ A precedent's holding, like Anne's advice, normally supplants its rationale. The proposal, accordingly, restricts the Court's deliberations on the threshold question to Rule of Law reasons. The rationale, however, may re-enter deliberations when there is a special justification for considering whether to overrule. Hence, much legal and judicial

matter if you and Anne were relevantly and equally authorities. That may seem to be closer to the case of a later Court consulting the precedent of an earlier Court. For the reasons given above, however, the earlier Court's precedent is law that binds the later Court (conditionally). See *supra* Part II.B. Hence, the two Courts are not relevantly and equally authorities.

⁸⁰ You might consult Anne to learn of the considerations you should consider when deciding whether to keep mum. In that case, however, you would be seeking information, not advice. You would be treating Anne as a theoretical authority. See *supra* note 78.

⁸¹ There is a difference: An advisee has no obligation to follow advice whereas a Justice has a constitutional obligation to follow the law, including constitutional precedents. But this difference is irrelevant to the present point.

⁸² Some judicial practice is to the contrary. Dissenting Justices, for example, generally do not appear to follow the majority's holding when essentially the same issue comes before them again. See SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT 1946-1992*, at 89-92 (1995); Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996). Professor Schauer infers from this practice that stare decisis does not now "exist." Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 391-97 (2007). This Essay does not find stare decisis in Supreme Court practice but, rather, in the Constitution. See *supra* Part II.A; *infra* Part II.E.

⁸³ See sources cited *supra* note 41.

practice suggests, stare decisis requires a court to follow a relevant precedent conditionally, without rethinking its rationale.⁸⁴

It is a separate question *whether* a precedent is authoritative when an overruling question arises. The preceding Section suggested (in effect) that an indistinguishable precedent loses its authority for the Court when it significantly impairs the constitutionalized Rule of Law. The proposal thus treats precedents and stare decisis as authoritative law for the Court up to that point. Thereafter, the precedent in question has no authority. The way then is clear for the Court to consider whether to overrule on the basis of all relevant reasons. It may decide to overrule, thereby extending the precedent's loss of authority. Or it may decide to retain the precedent despite its deficiencies, as when there is no better alternative with which to replace it.

E. *Constitutional Unity and Stability*

As Professor Richard H. Fallon, Jr. has written, “stare decisis presents constitutional puzzles . . . [that] extend deep into the foundations of constitutional law.”⁸⁵ The Court's overruling jurisprudence does not penetrate these foundations.⁸⁶ A fresh examination of them sheds new light on the legal status of constitutional precedents and stare decisis. It reveals a consequential conjunction of

⁸⁴ Judges, however, will and should consider a precedent's rationale to determine whether it is relevant. A case that should be distinguished is not relevant to the case at bar. It is not in question, and stare decisis does not require a court to follow it. Thus, a court may ignore it; draw a distinction, as by carving out an exception to it; or refuse to extend it into a previously unoccupied space. In such cases, the Court is not faced with an overruling issue.

⁸⁵ Fallon, *supra* note 39, at 596. However, these puzzles do not prevent Justices of very different constitutional dispositions from relying heavily on precedent in their opinions. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 170–72 (1998). Some political science studies indicate that, nonetheless, precedents do not actually constrain the Justices significantly. *E.g.*, BRENNER & SPAETH, *supra* note 82. Professor Merrill has countered effectively that these studies count cases in which a precedent was overruled, but not those in which it was followed. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 *CONST. COMMENT.* 271, 279 (2005). Professor Fallon has criticized such studies for taking up only the “external point of view,” thus neglecting H.L.A. Hart's paradigm-shifting distinction between internal and external ways of looking at law, the former of which would emphasize the Justices' practices of conforming to precedents, and of criticizing each other in opposing opinions and in conference, on the basis of precedents. Fallon, *supra* note 6, at 1150–58. Professor Schauer is more impressed with the studies. Schauer, *supra* note 82, at 389–91. *See generally* MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008).

⁸⁶ The Court has simply assumed a power to overrule constitutional precedents in its unbridled discretion. *See supra* Part I.A–B; *see also* John Wallace, Note, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 *BUFF. L. REV.* 187, 192–96 (1994) (reviewing leading judicial statements that the Court has unbridled power to overrule). Professor John Harrison has argued that stare decisis is not rooted in the Constitution. Harrison, *supra* note 39, at 513–25. He did not, however, consider the arguments in the text above. Professor Paulsen has argued that stare decisis is unconstitutional. Paulsen, *supra* note 15. He also did not consider this Essay's arguments.

Marbury v. Madison, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia*, together with Article III's case or controversy limitation on the federal judicial power: The Court has a constitutional duty to treat its constitutional precedents as law and to practice stare decisis with respect to them, subject to a proviso that permits justified overrulings.

