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# *Stare Decisis* 101

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## KEY TAKEAWAYS

The Founders believed that judges following their past decisions is necessary to reduce "arbitrary discretion."

*Stare decisis*, an important principle for the judicial process, is a rebuttable presumption in a civil law system, where judges interpret and apply written law to decide cases.

The Supreme Court uses specific factors to assess the strength of precedents and has reaffirmed, overruled, or modified past decisions that interpret the Constitution.

*Stare decisis* is a Latin phrase meaning "to stand by things decided."[1] In the judicial context, it is also known as the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[2] The U.S. Supreme Court has said that *stare decisis* is "of fundamental importance to the rule of law."[3] The part it plays in actual judicial decision-making, however, is complex, and varies depending on the judicial system, court, and category of case. A recent treatise on the subject, for example, spans more than 800 pages.[4]

This *Legal Memorandum* examines *stare decisis* in the context that receives the most attention: Supreme Court cases that involve prior interpretations of the Constitution. Rather than address the substantive merit of various decisions, the focus here is on the Supreme Court's application of principles or factors

when deciding whether to overturn a constitutional precedent. To that end, it offers as examples decisions that have been criticized by both liberals and conservatives.

*Stare decisis* is an increasingly common topic during confirmation hearings for Supreme Court nominees. In fact, adjusting for the length of each hearing record, references to "*stare decisis*" or "precedent" more than doubled between the 1971 confirmation hearing for Associate Justices William Rehnquist and Lewis Powell[5] and the 2017 hearing for Justice Neil Gorsuch.[6] Frequency, however, has not necessarily meant clarity. Senators often raise the subject in order to elicit clues about which precedents a nominee is likely to affirm or overrule. Unwilling to provide such "hints...forecasts... [or] previews,"[7] nominees may offer little in response.

In April 2017, when Senator Chris Coons (D–DE) asked Supreme Court nominee Neil Gorsuch whether certain precedents were "binding" or "settled," Gorsuch responded that "they are...due all the weight of a precedent of the U.S. Supreme Court."[8] In June 2010, Senator John Cornyn (R–TX) asked nominee Elena Kagan if the Supreme Court's decision the previous day in *McDonald v. City of Chicago*[9] "has full stare decisis effect."[10] Kagan said only that *McDonald* is "entitled to all the weight that precedent usually gets."[11] She offered the identical response when Senator Orrin Hatch (R–UT) asked her about the Supreme Court's decision in *Citizens United v. Federal Election Commission*.[12]

Her response suggested that little had changed. Nearly a quarter-century earlier, Senator Edward Kennedy (D–MA) asked Supreme Court nominee Antonin Scalia: "Well, what weight do you give the precedents of the Supreme Court? Are they given any weight? Are they given some weight? Are they given a lot of weight?"[13] Scalia answered, "It depends on the nature of the precedent, the nature of the issue."[14]

*Stare decisis* can operate vertically or horizontally. *Vertical stare decisis*, which refers to binding precedents of a higher court in the same jurisdiction, is "an inflexible rule that admits of no exception."[15] This paper focuses instead on *horizontal stare decisis*, or "a court's obligation to follow its own precedents,"[16] which has been called a "shape-shifting doctrine."[17] In the long run, while decisions of higher courts are followed as a matter of law, a court follows its own precedents as a matter of choice.[18] The focus here is on *stare decisis* in the U.S. Supreme Court and, more specifically, in cases that involve whether to retain or abandon prior interpretations of the Constitution.

Supreme Court nominees have frequently described the Court following its precedents as a presumption. In the 1971 hearing on his nomination to be

an Associate Justice, for example, William Rehnquist observed that there is "a presumption in favor of precedent in every instance."[19] Similarly, Justice Sonia Sotomayor explained at her July 2009 confirmation hearing that "the presumption is in favor of deference to precedent."[20] This presumption, however, is rebuttable. Justice Sandra Day O'Connor put it in practical terms at her 1981 hearing when she said that *stare decisis* "is not cast in stone but it is very important."[21] This analysis will look at the presumption of *stare decisis*, factors or criteria for rebutting that presumption, and some examples of the Supreme Court putting these principles into practice.

## The Presumption of *Stare Decisis*

*Stare decisis* is a presumption for both negative and positive reasons. On the negative side, it helps limit the power of the judiciary and, therefore, of government. "If men were angels," wrote James Madison, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[22] Those controls include the separation of federal government power into three branches. In *Federalist* No.78, Alexander Hamilton wrote that "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."[23]

Another control is that the Constitution guarantees a republican form of government[24] in which, wrote Founder James Wilson, "the people are masters of the government."[25] The people assert that mastery by using the Constitution to set rules for the powers and operation of government. In *Marbury v. Madison*,[26] the Supreme Court explained that the Constitution is written so that its "limits may be neither mistaken nor forgotten"[27] and that the "framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature."[28]

Hamilton also explained that the judiciary would be the "weakest" and "least dangerous" branch because the judiciary has "neither FORCE nor WILL, but merely judgment."[29] To avoid that judgment becoming "arbitrary discretion," Hamilton wrote, it is "indispensable that [judges] 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."[30] More than two centuries later, in the January 2006 hearing on his Supreme Court nomination, Justice Samuel Alito cited Hamilton in explaining that *stare decisis* "is a fundamental part of our legal system…because it limits the power of the judiciary."[31]

On the positive side, *stare decisis* is a presumption because it promotes confidence that judicial decisions are not simply "arbitrary, based on personal preference, or unbounded."[32] The Supreme Court has explained that "[*s*]*tare decisis* is the preferred course of action because it...contributes to the actual and perceived integrity of the judicial process."[33] *Stare decisis* also contributes to "stability in the law," as well as "evenhandedness" and "predictability."[34] At her 1981 confirmation hearing, Justice Sandra Day O'Connor explained that *stare decisis* "plays a very significant role our legal system" because "stability of the law and predictability of the law are vitally important concepts."[35] Professor Michael Sinclair connects the negative and positive effects of *stare decisis* when he writes that its "most significant" virtue "is the stability, continuity, and predictability it lends to the law.... Stability and certainty reduce judicial discretion."[36]

## A Rebuttable Presumption

The presumption that the Supreme Court will follow its own past decisions, however, is not, as the Supreme Court itself has often said, "a universal, inexorable command."[37] Several principles support this conclusion. The first is the general distinction between "common law" and "civil law" judicial systems. A common law system is a "system of making law by judicial opinion"[38] in which past judicial decisions are literally "the law" that judges use to decide present cases. Not surprisingly, "an absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis*—that is, the principle that a decision in one case will be followed in the next."[39]

The U.S. federal judiciary, however, operates under a civil law system in which, Justice Antonin Scalia wrote, "there is no such thing as common law. Every issue of law I resolve as a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[40] Justice Clarence Thomas has described the judicial task this way: "We interpret and apply written law to the facts of particular cases."[41] In a civil law system, the law that judges use to decide cases is made not by judges, but by the legislative branch (statutes), the executive branch (regulations), or the people through their elected representatives (the Constitution).

