INTRAGENERATIONAL CONSTITUTIONAL OVERRULING

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Introduction

The oral argument over affirmative action in *Fisher v. University of Texas*[1] began with a question of Fisher's standing, but after a few brief exchanges, Justice Stephen Breyer changed the subject to the potential overruling of *Grutter v. Bollinger*[2]: Was Fisher asking that *Grutter* be overruled? Justice Breyer explained that *Grutter* said affirmative action would last for twenty-five years and "I know that time flies, but I think only nine of those years have passed."[3] *Grutter* was not from another era and had engaged the Court's "thought and effort," so why overrule it?[4] Fisher's counsel understood the question and disclaimed any interest in "chang[ing] the Court's disposition of the issue in *Grutter*."[5]

This Article seeks to shed some light on a comparatively rare, but important issue in constitutional jurisprudence: Under what circumstances does the Supreme Court formally overrule one of its own significant constitutional precedents within the same judicial generation as the announcement of the precedent? This phenomenon is one part of the broader role of precedent and stare decisis in fashioning and maintaining constitutional law—albeit in part because of the modifier "significant"—there are a limited number of such cases (some three dozen where the overruled case was decided after the introduction of President Franklin Roosevelt's Court-packing plan, roughly once every other term). All of the cases contain at least one Justice (and typically more) who participated in the overruled case. Therefore, we can observe the willingness, if any, of Justices to change their minds in situations

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1 133 S. Ct. 2411 (2013).

2 539 U.S. 306 (2003).

3 Transcript of Oral Argument at 8, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

4 *Id.*

5 *Id.*

where formal adherence to stare decisis would counsel them not to. We can also see if the Justices' views on stare decisis and overruling have changed over time.

I. *CASEY*

Today, the formal legal standard governing the decision to overrule is embodied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[6] By the early 1990s, *Roe v. Wade*[7] had been under increasing assault at the Supreme Court for a decade,[8] so with the confirmation of Justice Clarence Thomas both pro-choice and pro-life activists believed that *Roe* would soon be overruled by either a six-to-three or five-to-four vote.[9] Instead, in *Casey*, the Court created a newly minted version of *Roe*, then saved that version by overruling two post-*Roe* decisions,[10] all the while offering the modern era's most detailed explanation of when the values of stare decisis should yield to the demands to overrule.[11]

The *Casey* Court asserted that four alternative pragmatic considerations go into deciding whether to overrule. First, has the rule of the prior case proven unworkable?[12] Second, has there been such reliance on the rule that overturning it would work hardship on affected parties?[13] Third, has the rule been eroded by subsequent developments in the law?[14] Fourth, have

6 505 U.S. 833 (1992).

7 410 U.S. 113 (1973).

8 Rust v. Sullivan, 500 U.S. 173 (1991) (upholding, five to four, over First Amendment objections a requirement that forbade any person engaged in federally funded pregnancy counseling from mentioning the possibility of an abortion or providing a referral to someone who would); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (holding constitutional, five to four, a requirement that physicians perform a test to determine viability, but also, five to four, refusing to overrule *Roe*); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating, six to three, a statute requiring use of abortion procedure that provides the most protection of the life of the fetus in a post-viability abortion); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (holding, six to three, requirements that second trimester abortions be performed in hospitals, that women be informed about the consequences of abortion, and that a twenty-four hour waiting period prior to an abortion all are violations of *Roe*).

9 LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 307 (2009).

10 *Thornburgh*, 476 U.S. at 747; *City of Akron*, 462 U.S. at 416.

11 For the prior era, Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410–11 (1932), was the leading authority as illustrated by a student note. Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990) (trying, just two years before *Casey*, to improve on the arguments in the then-current *Webster* decision). In another student note, William Rehnquist's son devoted several pages to Brandeis's *Burnet* opinion. James C. Rehnquist, Note, *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 350–53 (1986). On this Note, see *infra* note 40.