One of the Court's principal constitutional missions is to pursue a unified constitutional system, within the bounds of its institutional competence, under the Rule of Law.⁸⁷ *Marbury*, of course, announced that the Court has a power of judicial review over acts of the coordinate branches of the federal government.⁸⁸ *Martin* and *Cohens* established the Court's power to review state court decisions.⁸⁹ In *Martin*, Justice Story wrote that the Constitution requires "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview."⁹⁰ Similarly, the *Cohens* Court warned:

But the judicial control of the Union over State encroachments and usurpations, was indispensable to the sovereignty of the constitution—to its integrity—to its very existence. Take it away, and the Union becomes again a loose and feeble confederacy—a government of false and foolish confidence—a delusion and a mockery!⁹¹

Thus, the justification for judicial review is based in important part on the need to avoid a centrifugal Constitution, one that flies apart in practice.⁹²

The Court pursues this unifying mission by wielding its power of judicial review in cases. As Chief Justice Marshall famously wrote, the Constitution is law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁹³ An important link between this part of *Marbury* and Article III, Section 2, appears to have gone unnoticed:⁹⁴ The Court *says* what the law is only when it decides

⁸⁷ The Court's institutional competence is bounded by jurisdictional, justiciability, and separation of powers doctrines. Consequently, constitutional questions arise outside of the Court's cognizance. See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

⁸⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸⁹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 369–72 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816).

⁹⁰ *Martin*, 14 U.S. (1 Wheat.) at 347–48.

⁹¹ *Cohens*, 19 U.S. (6 Wheat.) at 371.

⁹² To be sure, the Constitution permits great diversity within its constraints on the federal and state governments. The constraints, however, should be generalizable.

⁹³ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁹⁴ Professor Fallon has argued that Article III, Section 1 ("The Judicial Power") authorizes the Court to follow precedent. He did not rely on the Court's power of judicial review together with Article III, Section 2's case or controversy requirement. Fallon, *supra* note 39, at 577. Professor Lawson has argued that "the reasoning of *Marbury* thoroughly de-legitimizes

cases or controversies and, therefore, only by the holdings of its precedents.⁹⁵ It follows that the Constitution requires the Court to treat the holdings of its constitutional precedents as law.⁹⁶

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

Stare decisis avoids such absurd consequences. Following constitutional precedents is the only way to extend their reach beyond the particular decided case.⁹⁷ Stare decisis therefore is constitutionally

precedent." Lawson, *supra* note 14, at 28. However, he did not consider the argument presented in this Essay, either.

⁹⁵ U.S. CONST. art. III, § 2. "Holdings" may be stated in broader or narrower terms depending on the degree of abstraction used to describe the facts. It is a question of degree and, therefore, not susceptible to any general definition or rule that would draw a workable and defensible line at any particular place. Article III, Section 2, however, should drive a federal court's understanding of a federal constitutional precedent toward the narrow end of the spectrum.

⁹⁶ For originalist arguments that constitutional precedents are law, see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–25 (2009); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447–62 (2006) [hereinafter Strang (2006)]; Strang, *supra* note 19.

Strong legal skepticism, legal pragmatism, strict originalism, and pure natural law do not treat constitutional precedents as law. Strong legal skepticism doubts that there is anything worthy of calling "law" in the normative (conduct-guiding) sense used here. See Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710 (1988). Legal pragmatism looks to the future: A pragmatist judge may treat precedents as "information rather than as authority" when gauging the consequences of a decision. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 97 (1990). For a more cautious pragmatic approach, see Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341–46 (1988). Strict originalism requires the Court to apply the Constitution directly, regardless of what the Court has held in the past. See, e.g., Lawson, *supra* note 14; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 (2000). Pure natural law does not depend for its pedigree on human decisions, including precedents. Other versions of natural law, however, include Rule of Law values among those within the natural law, thereby raising the issues considered in this Essay. See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 313–18 (1985). The threshold of "fit" in Ronald Dworkin's theory of "law as integrity," for example, functions comparably. DWORKIN, *supra* note 49, at 176–78.

⁹⁷ For a different argument supporting the importance of precedents, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (advancing

required by the conjunction of *Marbury*, *Martin*, and *Cohens*, together with Article III's case or controversy requirement (as well as the constitutionalized Rule of Law, embedded in due process of *law*⁹⁸). Stare decisis is the thread with which the Court weaves the fabric of a unified and stable constitutional system. Too loose a practice of stare decisis would allow the constitutional fabric to unravel. (Too tight a practice would make the fabric stiff and uncomfortable.)

It might be countered that the Court should treat its constitutional precedents as law for others but not for itself.⁹⁹ However, the constitutional system should be unified and stable across governmental institutions at any one time and over time.¹⁰⁰ A Supreme Court not bound by its precedents likely would vacillate over time as its composition changes, yielding unacceptable discontinuity and instability, and deflating the Court's legitimacy.

The Court's constitutional precedents bind the Court, in addition, because the Constitution is law that binds the Court and such precedents interpret the Constitution.¹⁰¹ The Court has held, for

"common law constitutionalism"); see also CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT (2004) (same).