**The Constitution and Constitutional Law.** This fundamental principle was understood at America's Founding. In 1795, less than a decade after the Constitution was ratified, the Supreme Court addressed the question, "What is the Constitution?"[42] Its answer was that the Constitution "is delineated by the mighty hand of the people" and "contains [their] permanent will."[43] The Constitution "can be revoked or altered only by the authority

that made it."[44] Since the Supreme Court did not make the Constitution, it does not have final authority to alter it and, therefore, its decisions interpreting the Constitution cannot take precedence over it.

Interpreting a written text requires "discovering...the meaning which the authors...designed it to convey to others."[45] An interpretation of text, therefore, is not the same as the text itself. Similarly, the Supreme Court's interpretations of the Constitution are just that—interpretations—and are not themselves the "supreme law of the land." Justice Felix Frankfurter expressed this view when he wrote that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[46] Justice William O. Douglas made the same point a decade later in his famous article on *stare decisis*. "A judge looking at a constitutional decision," Douglas wrote, "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."[47]

On October 21, 1986, then-Attorney General Edwin Meese III addressed this issue in a lecture at Tulane University titled "The Law of the Constitution."[48] He examined the "necessary distinction between the Constitution and constitutional law." These two, he said, "are not synonymous."[49] While the Constitution is "a document of our most fundamental law,"[50] Meese explained, "constitutional law is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it."[51] The Court's decisions do have a "binding quality," especially on the parties to a particular case, but they are not themselves the "supreme law of the land."

The difference between written law and its interpretation, then, tells us that *stare decisis* is not absolute. If it were, a new Supreme Court Justice being sworn into office would be taking an oath to "support and defend" herself and the opinions of her peers, past and present. Professor Stephen Carter offers another practical reason for this distinction between the Constitution and constitutional law. He writes that "if the decisions of the courts enjoy a status co-equal with the Constitution itself, then the argument that a case is wrongly decided because it is inconsistent with the Constitution no longer makes sense."[52]

**Unequal Precedent.** The second principle is that, in addition to *stare decisis* generally being less than absolute, "not all precedent is created equal."[53] Since interpretations of the Constitution or statutes are not themselves law, they can be wrong, and their strength as precedents depends on the steps necessary to correct error. When Congress believes that the Supreme Court has misconstrued one of its statutes, it can correct that error

with legislation. Correcting a misinterpretation of the Constitution, however, requires either a constitutional amendment or the Court abandoning its errant precedent.

As a result, the Court has long been more willing to reconsider its precedents in constitutional, rather than in statutory, cases.[54] Justice Louis Brandeis wrote in 1932 that "in cases involving the Federal Constitution, where correction through legislation is practically impossible, this Court has often overruled its earlier decisions."[55]During her confirmation hearing on October 14, 2020, Justice Amy Coney Barrett said that "no justice that I'm aware of, throughout history, has ever maintained the position that overruling a case is never appropriate....[T]he Supreme Court has always said that in some cases, overruling precedent is the right course for the Court to take. But that it's not done willy nilly."[56]

**Special Justification.** The third principle is that, as Justice Brett Kavanaugh recently explained, overruling a constitutional decision requires a "special justification"[57] or "strong grounds."[58] The Supreme Court has recognized certain factors or criteria for determining when those grounds exist, making reversal of a precedent the "right course for the Court to take."

## Rebutting the *Stare Decisis* Presumption

The presumption of *stare decisis*, as Justice David Souter explained at his 1990 confirmation hearing, is "a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-to-case basis."[59]

At three different levels, however, this presumption is not absolute.

- First, *stare decisis* is generally less dominant in civil law systems in which courts interpret and apply written law to decide cases.

- Second, within that system, *stare decisis* is a weaker presumption when the Supreme Court interprets the Constitution than when it interprets a statute.[60]

- Third, at the level of individual cases, "some precedents are weaker and some are stronger."[61]

The sheer volume of scholarship and analysis, including the recent publication of an 800-plus page treatise,[62] shows that no strict formula exists for the Supreme Court to determine whether to retain or reverse its

constitutional precedents. Rather, "[w]hen the Supreme Court decides to overrule a precedent, it applies what it calls the 'principles of *stare decisis*.'"[63] These principles, Souter explained, help address "the problem of trying to give a proper value to a given precedent when someone asks a court to overrule it and to go another way."[64]

Some commentators argue that the only relevant *stare decisis* principle is whether the precedent, as an original matter, correctly interpreted the Constitution.[65] For them, the distinction between the Constitution and constitutional law trumps every other consideration. In his concurring opinion in *Gamble v. United States*, Justice Clarence Thomas argued that "the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions...over the text of the Constitution and other duly enacted federal law."[66] Anything less than "adherence to the correct, original meaning of the laws we are charged with applying," he wrote, "invites arbitrariness into judging."[67]

The Court, however, has not gone that far. Instead, the "typical formulation of the *stare decisis* standard" requires "good reasons"[68] or a "special justification"[69] to overrule a constitutional precedent. The "threshold question," Souter explained, is "whether the prior case was wrong."[70] If it was, "then we look to a series of factors to try to decide how much value we ought to put on that precedent even though it is not one that we particularly like or would think appropriate in the first instance."[71] The fact that a prior decision incorrectly interpreted the Constitution, therefore, is a necessary but not a sufficient justification for the Court to overrule it.[72]

The Supreme Court commonly considers five "prudential and pragmatic" factors "when deciding whether to overrule a precedent interpreting the Constitution."[73] These are:

- the quality of the reasoning of the prior decision;
- the workability of the prior decision, or "whether the precedent's rules or standards are too difficult for lower federal courts or other interpreters to apply";
- whether the prior decision is inconsistent with related decisions;
- whether there is a changed understanding of relevant facts; and
- the reliance interests implicated by the prior decision.[74]

The first four of these factors focus on a precedent's merit and impact within the judicial system, while the fifth factor considers its impact outside of the judiciary. "The Supreme Court may consider whether it should *retain* a precedent, even if flawed, because overruling the decision would injure...[those] who had relied on it."[75] Reliance encompasses more than just courts relying on it to reach certain legal results, but also includes how governments, individuals, and other entities have relied on it to structure their real world dealings.[76]

A recent treatise authored by a group of federal judges, *The Law of Judicial Precedent*, provides a more detailed discussion of factors that the Supreme Court considers. Factors that counsel overruling a precedent include:

- that it "is contrary to plain principles of law";
- that it "hasn't been followed or acquiesced in," the "decision has been met with general dissatisfaction, protest, or severe criticism"; and
- that it "was wrong in the first place, it produces general injustice, and less harm will result from overruling the decision than from allowing it to stand."[77]

Conversely, factors leading the Court to retain a precedent include:

- that the decision "has stood unchallenged for many years";
- that the decision "has been universally accepted, acted on, and acquiesced in by courts, the legal profession, and the general public";
- that reliance "has been placed on the prior decision: contracts have been made, business transacted, and rights adjusted in reliance on the decision for a long time or to a great extent"; or
- that the "prior decision involved interpretation of a statute."[78]

Supreme Court nominees have also discussed factors that give precedents greater weight. Rehnquist, for example, said that "great weight should be given to precedent"[79] generally, but that a unanimous decision "makes a precedent stronger" than a 5–4 decision.[80] He also said that a decision that is "not only unanimous at the time it was handed down, but has been repeatedly reaffirmed" or has "stood for a long time" has greater precedential weight.[81]