12 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

13 *Id.*

14 *Id.*

the underlying facts changed or come to be seen differently so as to rob the rule of justification?[15]

The *Casey* Court then concluded that none of these considerations justified overruling the "central holding" of *Roe* that a woman has a right to choose an abortion before viability, a right that cannot be unduly burdened by government regulation.[16] *Roe* had not proven unworkable. While "reliance on *Roe* cannot be exactly measured," the cost of overruling "for people who have ordered their thinking and living around that case [cannot] be dismissed."[17] Thus *Roe* was deemed that rarest of situations where reliance was found outside of a commercial context. Subsequent doctrine had not weakened *Roe*'s "doctrinal footings."[18] Finally, while "time ha[d] overtaken some of *Roe*'s factual assumptions"—changing when viability begins and allowing for safer late-term abortions—the Court stated that these went to timing and competing interests and "ha[d] no bearing on the validity of *Roe*'s central holding."[19]

The *Casey* Court went on to contrast its decision with earlier Courts' decisions to overrule *Lochner*[20] (employing *Lochner* as a short-hand for the Court's pre-1937 laissez faire jurisprudence) and *Plessy v. Ferguson*.[21] In both situations the Court concluded that the underlying facts had either changed or were understood differently, so much so that the Court would have paid a "terrible price" had it not overruled.[22] With the Great Depression, most people understood that an unregulated market could not "satisfy minimal levels of human welfare."[23] Similarly most people could understand that *Plessy*'s conclusion that segregation did not stamp African-Americans with a badge of inferiority was no longer tenable; segregation stigmatized and penalized African-Americans. By contrast because none of the pragmatic criteria pointed to overruling *Roe*, overruling it would be seen to constitute caving to political pressure: the Court would therefore pay "the terrible price" if it jettisoned *Roe*.[24]

Having concluded not to overrule *Roe*—or, more precisely, to reconceptualize *Roe* and then to stand fast behind that reconceptualization—the Court then proceeded to overrule two cases applying *Roe*. The *Casey* Court's newly fashioned "undue burden" test allowed states to require specific record keeping, to require a specified informed consent, and to impose a waiting period between the consent and the abortion.[25] *Roe*'s so-called "central hold-

15 *Id.*
16 *Id.* at 860–61.
17 *Id.* at 856.
18 *Id.* at 857.
19 *Id.* at 860.
20 Lochner v. New York, 198 U.S. 45 (1905).
21 163 U.S. 537 (1896).
22 *Casey*, 505 U.S. at 864.
23 *Id.* at 862.
24 *Id.* at 864.
25 *See* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 758 (1986); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 426 (1983).

ing" was important; its various applications less so and hence less entitled to the benefits of stare decisis for reasons that remain somewhat obscure.

The Court's treatment of stare decisis enjoys credibility because Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter appear to have changed their positions—at least in part, if perhaps not entirely—out of respect for stare decisis. Justice O'Connor had been supportive of regulations of abortion in the 1980s.[26] Justice Kennedy had questioned abortion as a constitutional right in the only direct challenge to abortion since he took his seat.[27] All three Justices had been in the majority in *Rust v. Sullivan*,[28] ostensibly a First Amendment case but in reality one driven by opposition to abortion. The three Justices who had participated in *Roe* remained unchanged. Justice Harry Blackmun fully supported *Roe*, while Justices Byron White and William Rehnquist, the two original dissenters, supported overruling.[29]

Although the *Casey* holding on stare decisis remains, formally, the governing rule (or set of legal standards) by which to judge whether a constitutional precedent should be overruled,[30] a moment's reflection reveals several deficiencies with *Casey*'s approach. For starters, the Court's treatments of *Lochner* and *Plessy* are plainly disingenuous. The Court that eviscerated *Lochner*'s economic substantive due process law and the Warren Court that uprooted the "separate but equal" doctrine knew that *Lochner* and *Plessy* were wrong the day they were decided on the basis of facts then known to anyone who bothered to read the first Justice John M. Harlan's dissent in both cases.