⁹⁸ See *supra* Part II.C.

⁹⁹ See Monaghan, *supra* note 10, at 3 ("The question of the appropriate internal authority of the Court's opinions—their stare decisis effect—is not resolved by the observation that other tribunals are bound."); cf. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) ("[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes."); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) ("A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."). Perhaps something like the Scalia-Douglas view was Professor Paulsen's unstated assumption when he proclaimed without qualification that "*stare decisis* is unconstitutional," and that "*stare decisis* in constitutional law . . . is utterly unjustifiable," while at the same time endorsing *Marbury*. Paulsen, *supra* note 15, at 298.

¹⁰⁰ "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion) (citing Lewis Powell, *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16).

¹⁰¹ See generally Fallon, *supra* note 39; Strauss, *supra* note 97. In any event, the original understanding of the Constitution may have been that the Court would be duty-bound to treat its constitutional precedents as law for itself. In THE FEDERALIST PAPERS NO. 78, Hamilton wrote: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . ." (emphasis added). Adams wrote, "the Laws of every State ought always to be fixed, [and] certain," and that "every possible Case [should be] settled in a Precedent, leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge." Strang 2006, *supra* note 96, at 456–57 (alterations in original) (quoting 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L.H. Butterfield ed., 1961)) (internal quotation marks omitted). But the proposition is not supported by clear evidence. See generally Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959); McGinnis & Rappaport, *supra* note 96; Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 743 (2010); Polly J. Price, *Precedent*

example, that “speech,” within the meaning of the First Amendment’s Speech Clause, includes symbolic expressions like wearing a black arm band to protest a war.¹⁰² Consequently, *the First Amendment* protects such expressions; the interpretive precedent just draws this meaning out.¹⁰³ The interpretation does not change the Speech Clause. Constitutional precedents are (or, at least, ought to be) hinged on the Constitution’s text.

III. JUDGING IN GOOD FAITH

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

As suggested elsewhere, judges (and Justices) have a duty to uphold the law in good faith.¹⁰⁴ In brief, judging in good faith requires a judge to decide on the basis of the relevant legal reasons and only those reasons. This judicial duty excludes from a judge’s proper deliberations all other kinds of reasons, including moral reasons not incorporated into the law, reasons of political loyalty or identification, and reasons of personal interest. A judge forgoes the opportunity to act on such reasons, in her judicial capacity, when assuming the bench. Bad faith occurs when she recaptures such a forgone opportunity.

It may be added here that the law’s categories stand for different sets of possible reasons bearing on the answers to different legal questions. Judgments in contract law, for example, properly depend on different reasons from those on which criminal law judgments depend. Thus, just deserts is an important reason for punishing criminals, but it counts for nothing in contract law. Within contract law, as well, different sets of reasons bear on questions concerning offers, breaches,

and Judicial Power After the Founding, 42 B.C. L. REV. 81 (2000); Strang (2006), *supra* note 96, at 447–62. For this reason, the argument in this Essay does not depend on original understanding(s).

¹⁰² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (“[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.”).

¹⁰³ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget that it is a *constitution* we are expounding.”).

¹⁰⁴ See generally BURTON, *supra* note 58.

remedies, etc. Within criminal law, different sets bear on the required actus reus and mens rea.

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

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

In a hotly contested case on a topic that elicits strong emotions, like *Roe v. Wade*,¹⁰⁵ the temptation to “peek” may be hard to resist. Even so, constitutionally speaking, it is and should be a Justice’s duty to resist. Realistically, humanly, and understandably, some would succeed while others would give in to this temptation. That some, even many, would give in, however, is a poor reason for concluding that the Justices *ought* to give in. The proposed law assumes that the Justices judge in good faith. But it is no more a panacea, whether for bad faith or some sort of weakness of the will, than is any other law.

CONCLUSION

The Constitution precludes the Supreme Court from exercising its overruling power as a matter of unbridled discretion. The Fifth Amendment’s Due Process Clause constrains the Court’s power to overrule its constitutional precedents: It requires a constitutional law of overruling. This Essay has proposed a law that poses two distinct questions to be decided in order and in turn: (1) Should the Court consider overruling the precedent in question? (2) If so, should the Court overrule it? The pivotal question is the first one. The answer should turn on whether a precedent in question significantly impairs the constitutionalized Rule of Law. A precedent thus significantly impairs when the precedent is incapable of guiding conduct, as when it is opaque, incoherent, unreliable, or unworkable, or when it lacks at least a

¹⁰⁵ 410 U.S. 113 (1973).

minimal or colorable justification. When the precedent so impairs, stare decisis lapses for the Court as applied to that precedent. The Court then may overrule if the precedent is indistinguishable, mistaken, and there is a better alternative. There then is no conflict between stare decisis and overruling. Rather, the Constitution constrains the Court's power here, by law, as it constrains every other exercise of governmental power.