## "Super" Precedents?

The idea that not all precedents are created equal applies to the distinction between constitutional and statutory interpretations, but does it also apply among constitutional precedents themselves? The descriptive label "super precedent," for example, has been used in several different ways to identify either the effect or the permanence of certain Supreme Court decisions. As Justice Barrett pointed out in her confirmation hearing, however, "it is not a doctrinal term that comes from the Supreme Court."[82] The term first appeared in a 1976 article examining the citation of precedents in judicial decisions.[83] The authors defined a "super precedent" as one "that it so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place."[84]

The label has also been used to describe a precedent's permanence, either because its validity as a precedent would never be challenged or because it would be invulnerable to such a challenge. Professor Michael Gerhardt, for example, defines a super precedent as a decision that "has been widely and uniformly accepted by public authorities generally, including the [Supreme] Court, the President, and Congress."[85] In other words, these are precedents that no one would challenge or, as Barrett has written, that "no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds."[86] Gerhardt argues that *Roe v. Wade* would not constitute a super precedent because of the "persistent condemnation of *Roe*, particularly by national political leaders."[87]

In her scholarship[88] and during her confirmation hearing, Barrett addressed the topic of super precedents in this context. A super precedent, she told the Judiciary Committee, is "so well established that it would be unthinkable that it would ever be overruled. And there are about six cases on this list that other scholars have identified."[89]

The label "super precedent" has also been applied to precedents that, while not "widely and uniformly accepted," are said to be virtually immune from reversal because they have repeatedly been reaffirmed.[90] This idea was first suggested by Judge J. Michael Luttig during the litigation in *Richmond Medical Center for Women v. Gilmore*,[91] which challenged a Virginia law prohibiting partial-birth abortions. The district court granted a preliminary injunction against the statute,[92] Judge Luttig stayed that injunction,[93] and a three-judge appeals court panel refused to vacate the stay. These decisions were made before the Supreme Court announced its decision in *Stenberg v. Carhart*,[94] which challenged Nebraska's ban on partial-birth abortions.

On the merits, the district court found the statute unconstitutional.[95] While that decision was pending before the Fourth Circuit, the Supreme Court issued its decision in *Stenberg*, finding Nebraska's statute unconstitutional. When the Fourth Circuit agreed to lift the stay on the injunction against the Virginia statute, Luttig agreed that it was "not sustainable" under *Stenberg*. He wrote: "I understand the Supreme Court to have intended its decision in Planned Parenthood v. Casey...to be a decision of super-stare decisis with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy."[96]

In *Casey*, the Supreme Court held that "the essential holding of Roe v. Wade should be retained and once again reaffirmed."[97] Luttig believed that the precedential status of *Roe v. Wade* was "not merely confirmed, but reinforced, by the Court's recent decision in Stenberg v. Carhart."[98] In *Stenberg*, citing *Roe* and *Casey*, the Supreme Court observed that "this Court...has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose....We shall not revisit those legal principles."[99]

In several confirmation hearings for Supreme Court nominees, some senators extended the argument that *Roe v. Wade* is a "super precedent" by multiplying the circumstances that they believe count as a reaffirmance of that precedent. During the 2005 hearing for Chief Justice John Roberts, for example, Judiciary Committee Chairman Arlen Specter (R–PA) claimed that "*Roe* [had] been taken up...with an opportunity for *Roe* to be overruled"[100] a total of 38 times. Each time the Supreme Court did not overrule *Roe*, Specter argued, counts as an actual "reaffirmation."[101] With so many reaffirmations, he said, *Roe* has "become a super-duper, or maybe even more, super-duper-duper [precedent]."[102] Specter made the same argument during the 2006 hearing for Justice Samuel Alito[103] and in the 2009 hearing for Justice Sonia Sotomayor.[104] In 2017, Senator Dianne Feinstein (D–CA) raised the issue during the hearing for Justice Neil Gorsuch.[105]

Senator Orrin Hatch (R–UT), who served on the Judiciary Committee during these hearings, examined the Specter/Feinstein argument, concluding that *Roe v. Wade* had actually been reaffirmed only three times.[106] The other cases on the Specter/Feinstein lists did not challenge abortion restrictions at all, never even cited *Roe*, applied it without discussing its validity, or explicitly declined to address *Roe*'s validity as a precedent.

While the term "super precedent" may have some descriptive utility, it is not a doctrinal or jurisprudential category. At his hearing, Alito declined to "get into categorizing precedents as super precedents or super duper precedents."[107] Similarly, Sotomayor said that "I don't use the word 'super.' I don't know how to take that word. All precedent of the Court is entitled

to the respect of the doctrine of *stare decisis*."[108] The better approach is to keep the factors that some say place certain precedents in a separate "super" category, such as reaffirmance, in their proper analytical place. Those factors are among several that the Supreme Court considers when evaluating the validity of its constitutional precedents.

## The *Stare Decisis* Rebuttable Presumption in Practice

The Supreme Court has applied the *stare decisis* factors in a variety of cases when deciding whether to retain or abandon its precedents. Dissenting Justices not only disagree about the result of applying these factors, but sometimes accuse the majority of even creating new *stare decisis* approaches to reach a preferred result. That said, the process of identifying, applying, and explaining the *stare decisis* analysis means that discretion may be less "arbitrary," a goal the Founders sought to achieve. This does not mean that the original decision was correct, or that its interpretation of the Constitution was valid. Nor does it mean that the result of that original decision, or of its reconsideration, will be conservative or liberal. The discussion that follows highlights some well-known decisions to demonstrate how the Supreme Court has applied the principles of *stare decisis*.

### The Precedents: Cases Establishing the "Dual Sovereignty" Doctrine

### The Decision: *Gamble v. United States*

### The Result: Reaffirmed

The Fifth Amendment to the U.S. Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Since the mid-19th century, the Supreme Court has held that "offense" means the violation of a law.[109] The same conduct, therefore, could violate the laws of two separate sovereigns, such as a state and the United States, and could be prosecuted twice. This came to be known as the "dual sovereignty doctrine."

When Terance Gamble, who had previously been convicted of being a felon in possession of a firearm under Alabama law,[110] faced federal prosecution for the same conduct,[111] he asked the Court to overrule the dual-sovereignty doctrine. In a 7–2 decision, the Court declined to do so.

In writing for the Court, Justice Alito said that "the doctrine of *stare decisis*

is another obstacle" to Gamble's argument.[112] He explained that *stare decisis* "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."[113] Effectively reversing an entire doctrinal category, Alito wrote, would require overruling numerous major decisions "spanning 170 years." Finally, neither the application of the Double Jeopardy Clause to the states nor the expansion of federal criminal law "washed away any theoretical foundation of the dual-sovereignty rule."[114]

## The Precedent: *Roe v. Wade*

## The Decision: *Planned Parenthood of Southeastern Pennsylvania v. Casey*

## The Result: "Essential Holding" Reaffirmed

This decision is an example not only of the Supreme Court applying the principles of *stare decisis*, but also how the Court may do so to reach a result other than simply affirming or overruling a precedent in its entirety.