Thus, one needs to add to *Casey*'s list of four considerations another: Do the Justices now feel that the case was wrong the day it was decided? Michael Gerhardt's study of precedent concluded this was the second most common reason for overruling,[31] and, indeed, it may be possible that the "wrong when decided" test supplants all others, except perhaps the reliance factor.

Why does *Casey* not mention this criterion for overruling? I suspect that it was unmentioned for an obvious reason—it was the precise claim the four *Casey* dissenters leveled at *Roe*, and Justices O'Connor, Kennedy, and Souter appeared unwilling (and perhaps unable) to defend *Roe* against that claim.

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26 *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 522 (1989); *Thornburgh*, 476 U.S at 815; *City of Akron*, 462 U.S. at 452.

27 *See Webster*, 492 U.S. at 518.

28 500 U.S. 173 (1991) (dealing with federally funded family service providers).

29 *See id.* at 176; *id.* at 220 (Blackmun, J., dissenting).

30 Interestingly, the Court in the modern era has held that only it is entitled to apply this rule. Hicks v. Miranda, 422 U.S. 332, 344 (1975). Lower courts have been admonished not to depart from Supreme Court precedent but rather to apply that precedent faithfully unless or until the Supreme Court itself jettisons the precedent. *Id.*

31 *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 19 (2008); *see also* Philip Frickey, *A Further Comment on Stare Decisis and the Overruling of* National League of Cities, 2 CONST. COMMENT. 341, 342 (1985). In addition to Gerhardt, broader studies of precedent are found in SAUL BRENNER & HAROLD SPAETH, STARE INDECISIS (1995) and HAROLD SPAETH & JEFFREY SEGAL, MAJORITY RULE OR MINORITY WILL (1999).

Further, as the doctrinal (shall we say?) elasticity underlying *Casey* shows, "overruling" is not a simple on/off switch. *Casey* totally reconceived *Roe*'s logical basis, completely rewrote the rules of *Roe*, overruled two of *Roe*'s ancillary decisions, and then pronounced that respect for stare decisis counseled that *Roe* should not be overruled. "Applying precedents requires interpreting them, interpreting them frequently entails modifying them, and modifying them often entails extending or contracting them."[32] Slightly differently put, because the Court has freedom to do whatever pleases it at the moment,[33] overruling is merely one of many options available to the Court in drafting (and crafting) an opinion, as *Casey* itself reveals. Inconsistent precedent can be ignored.[34] Or it can be disingenuously distinguished.[35] Express overrulings are infrequent compared to decisions that render prior law irrelevant.[36] Even less frequent are cases where the Court says it reaches a result under the Constitution because precedent compels it notwithstanding that some of the Justices find the result untenable.[37] There must be, then, a fair amount of bobbing and weaving going on in the Court's interpretation of its precedents.[38]

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32 GERHARDT, *supra* note 31, at 34–35.

33 LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

34 Thus *Cohen v. California*, 403 U.S. 15 (1971), protecting under the First Amendment wearing a jacket emblazoned with "Fuck the Draft," never mentions the three-year-old *United States v. O'Brien*, 391 U.S. 367 (1968), which allowed punishing those who burned their draft cards in protest of the Vietnam War. *See* Thomas G. Krattenmaker, *Looking Back at* Cohen v. California*: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 679 (2012) ("How was what O'Brien did any different from what Cohen did[?] . . . *Cohen*, I would argue, shows why the *O'Brien* Court should have looked more carefully at the government's assertedly nonspeech related justifications for punishing O'Brien for engaging in behavior that, in its communicative aspects, was indistinguishable from Cohen's actions. . . . Perhaps more dramatically, how can one extol the virtues of uncensored emotive outbursts on public issues without even noting that this appears to be precisely what *O'Brien* involved, too?"). *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), presented an identical issue to *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367 (1969), regarding a personal attack on a public figure by a media corporation, but the former never mentioned the latter. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 194 (1994); L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345.