In *Roe v. Wade*,[115] the plaintiffs challenged the constitutionality of a Texas law prohibiting abortion except to save the life of the mother. The U.S. District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment."[116] The U.S. Supreme Court voted 7–2 to also hold the law unconstitutional, but for a different reason. It held that, although the Constitution "does not explicitly mention any right of privacy...the Court has recognized that a right of personal privacy...does exist under the Constitution."[117] This right of privacy, which the Court said was "founded in the Fourteenth Amendment's concept of personal liberty,"[118] is "broad enough to cover the abortion decision" but "is not absolute and is subject to some limitations" so that "at some point the state interests as to protection of health, medical standards, and prenatal life, become paramount."[119]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[120] plaintiffs challenged the constitutionality of several provisions of the Pennsylvania Abortion Control Act. These provisions required that, prior to obtaining an abortion: (1) a woman's consent to an abortion had to be informed; (2) a minor had to obtain either consent from one of her parents or a judicial bypass order; and (3) a married woman had to attest that she had notified

her spouse. The only exception to compliance with these requirements was for abortions performed as a "medical emergency," provided that abortion facilities performing such abortions met certain reporting requirements.

In a controversial decision, the Supreme Court split three ways regarding the validity of *Roe v. Wade*. Justices O'Connor, Kennedy, and Souter authored what became known as the "joint opinion." They considered the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*" and concluded that the "essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[121]

This holding has three parts. First, women have a constitutional right "to choose to have an abortion before viability and to obtain it without undue interference from the State." Second, the government may restrict abortion after viability "if the law contains exceptions for pregnancies which endanger the woman's life or health." Third, the government has legitimate interests "from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[122]

Even though the *Casey* joint opinion said that it was reaffirming *Roe*'s essential holding, it bore little resemblance to that precedent. *Roe*, for example, split pregnancy into three parts for purposes of weighing the woman's abortion right against the government's interests; *Casey* divided pregnancy into two parts, pre- and post-viability. *Roe* left little room for the government to restrict abortion in the first trimester; *Casey* allowed pre-viability restrictions, which would include the first trimester, that did not impose an "undue burden."

Even though the joint opinion introduced the novel concept of "undue burden," it still claimed that it was "reaffirming the central holding of *Roe*." This conclusion was supposedly based on "the explication of individual liberty we have given combined with the force of *stare decisis*."[123] After discussing the general purpose for *stare decisis*, the joint opinion examined specific factors, such as:

- "[W]hether the rule has proven to be intolerable simply in defying practical workability."[124] They concluded: "Although *Roe* has engendered opposition, it has in no sense proven 'unworkable.'"[125]

- "[W]hether 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."[126] They concluded that overruling *Roe* "would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate

relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[127]

- "[W]hether related principles of law have so far developed as to have left the old rule not more than a remnant of abandoned doctrine."[128] They concluded: "No evolution of legal principle has left *Roe's* doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking."[129]

- "[W]hether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[130] While acknowledging that "time has overtaken some of *Roe*'s factual assumptions," they concluded that these facts "have no bearing on the validity of *Roe*'s central holding."[131]

Chief Justice Rehnquist, joined by Justices Byron White, Scalia, and Thomas, wrote that "*Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."[132] The joint opinion, they argued, had used a "a newly minted variation on *stare decisis*" to "retain[] the outer shell of *Roe v. Wade*."[133]

The Supreme Court's decisions in *Roe* and *Casey* remain highly controversial—both on their own and in relation to each other. Significantly, whether a constitutional precedent continues to be criticized is one of the factors relevant to its validity. Cases continue to be filed seeking their reversal or challenging their legal underpinnings.[134]

### The Precedent: *Bowers v. Hardwick*

### The Decision: *Lawrence v. Texas*

### The Result: Overruled

While the prior two cases examined instances in which the Supreme Court applied the principles of *stare decisis* to retain its prior decisions, it sometimes applies the principles and comes to the conclusion that its prior precedents should be overruled. While the Supreme Court's constitutional

precedents are entitled to a presumption of validity, "some of the most important [or consequential] Supreme Court decisions in U.S. history were those in which the Court overruled or departed from one of its precedents."[135]

In *Bowers v. Hardwick*,[136] the Supreme Court voted 5–4 to uphold the constitutionality of a Georgia statute criminalizing sodomy. The U.S. Court of Appeals for the Eleventh Circuit held that the statute violated the "fundamental" right to "private and intimate association" protected by the Ninth and Fourteenth Amendments.[137] The Supreme Court said the issue was whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[138]

Writing for the Court, Justice White concluded that none of its cases recognizing a right to personal privacy "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[139] The Court refused to expand the right to privacy further because it did not meet either of the two tests for identifying unenumerated fundamental rights. It was neither "implicit in the concept of ordered liberty"[140] nor "deeply rooted in this Nation's history and tradition."[141]

In *Lawrence v. Texas,*[142] two men prosecuted for engaging in private consensual homosexual activity challenged the Texas statute under the Equal Protection Clause of the U.S. and Texas Constitutions. The Texas Court of Appeals, applying *Bowers v. Hardwick*, rejected the constitutional challenge and affirmed the convictions. Justice Anthony Kennedy wrote the majority opinion for the Court, which voted 5–4 to reverse. His analysis showed how the principles of stare decisis, while offering some guidance, can nonetheless be manipulated to reach a desired result.

While the Court in *Bowers* viewed the right to privacy as confined to the factual context of the precedents recognizing it, for example, the Court in *Lawrence* treated those decisions as a floor rather than a ceiling. As a result, the Court viewed *Bowers* as an outlier from its previous decisions that expanded the "substantive reach of liberty under the Due Process Clause" of the Fourteenth Amendment.[143]

Looking more specifically at the *stare decisis* factors, Kennedy concluded that factual circumstances had changed since the Court decided *Bowers* by narrowing his frame of reference. While *Bowers* relied on broad statements about historical condemnation of homosexual activity, Kennedy focused on "our laws and traditions in the past half century," which show an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[144] The number of states with anti-sodomy laws declined from 50 before 1961, to 25 at the time *Bowers* was decided in 1986, to 13 when the Court decided *Lawrence* in 2003.

While Kennedy narrowed his focus when examining whether factual circumstances had changed, he broadened the focus when considering how principles of law had developed since *Bowers*. Specifically, he asserted that the "foundations of *Bowers* have sustained serious erosion from our recent decisions in" *Planned Parenthood v. Casey* and *Romer v. Evans*.[145] *Casey*, of course, involved abortion, and *Romer* was decided on equal protection grounds. *Bowers*, in contrast, involved sodomy and was decided on due process grounds.

Kennedy was in the plurality of Justices authoring the joint opinion in *Casey*, which emphasized reliance interests to justify upholding at least the "central holding" of *Roe*. In *Bowers*, however, Kennedy dismissed those concerns. "Indeed," he wrote, "there has been no individual or social reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so."[146] In short, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[147]

As they did in their *Casey* dissent, Justice Scalia, joined by Chief Justice William Rehnquist and Justice Thomas, accused the majority of employing a contrived version of stare decisis, writing that "we should be consistent rather than manipulative in invoking the doctrine."[148] They argued that the same *stare decisis* factors that the Court used to reaffirm the "essential holding" of *Roe* would counsel similarly reaffirming *Bowers*. In *Casey*, for example, the widespread criticism of *Roe* was a strong reason to *reaffirm* it, while in *Lawrence*, "the widespread opposition to *Bowers*" was a reason to *overrule* it.[149]

## The Precedents: *Johnson v. Louisiana* and *Apodaca v. Oregon*

## The Decision: *Ramos v. Louisiana*

## The Result: *Overruled*

In a pair of 1972 decisions, the Supreme Court addressed whether the Constitution requires a unanimous jury verdict to convict someone of a serious criminal offense. In these cases, the appellants argued that unanimity is necessary to apply the requirement of proof beyond a reasonable doubt. In *Johnson v. Louisiana*,[150] a jury voted 9–3 to convict the defendant of armed robbery. The Supreme Court held that, while the Fourteenth Amendment

had been interpreted to require proof beyond a reasonable doubt,[151] this standard applies to the majority that convicts and does not, by itself, require unanimity. Justice Byron White wrote that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt."[152]

In *Apodaca v. Oregon*,[153] juries convicted three men of serious crimes by votes of 11–1 in two cases and 10–2 in another. Writing for himself and three other members of the Court, Justice White focused on "the function served by the jury in contemporary society."[154] The Court held that, unlike the Fourteenth Amendment's due process clause, the Sixth Amendment does not require proof beyond a reasonable doubt for a criminal conviction and, therefore, does not require unanimity.[155]

This issue returned to the Supreme Court during the 2019–2020 term. In *Ramos v. Louisiana,* a jury voted 10–2 to convict Evangelisto Ramos of a serious crime, and he was sentenced to life in prison without the possibility of parole.[156] By a 6–3 vote, the Supreme Court overturned Ramos' conviction and reversed both *Johnson v. Louisiana* and *Apodaca v. Oregon*.

Justice Neil Gorsuch applied the principles of *stare decisis*, starting with the view that those precedents were "gravely mistaken" and noting that "no Member of the Court today defends either as rightly decided."[157] *Apodaca*'s reasoning was flawed, he explained, because "the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right."[158] Not only was *Apodaca* inconsistent with "120 years of preceding case law," but its status as a jurisprudential outlier was magnified by later developments.[159] These include the Court rejecting what was arguably the foundation of Justice Lewis Powell's deciding vote in *Apodaca*.

Looking at reliance interests, Gorsuch observed that "neither *Louisiana* nor *Oregon* claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke.... Nor does anyone suggest that nonunanimous verdicts have 'become part of our national culture.' It would be quite surprising if they had," he wrote, "given that nonunanimous verdicts are insufficient to convict in 48 States and federal court."[160]

Like the dissenters in *Casey* and *Lawrence*, the dissenting Justices in *Ramos* accused the majority of changing the doctrine of *stare decisis* itself. Joined by Chief Justice Roberts and Justice Elana Kagan, Justice Alito wrote: "The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered."[161]

In a concurring opinion, Justice Brett Kavanaugh explained his concern that "the Court has articulated and applied those various individual [*stare decisis*] factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together."[162] Kavanaugh offered an approach that would organize the *stare decisis* factors into "three broad considerations."[163] First, "is the prior decision not just wrong, but grievously or egregiously wrong?" Second, "has the prior decision caused significant negative jurisprudential or real-world consequences?" And third, "would overruling the prior decision unduly upset reliance interests?"[164] Applying those broad categories, he agreed with the majority's decision to overrule these two precedents.

## The Precedent: *Plessy v. Ferguson*

## The Decision: *Brown v. Board of Education*

## The Result: *De Facto* Overruled

The discussion of *Casey* noted that the Supreme Court's reconsideration of a precedent may not always result in a direct reaffirmance or reversal. In *Casey*, the Court said it was reaffirming the "essential holding" of *Roe v. Wade*. The Court had previously reaffirmed the "general principles laid down in *Roe*."[165] Another variation includes decisions that can be described as reaffirming or overruling a precedent in practice without the Court explicitly using certain words or phrases.

In *Plessy v. Ferguson*,[166] the Supreme Court held that a Louisiana law providing for "equal but separate accommodations for the white and colored races" on passenger trains did not violate the Fourteenth Amendment's equal protection clause.[167] Justice Henry Brown, for the eight-Justice majority, wrote that a statute "which implies merely a legal distinction" based on race "has no tendency to destroy the legal equality" of the races.[168]

In *Brown v. Board of Education*,[169] the Court addressed whether this "separate but equal" doctrine permitted states to segregate public school students on the basis of race. While not using phrases such as "principles of stare decisis," the Court applied the same basic analysis to conclude unanimously that "[s]eparate education facilities are inherently unequal."[170]

The Court noted that the "separate but equal" doctrine had emerged not only recently, but in the context of transportation rather than public education.[171] The Court had considered six cases since *Plessy* "involving

the 'separate but equal' doctrine in the field of public education," but had not re-examined that precedent. Instead, in one of those cases, "the Court had expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education."[172] The Court also explained how *Plessy* itself was inconsistent with prior caselaw, which had interpreted the Fourteenth Amendment as "proscribing all state-imposed discriminations" based on race[173] against a particular race.[174] It also discussed the changed circumstances surrounding public education since *Plessy*.[175]

### The Precedent: *Abood v. Detroit Board of Education*

### The Decision: *Janus v. Am. Fed. of State, Cnty., and Mun. Employees, Council 31*

### The Result: Overruled

Can employees be forced to subsidize organizations and speech promoting political views or policy positions with which they disagree? In 1977, the Supreme Court held in *Abood v. Detroit Board of Education*[176] that public sector employees who are not union members may be charged a fee to subsidize union activities that are "germane to [the union's] duties as collective-bargaining representative."[177] That fee could not, however, be imposed to pay for the union's political or ideological activities. The Court said that such a fee arrangement does not violate the First Amendment.

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[178] an Illinois public sector employee challenged a similar fee arrangement. This time, the Supreme Court concluded that it did violate the First Amendment and overruled *Abood*.

Justice Alito, writing for the majority in *Janus*, recognized that "our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood* ‹s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*."[179]

## The Precedent: *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*

## The Decision: *Knick v. Township of Scott, Pennsylvania*

## The Result: Overruled

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, a jury found that actions by a county planning commission amounted to a Fifth Amendment taking and awarded damages to a landowner. The Supreme Court, however, held that the lawsuit had been premature. "[A] property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law."[180]

The Supreme Court revisited this issue in *Knick v. Township of Scott, Pennsylvania*.[181] In this case, a property owner whose land included a small cemetery challenged in state court an ordinance requiring that cemeteries be open to the public. In a seeming catch-22, the township agreed to stay its enforcement action during the court proceedings, but the court stayed its proceedings because there was no active enforcement action by the township. When Knick filed a federal lawsuit, the U.S. District Court said that *Williamson* required that she first seek compensation in state court.

In a 5–4 decision, the Supreme Court concluded that this "state litigation" requirement significantly undermined the Fifth Amendment's protection of the right to own property. Writing for the majority, Chief Justice Roberts said that "the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled."[182] A property owner, the Court held, "acquires a Fifth Amendment right to compensation at the time of a taking.[183]

In reaching this decision, the Chief Justice said, that the Court has "identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions ... and reliance on the decision.'... All of these factors counsel in favor of overruling *Williamson County*."[184] That precedent "was not just wrong. Its reasoning

was exceptionally ill founded and conflicted with much of our takings jurisprudence."[185] Because of its "shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years."[186]

## Conclusion

This *Legal Memorandum* has examined how *stare decisis*, or the practice of a court following its previous decisions, operates in the context of Supreme Court decisions that interpret the Constitution. In general, *stare decisis* is "the norm"[187] and an important part of the American judicial system because it limits judicial discretion and promotes stability, consistency, and predictability. For these reasons, it is a presumption that the Supreme Court will follow its constitutional precedents.