35 Just as *Federal Communications Commission v. Pacifica*, 438 U.S. 726 (1978), forbidding saying "fuck" and six other dirty words over the public airways, does to *Cohen*. Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence*, 64 VA. L. REV. 1123, 1229–31 & nn.638, 639, 642 (1978) (comparing various possibilities: averting the eyes v. even turning off the radio leaves the harm intact; no evidence of anyone powerless to avoid Cohen's jacket v. one actual complaint about Pacifica's broadcast; thirty days in jail v. potential loss of millions if broadcast license revoked).

36 For instance the law of confessions after *Miranda v. Arizona*, 384 U.S. 436 (1966), created its requirement of warnings.

37 Dickerson v. United States, 530 U.S. 428 (2000) (reaffirming *Miranda*, with only Justices Scalia and Thomas dissenting).

38 *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is excessive. L.A. Powe, Jr., Brandenburg*: Then and Now*, 44 TEX. TECH L. REV. 69, 71 (2012) ("If taken seriously, the *Brandenburg* test

Finally, the *Casey* treatment of overruling has an almost pristine naïveté about it, suggesting that overruling takes place only when something internal to law has changed—and therefore that that something is neither the composition of the Court nor the ideologies of the Justices. Deciding whether to change the law, the Court would have us believe, requires simply the application of four fairly objective tests whose outcomes should not be greatly affected by the ideologies, backgrounds, or political ambitions of those applying them. *Casey* seems to suggest that the decision whether or not to overrule depends not on changes in the Court's personnel but rather changes in society. The counterpoint to this view was expressed by Justice Antonin Scalia three years before *Casey* when he wrote that "[o]verrulings of precedent rarely occur without changes in the Court's personnel."[39] What would we perceive if we look at intragenerational constitutional overrulings through the lens of a shifting personnel make-up rather than the *Casey* factors?

These reflections on *Casey* lead to two conclusions at the outset. First, any study of overrulings needs to account for two factors in addition to those cited in *Casey*: (1) Was the precedent wrong when decided (however that may be determined), and (2) have changes in the Court's personnel made the precedent untenable or abhorrent to a new majority? Second, even with these amendments to the list of *Casey* factors, a study of overrulings needs to be taken with a grain of salt.[40] As *Casey* itself proves, whether subsequent Case *B* overrules earlier Case *A* is often a matter of interpretation and the choice to hollow out an unwanted precedent is all too available and much

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solved the constitutional issue present since *Schenck* [*v. United States*, 249 U.S. 47 (1919),] by implicitly holding that all the cases that upheld convictions were wrongly decided. The only problem with such an interpretation is that the Court cited *Dennis* [*v. United States*, 341 U.S. 494 (1951),] favorably even though the test articulated only the requirement that the possibility of attempted overthrow of the government at some unspecified later date when conditions were ripe outweigh the minimal intrusion on free speech. Furthermore, *Brandenburg* quoted *Noto v. United States*[, 367 U.S. 290 (1961),] on the advocacy–incitement distinction without noting that in a companion case, *Scales v. United States*[, 367 U.S. 203 (1961),] the defendant went to jail." (footnotes omitted)).

39 South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

40 Consider the statement of Chief Justice Rehnquist: "'[*S*]*tare decisis* in constitutional law is pretty much of a sham.'" JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 250 (2012) (quoting Letter from William Rehnquist to James Rehnquist (Dec. 17, 1986)). The statement came in a letter to his son, James C. Rehnquist dated December 17, 1986. *Id.* at 309 n.248. At the time, James was Editor-in-Chief of the *Boston University Law Review*. James's student note was entitled *The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, and it began by noting the then-current overruling of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See* Rehnquist, *supra* note 11, at 345. The note's thesis was that the "world of constitutional adjudication would surely profit from a rejection of stare decisis." *Id.* at 374. This is preceded by a lengthy section: "The Myth of Principled Overruling." *Id.* at 358–64. The Rehnquists may have been correct in 1986, but as this Article will note, this is just about the time that most members of the Court began to discuss stare decisis more frequently.