This presumption, however, can be rebutted. Precedents are generally less binding in a civil law system, in which interpretations of written law are distinct from the law itself. Past decisions interpreting the Constitution are less binding, or have less precedential weight, than those interpreting statutes. And various factors can make some precedents stronger than others. The Supreme Court applies those factors when it considers overruling a precedent and has reaffirmed or overruled the whole of some past decisions and only part, or the "essence," of others. It has overruled some precedents explicitly and others implicitly.

The existence of "principles of *stare decisis*" does not suggest a strict formula for determining whether a precedent should be retained or abandoned. The need to use them and explain their application, however, can serve to reduce the "arbitrary discretion" that the Founders sought to prevent.

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## Endnotes

1. Timothy Oyen, *Stare Decisis*, Legal Information Institute, https://www.law.cornell.edu/wex/stare_decisis (last visited October 25, 2020).
2. Black's Law Dictionary Online (11th ed. 2019). A judicial precedent is "a decided case that furnishes a basis for determining later cases involving similar facts or issues." *Id*.
3. Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 494 (1987). In his January 2006 confirmation hearing, Justice Samuel Alito called *stare decisis* "very important" and "a fundamental part of our legal system." Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 109th Congress, 2nd Session, S.Hrg. 109–277, at 318. At his hearing a dozen years earlier, Justice Stephen Breyer similarly said that "stare decisis is very important to the law." Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States, Hearings before the Committee on the Judiciary, United States Senate, 103rd Congress, 2nd Session, S.Hrg. 103–715, at 291.
4. See Bryan A. Garner et al., The Law of Judicial Precedent (2016).
5. Nominations of William H. Rehnquist and Lewis F. Powell, Jr., to be Associate Justices of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 92nd Congress, 1st Session, S.Hrg. 1–492.
6. Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 115th Congress, 1st Session, S.Hrg. 115–208.
7. Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 103rd Congress, 1st Session, S.Hrg. 103–482, at 323.
8. Nomination of Neil M. Gorsuch, *supra* note 6, at 325.
9. 561 U.S. 742 (2010).
10. Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 111th Congress, 2nd Session, S.Hrg. 111–1044, at 165.
11. *Id.*
12. *Id.* at 92; see also Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010).
13. Nomination of Antonin Scalia to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 99th Congress, 2nd Session, S.Hrg. 99–1964, at 37.
14. *Id*.
15. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1712 (2013) [hereinafter Barrett, *Precedent*].
16. *Id*.
17. *Id.* See also George Costello, Cong. Rsch. Serv., RL33172, The Supreme Court's Overruling of Constitutional Precedent: An Overview, at 1 (November 29, 2005) ("the law of *stare of decisis* in constitutional decision making has been called amorphous and manipulable, and has been criticized as incoherent.").
18. See Helvering v. Hallock, 309 U.S. 109, 119 (1940) ("*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.").
19. Nominations of William H. Rehnquist and Lewis F. Powell, Jr., *supra* note 5, at 56 (Rehnquist), 219 (Powell) ("there is normally a strong presumption in favor of established precedent").
20. Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 111th Congress, 1st Session, S.Hrg. at 96; see also Nomination of Samuel A. Alito, Jr., *supra* note 3, at 319 ("...it is a general presumption that courts are going to follow prior precedents").
21. Nomination of Sandra Day O'Connor to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 97th Congress, 1st Session, S. Hrg. at 83.
22. The Federalist No. 51 (James Madison).
23. The Federalist No. 78 (Alexander Hamilton).
24. U.S. Const., art. VI.
25. 2 The Works of James Wilson 384 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).
26. 5 U.S. 137 (1803).
27. *Id*. at 176.
28. *Id*. at 179–80. For more on the Founders' design for the exercise of judicial power, see Thomas Jipping, *"Whatever Means Necessary": Weaponizing the Judicial Confirmation Process*, Heritage Found. Legal Memorandum No.266, at 2–4 (June 11, 2020), https://www.heritage.org/courts/report/whatever-means-necessary-weaponizing-the-judicial-confirmation-process.

29. The Federalist No. 78 (Alexander Hamilton).
30. *Id.*
31. Nomination of Samuel A. Alito, Jr., *supra* note 3 at 318. During Justice Anthony Kennedy's 1987 confirmation hearing, Chairman Joe Biden (D–DE) asked questions "about how the doctrine of precedent restrains the exercise of power by the Supreme Court in particular." *See* Nomination of Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 100th Congress, 1st Session, S. Hrg. at 24.
32. Garner et al., *supra* note 4, at 10; see also Costello, *supra* note 17, at 2 ("Adherence to precedent is a fundamental principle of jurisprudence that promotes certainty in the law and uniformity in the treatment of litigants, and thereby prevents arbitrariness.").
33. Payne v. Tennessee, 501 U.S. 808,827 (1991); see also Garner et al., *supra* note 4, at 10 ("[B]y seeking to ensure some consistency in outcomes among decision-makers, the doctrine of precedent may simultaneously promote respect for the judiciary as a neutral source.").
34. Nomination of John G. Roberts, Jr., to be the Chief Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 109th Congress, 1st Session, S. Hrg. at 141–42; see also Kimble v. Marvel Enterprises, 576 U.S. 446 (2015).
35. Nomination of Sandra Day O'Connor, *supra* note 21, at 83; see also *id.* at 252 ("The doctrine of stare decisis is a very significant and important one for the judicial system" and a "very basic concept" because "to give predictability and stability to the law, an effort so that the public generally and other judges can be guided by the knowledge that the law in a certain area has been decided. Indeed, as one previous famous judge has indicated, sometimes it is better that the law be decided than that it be decided correctly").
36. Michael Sinclair, *Precedent, Super-Precedent*, 14 Geo. Mason L. Rev. 363, 369 (2007).
37. Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924); see also Burnet v. Coronado Oil & Gas Co, 285 U.S. 393, 405 (1932) (subsequent history omitted); *Payne*, 501 U.S. at 828.
38. Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, The Tanner Lectures on Human Values, March 8 and 9, 1995, at 84, https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf (last visited December 17, 2020).
39. *Id*. at 83.
40. *Id*. at 88.
41. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J. concurring).
42. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).
43. *Id*.
44. *Id*.
45. Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 1 (1896).
46. Graves v. O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J. concurring).
47. William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).
48. Edwin Meese III, *The Law of the Constitution: A Bicentennial Lecture,* Paper Presented at the Citizen's Forum on the Bicentennial of the Constitution (1986), *available at* https://files.eric.ed.gov/fulltext/ED278586.pdf (last visited December 17, 2020).
49. *Id*. at 4.
50. *Id*. at 5.
51. *Id*. at 6.
52. Stephen Carter, *The Courts Are Not the Constitution*, Wall St. J., Feb. 7, 1989, *reprinted in* John Brewer, Who Speaks for the Constitution? The Debate Over Interpretive Authority 28 (1992).
53. Garner et al., *supra* note 4, at 23 (2016).
54. Nomination of William H. Rehnquist to be Chief Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 99th Congress, 2nd Session, S.Hrg. at 133 ("when you are talking about construing a provision of the Constitution where Congress cannot come back and change it if it feels the Court has made a mistake, then there is more latitude for overruling precedent."); see also Garner et al., *supra* note 4, at 352 (stating that the "doctrine of stare decisis applies less rigidly in constitutional cases than it does in statutory cases because the correction of an erroneous constitutional decision by the legislature is well-nigh impossible....").
55. Burnet, 285 U.S. at 406–07 (subsequent history omitted); see also Costello, *supra* note 17, at 2 (the Supreme Court "is less reluctant to overrule a decision that involves constitutional interpretation rather than interpretation of a statute."); see also Nomination of Elena Kagan, *supra* note 10, at 211 (explaining her view that "it is a longstanding principle, a very well accepted one" that stare decisis plays a less important role with regards to constitutional decisions). "In fact, in the history of the United States, only five Supreme Court precedents have been overturned through constitutional amendment." Brandon J. Murrill, Cong. Rsch.Serv., R45319, The Supreme Court's Overruling of Constitutional Precedent at 54, n. 54 (2018).

56. Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 116th Congress, 2nd Session (unofficial transcription) *available at* https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-3-transcript (last visited December 17, 2020); see also Nomination of Antonin Scalia, *supra* note 13, at 37 ("I will not say that I will never overrule a prior Supreme Court precedent.").
57. Ramos v. Louisiana, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J. concurring in part) (citations omitted).
58. *Id*. at 1415 (citations omitted).
59. Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, United States Senate, 101st Congress, 2nd Session. S.Hrg. 101–1263, at 67.
60. See Garner et al., *supra* note 4, at 352 (stating that the "doctrine of stare decisis applies less rigidly in constitutional cases than it does in statutory cases because the correction of an erroneous constitutional decision by the legislature is well-nigh impossible…."); *Kimble*, 135 S.Ct. at 2418 (Alito, J., dissenting) ("We do not give super-duper protection for decisions that do not actually interpret a statute.").
61. Nomination of Antonin Scalia, *supra* note 13, at 38 (Scalia agreeing with Kennedy).
62. Garner et al., *supra* note 4.
63. Orrin G. *Hatch, There's Nothing "Super" About* Roe v. Wade, 29 Stan. L. & Pol'y Rev. Online 4, 6 (Feb. 22, 2018).
64. Nomination of David H. Souter, *supra* note 59, at 67.
65. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23, 25–28 (1994).
66. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J. concurring).
67. *Id*. Justice Antonin Scalia called himself a "faint-hearted originalist." *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989).
68. Johnson v. United States, 135 S.Ct. 2551, 2575 (2015).
69. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). During her hearing, Justice Barrett agreed with the proposition, raised by Senator Patrick Leahy (D–VT), that overruling a precedent requires a "special justification over or above the belief that the precedent was wrongly decided." *See* Nomination of Amy Coney Barrett, *supra* note 56.
70. Nomination of David H. Souter, *supra* note 59, at 67.
71. *Id*.
72. See Nomination of Ruth Bader Ginsburg, *supra* note 7, at 197 ("the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough."). See also Nomination of Amy Coney Barrett, *supra* note 56. ("the inquiry begins because there's been some argument that the precedent was wrong. But that's not enough to justify an overruling.").
73. Murrill, *supra* note 55.
74. *Id.*
75. *Id.*
76. See, e.g., Nomination of Samuel A. Alito, Jr., *supra* note 3, at 318–19 (stating that "People can rely on decisions in a variety of ways" and discussing various types of reliance interests).
77. Garner et al., *supra* note 4, at 396.
78. *Id.* at 404.
79. Nominations of William H. Rehnquist and Lewis F. Powell, Jr., *supra* note 5, at 19 (Rehnquist).
80. *Id.*
81. Nominations of William H. Rehnquist and Lewis F. Powell, Jr., *supra* note 5, at 55 (Rehnquist), 220 (Powell) ("generally the longer a case has existed, the more frequently it has been cited and relied upon, the stronger the presumption against overruling it inevitably becomes"). Rehnquist reaffirmed this view during his confirmation hearings to be Chief Justice. *See* Nomination of William H. Rehnquist, *supra* note 54, at 280.
82. Nomination of Amy Coney Barrett, *supra* note 56.
83. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & Econ. 249 (1976).
84. *Id*. at 251.
85. Michael Gerhardt, *The Irrepressibility of Precedent*, 86 N. C. L. Rev. 1279, 1293 (2008). Elsewhere, Gerhardt describes superprecedents that establish "foundational institutional practices" such as judicial review, "foundational doctrine" such as rendering "political questions" nonjusticiable, and "foundational decisions" on specific questions of constitutional law such as *Brown v. Board of Education*, 347 U.S. 483 (1954), or *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See Michael Gerhardt, *Super Precedent*, 80 Minn. L. Rev. 1204 (2006).
86. Barrett, *Precedent*, *supra* note 15, at 1734.

87. Gerhardt, *Super Precedent*, *supra* note 85, at 1220.
88. See, e.g., Barrett, *Precedent*, *supra* note 15, at 1734–37 (2013).
89. Nomination of Amy Coney Barrett, *supra* note 56. Later in the hearing, Barrett responded to a question by Senator Amy Klobuchar (D–MN) by saying that a super precedent is one that is "so widely established and agreed upon by everyone [that] calls for its overruling simply don't exist." *Id.*
90. For a thorough analysis of this use of "super precedent," see Hatch, *Nothing Super*, *supra* note 61.
91. 219 F.3d 376 (4th Cir. 2000).
92. Richmond Medical Center for Women v. Gilmore, 11 F.Supp.2d 795 (E.D. Virginia 1998).
93. Richmond Medical Center for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998).
94. 530 U.S. 914 (2000).
95. Richmond Medical Center for Women v. Gilmore, 55 F.Supp.2d 442 (E.D. Virginia 1999).
96. Richmond Medical Center for Women v. Gilmore, 219 F.3d 376, 377 (4th Cir. 2000).
97. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).
98. *Id.*
99. Stenberg v. Carhart, 530 U.S. 914, 920 (2000).
100. Nomination of John G. Roberts, Jr., *supra* note 34, at 141–49.
101. *Id.*
102. *Id.*
103. Nomination of Samuel A. Alito, Jr., *supra* note 3, at 317–26.
104. Nomination of Sonia Sotomayor, *supra* note 20, at 373–412.
105. Nomination of Neil M. Gorsuch, *supra* note 6.
106. See Planned Parenthood v. Casey, 505 U.S. 833,855 (1992) (it is "imperative to adhere to the essence of *Roe*'s original decision, and we do so today."); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747,759 (1986) ("we reaffirm the general principles laid down in *Roe* and *Akron*."); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983) ("We…reaffirm *Roe v. Wade*.").
107. Nomination of Samuel A. Alito, Jr., *supra* note 3, at 321.
108. Nomination of Sonia Sotomayor, *supra* note 20, at 376.
109. See Moore v. Illinois, 14 How. 13, 1 (1852).
110. See Gamble, 139 S.Ct. at 1964 (citing Ala. Code § 13A–11–72(a)(2015)).
111. *Id*. at 1964 (citing 18 U.S.C. § 922 (g)(1)).
112. *Id*. at 1969 (2019).
113. *Id*. (citations omitted).
114. *Id.* at 1979 (citations omitted). Justice Gorsuch applied the stare decisis factors but came to a different conclusion. See *id*. at 2005–06 (Gorsuch, J. dissenting).
115. 410 U.S. 113 (1973).
116. 314 F.Supp. 1217, 1225 (N.D. Texas 1970).
117. 410 U.S. at 153.
118. *Id*. at 154.
119. *Id*. at 155.
120. 505 U.S. 833 (1992).
121. *Casey*, 505 U.S. at 845-46.
122. *Id.* at 846.
123. *Id.* at 853.
124. *Id.* at 854 (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).
125. *Id.* at 855.
126. *Id. at* 854–55 (citing, for example, United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924)).
127. *Id.* at 856.