less likely to be met with hostile criticism.[41] Nevertheless, it does matter when the Court explicitly intones "overruled," if only because this is the only instance in which lower courts are permitted to disregard the overruled precedent.[42] Even for constitutional adjudication, lower courts remain the principal decision makers in the legal system of the United States. Moreover, based on my experience of following the Court carefully for over forty years, I think the Justices take seriously the use of the word "overruled"—which helps explain why it did not appear in a *Brown*[43] opinion that was designed not to inflame the South any more than would occur naturally from the result itself.[44]

II. WHICH CASES?

Now let us explore constitutional cases that resulted in intragenerational overrulings. I will follow *Casey*'s pragmatic criteria while also adding "wrong the day it was decided" and then subsequently focus on changes in the Court's personnel as an additional or alternative explanatory factor. I begin by looking at the universe of constitutional cases (excluding only those of minimal importance[45] and those reversed on rehearing[46]) that were over-

41 *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010) (offering an excellent descriptive and normative discussion of the subject).

42 Hicks v. Miranda, 422 U.S. 332 (1975).

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

44 POWE, *supra* note 33, at 29.

45 *Gray v. Sanders*, 372 U.S. 368 (1963) (applying one person, one vote to gubernatorial elections), and *Wesberry v. Sanders*, 376 U.S. 1 (1964) (applying one person, one vote to congressional elections), are probably the most important cases I excluded, but I did so because the majorities did not even bother to acknowledge their overrulings and because *Baker v. Carr*, 369 U.S. 186 (1962), already covers the area. The other cases excluded as too minimal are: *Lee v. Florida*, 392 U.S. 378 (1968) (holding inadmissible illegally intercepted phone calls in state court), *Perez v. Campbell*, 402 U.S. 637 (1971) (holding state law preempted as regulation of immigrants), *United States v. Scott*, 437 U.S. 82 (1978) (holding there to be no double jeopardy when the state appeals a decision favoring defendant when the defendant sought termination of trial on basis other than guilt or innocence), *United States v. Salvucci*, 448 U.S. 83 (1980) (holding that defendants charged with possession may only claim benefits of exclusionary rule if their own Fourth Amendment rights are violated), *United States v. Ross*, 456 U.S. 798 (1982) (holding on the scope of an automobile search), *Alabama v. Smith*, 490 U.S. 794 (1989) (holding on when a sentence at trial exceeds a sentence from a guilty plea), *California v. Acevedo*, 500 U.S. 565 (1991) (holding on the scope of automobile searches), *United States v. Dixon*, 509 U.S. 688 (1993) (holding on the definition of same offense under double jeopardy), *Nichols v. United States*, 511 U.S. 738 (1994) (holding on whether a prior conviction enhanced sentencing), *Hudson v. United States*, 522 U.S. 93 (1997) (holding that civil and then criminal penalties for the same conduct does not constitute double jeopardy), and *Pearson v. Callahan*, 555 U.S. 223 (2009) (holding on qualified immunity in civil action for warrantless search). Perhaps those who teach criminal law might disagree with my characterization, but from a constitutional law perspective it makes sense.

ruled within a generation (21 years)[47] of their being handed down.[48] This significantly limits the number of cases to be considered because the "average lifespan of an overruled precedent is 29.2 years."[49] Furthermore, because there were few overrulings in the first century of the Supreme Court and, more specifically, because the entire "constitutional universe" changed after President Roosevelt's Court-packing plan, I limit the data to the opinions where the overruled case was decided after 1937.[50]

As *Brown v. Board of Education* illustrates, a case can be overruled without explicit use of the term, and I have included three cases—*Baker v. Carr*,[51] *Gregg v. Georgia*,[52] and *Gonzales v. Carhart*[53]—which do not explicitly overrule but clearly do have such an effect.[54] There may be others,[55] and there cer-

46 The one exception is *Reid v. Covert*, 354 U.S. 1 (1957) (holding overseas military dependents cannot be tried by courts martial for criminal offenses), because it also overruled *Kinsella v. Krueger*, 351 U.S. 470 (1956).