128. *Id.* at 855 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989).
129. *Id.* at 857.
130. *Id.* at 855 (citing, for example, Burnet, 285 U.S. at 412 (Brandeis, J. dissenting)).
131. *Id.* at 860.
132. *Id.* at 944 (Rehnquist, C.J. concurring in part and dissenting in part).
133. *Id.*
134. See, e.g., Ed Whelan, *Best Opportunity the Supreme Court Will Ever Have to Overturn* Roe, Bench Memos, National Review, (Nov. 9, 2020), *available at* https://www.nationalreview.com/bench-memos/best-opportunity-the-supreme-court-will-ever-have-to-overturn-roe/ (last visited December 17, 2020); Joe Palazzolo and Nicole Hong, *Abortion Foes to Take New Aim at* Roe v. Wade, The Wall Street Journal (June 29, 2018, 10:11 AM ET), *available at https://www.wsj.com/articles/abortion-foes-to-take-new-aim-at-roe-v-wade-1530223760* (last visited December 17, 2020). Of course, the criticism of *Roe* and its rationale was not limited to the conservatives. See, e.g., Alisha Haridasani Gupta, *Why Ruth Bader Ginsburg Wasn't All That Fond of* Roe v. Wade, N.Y. Times (Updated Oct. 21, 2020), https://www.nytimes.com/2020/09/21/us/ruth-bader-ginsburg-roe-v-wade.html (last visited December 17, 2020); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973); Benjamin Wittes, *Letting Go of* Roe, The Atlantic (Jan./Feb. 2005), https://www.theatlantic.com/magazine/archive/2005/01/letting-go-of-roe/303695/ (last visited December 17, 2020).
135. Garner et al., *supra* note 4, at 36 (citing Brown v. Board of Education, 347 U.S. 483 (1954); West Virginia State Board of Education v. Barnette (1943); Mapp v. Ohio, 367 U.S. 643 (1961); Lawrence v. Texas (539 U.S. 558 (2003)); see also Nomination of Neil Gorsuch, *supra* note 6, at 210–212 (stating that "*Brown v. Board of Education* corrected an erroneous decision, a badly erroneous decision, and vindicated a dissent by the first Justice Harlan in *Plessy v. Ferguson*, where he correctly identified that separate to advantage one race can never be equal.").
136. 478 U.S. 186 (1986).
137. *Id.* at 189.
138. *Id.* at 190.
139. *Id.* at 203.
140. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
141. Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).
142. 539 U.S. 558 (2003).
143. *Lawrence*, 593 U.S. at 564 (citing Pierce v. Society of Sister, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); and Griswold v. Connecticut, 381 U.S. 479 (1965)); see also *id.* at 565–66 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services Int'l, 431 U.S. 678 (1977)).
144. *Lawrence*, 593 U.S. at 571–72.
145. *Id.* at 575. In *Romer*, 517 U.S. 620 (1996), the Supreme Court held that a Colorado law preventing any governmental entities from recognizing sexual orientation as a protected status lacked any rational basis and violated the Equal Protection Clause of the U.S. Constitution. This remains a controversial decision.
146. *Id.* at 577.
147. *Id.* at 578.
148. *Id.* at 587 (Scalia, J. dissenting).
149. *Id.* at 586–88 (Scalia, J. dissenting). *Lawrence* was not only controversial on its own merits, but also contributed to other innovative—and heavily criticized—constitutional interpretations. The Court, for example, later invoked *Lawrence*, at least in part, as a basis for its decisions in *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), recognizing a constitutional right for same-sex couples to marry. See, e.g., Andrew Chung, *U.S. Supreme Court Conservatives Revive Criticism of Gay Marriage Ruling*, Reuters (Oct. 5, 2020, 1:28 PM), https://www.reuters.com/article/us-usa-court-gaymarriage/u-s-supreme-court-conservatives-revive-criticism-of-gay-marriage-ruling-idUSKBN26Q2N9 (last visited December 17, 2020).
150. 406 U.S. 356 (1972).
151. See *In re* Winship, 397 U.S. 358 (1968).
152. *Id*. at 360.
153. 406 U.S. 404 (1972).
154. *Id*. at 410.
155. *Id*. at 412.
156. *Ramos*, 140 S. Ct. at 1394.
157. *Id.*

158. *Id*. at 1405.
159. *Id.*
160. *Id.* at 1406–07 (citations omitted).
161. *Id.* at 1425 (2020) (Alito, J. dissenting).
162. *Id.* at 1414–25 (Kavanaugh, J. concurring).
163. *Id.*
164. *Id.*
165. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).
166. 163 U.S. 537 (1896).
167. *Id*. at 541.
168. *Id*. at 542.
169. 347 U.S. 483 (1954).
170. *Id*. at 495.
171. *Id.* at 491.
172. *Id.* at 491–92.
173. *Id*. at 491.
174. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), Justice Sonya Sotomayor likened the majority's reasoning, which upheld the Trump administration's so-called "travel ban," to that in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld President Franklin D. Roosevelt's decision to intern Japanese Americans in camps during World War II. While the Court had never explicitly overruled *Korematsu*, it had often treated that precedent as defunct. Sotomayor's dissent prompted a terse reply from Chief Justice Roberts, who wrote the majority opinion. "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious. *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Trump v. Hawaii*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J. dissenting)).
175. *Id.*at 491–95.
176. 431 U.S. 209 (1977).
177. *Id*. at 235.
178. 138 S. Ct. 2448 (2018).
179. *Janus*, 138 S. Ct. at 2478-79.
180. *Knick,* 139 S. Ct. at 2167 (citation omitted).
181. 139 S. Ct. 2162 (2019).
182. *Id.*
183. *Id*. at 2178.
184. *Id.*(citing *Janus,* 138 S. Ct. at 2478).
185. *Id*.
186. *Id*. Roberts also explained how the state-litigation requirement is "unworkable in practice" and resulted in no reliance interests. *Id*. Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. While she accused the majority of "transgress[ing] all usual principles of *stare decisis*," she focused, however, primarily on defending the merits of *Williamson County*. *Id*. at 2181 (Kagan, J. dissenting).
187. *Ramos*, 140 S.Ct. 1413 (Kavanaugh, J. concurring).