47 If I limited the years to the nineteen between *Roe* and *Casey*, only three overrulings would be eliminated: *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942); *Moore v. Ogilvie*, 394 U.S. 814 (1969), overruling *MacDougall v. Green*, 335 U.S. 281 (1949); and *Batson v. Kentucky*, 476 U.S. 79 (1986), overruling *Swain v. Alabama*, 380 U.S. 202 (1965).

48 I began with the lists from GERHARDT, *supra* note 31, app. at 207–45 (to which I added *Baker v. Carr* and *Gonzales v. Carhart*), and the Congressional Research Service's "Supreme Court Decisions Overruled by Subsequent Decision." S. DOC. NO. 108-17, app. at 2385–99 (2004). The reason I added *Baker* and *Carhart* even though neither uses the magic word is that the dissenters thought the majority had overruled (and so do I), and the old law was gone. After all, *Brown* never mentioned overruling *Plessy*. I cut down both lists when I believed they were too generous in declaring a prior case overruled.

49 GERHARDT, *supra* note 31, at 11.

50 There were forty-four overrulings prior to *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). *West Coast Hotel* ended the *Lochner* era by upholding a state law that mandated a minimum wage for women. *Id.*

51 369 U.S. 186 (1962) (holding that legislative redistricting constitutes a justiciable controversy and implicitly ushering in the one person, one vote requirement).

52 428 U.S. 153 (1976) (reinstating capital punishment).

53 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

54 Gerhardt agrees that *Baker* is an implicit overruling, and his book was completed before *Carhart*. GERHARDT, *supra* note 31, at 25. He does not treat *Gregg* as an overruling, but he does list *Furman v. Georgia*, 408 U.S. 238, 254 (1972), the case *Gregg* implicitly overruled, as implicitly overruling *McGautha v. California*, 402 U.S. 183 (1971), on standardless sentencing in capital cases. GERHARDT, *supra* note 31, at 25. It seems to me that the two situations are remarkably similar. Justices Potter Stewart and Byron White changed their votes from *McGautha* to *Furman* and then changed again (and back) from *Furman* to *Gregg*. Both *Furman* and *Gregg* had significant changed facts. In *Furman* it was the imminent execution of hundreds of death row inmates previously protected by stays. In *Gregg* it was the thirty-five new state laws authorizing capital punishment. While there is a rough equivalency, I tilt toward *Gregg* over *Furman* being the more important development, and, as with *Baker*, *Gray v. Sanders*, and *Wesberry v. Sanders*, I believe only one case should be counted. *See supra* note 45.

55 For instance both the Congressional Research Service and Gerhardt list *Miller v. California*, 413 U.S. 15 (1973), as overruling *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *See* S. DOC. NO. 108-17, app. at 2395 (2004); GERHARDT, *supra* note 31, app. at 225. To be

tainly are examples of hollowed out precedents as Barry Friedman shows,[56] but my focus is on changes in the law where all agree Case *B* overrules Case *A*. During the post-1937 period the Congressional Research Service lists 189 cases, both statutory[57] and constitutional, as having been overruled. The subset I discuss is a little over one-sixth of the total. They are listed chronologically in the Appendix. Almost two-thirds of them were decided during the chief justiceships of Earl Warren and Warren Burger: fourteen during the Warren Court (of which seven were its own) and nine during the Burger Court (seven from the Warren era, two of its own).

III. *Casey*'s Categories Applied

A look at *Casey*, *Brown*, and the end of laissez faire economic protection suggests that falling within one of the categories may not be a sufficient reason for overruling. There is the aforementioned claim that *Roe* was wrong the day it was decided, but *Casey* reaffirmed *Roe*'s "central holding."[58] Beginning with *Missouri ex rel. Gaines v. Canada*[59] the doctrinal underpinnings of *Plessy* had been steadily eroded and segregation was perceived vastly differently than it had been in 1896, but *Henderson v. United States*[60] refused, contrary to the suggestion of the Justice Department, to overrule *Plessy*. Similarly, the Great Depression exposed laissez faire economics as untenable, but *Morehead v. New York ex rel. Tipaldo*[61] still reaffirmed *Adkins v. Children's Hospital*.[62] *Casey*, however, offers clues, for in overruling two cases—but not *Roe*—the opinion showed that more than one of *Casey*'s four considerations are often present when there is a decision to overrule.

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sure, the law of obscenity changes between *Memoirs*, *Redrup v. New York*, 386 U.S. 767 (1967), and *Miller*, but it is not clear that either Fanny Hill (*Memoirs*) or second-string girlie magazines hoping to be the down-market Playboy (*Redrup*) would be obscene under *Miller*. Thus I do not perceive this as an overruling.

56 *See supra* note 41.

57 Because of the focus on constitutional overrulings, I have no occasion to comment on the mindless application of stare decisis in reaffirming Major League Baseball's antitrust exemption. *See* Flood v. Kuhn, 407 U.S. 258 (1972) (failing to overrule Toolson v. New York Yankees, 346 U.S. 356 (1953), and Federal Baseball Club v. National League, 259 U.S. 200 (1922)).

58 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

59 305 U.S. 337 (1938) (holding that providing a law school for whites but not for African-Americans denies equal protection).

60 339 U.S. 816, 825–26 (1950) (segregating train passengers in a dining car by a wood partition highlights "the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers" and thereby violates the Interstate Commerce Act).

61 298 U.S. 587 (1936) (holding a minimum wage for women unconstitutional), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

62 261 U.S. 525 (1923) (holding a minimum wage for women unconstitutional), *overruled by West Coast Hotel*, 300 U.S. at 379.

A. Unworkable

Still, one factor that should be sufficient by itself is unworkability, the first consideration mentioned in *Casey*. To be sure, very few constitutional doctrines prove unworkable, but if a doctrine cannot be applied sensibly, it should be jettisoned. Twice the modern Court has asserted unworkability as a justification for overruling. In one instance, the overruling of *National League of Cities v. Usery*[63] supposedly taught that the Court could not apply a doctrine that would preclude federal rules that "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."[64] However, in *Seminole Tribe of Fla. v. Florida*[65] the Court backed off the rule that Congress has the authority to override Eleventh Amendment protections of states (so long as the law explicitly does so).[66]

Garcia v. San Antonio Metropolitan Transit Authority[67] found *National League of Cities* unworkable because it was supposedly impossible for Courts to determine whether a particular governmental function was integral or traditional.[68] The Court might instead have relied on four cases subsequent to *National League of Cities* in which the Court rejected state claims that federal rules were too intrusive on state choices.[69] In other words, the showing of unworkability in *Garcia* appears to have been the result of subsequent developments that eroded *National League of Cities*—with *EEOC v. Wyoming*,[70] which permitted the application of federal age discrimination laws to state workers, being close to indistinguishable from *National League of Cities*.

When *Seminole Tribe v. Florida*[71] overruled *Union Gas* the majority noted that "lower courts that have sought to understand and apply the deeply fractured decision" have been "confus[ed]" because *Union Gas*'s necessary fifth vote had repudiated the rationale of the plurality.[72] Yet if the rule of *Union Gas* is that when Congress exercises its powers it can abrogate sovereign immunity, that rule can easily be applied—is Congress exercising a delegated

63 426 U.S. 833 (1976) (holding that Congress may not expand the Fair Labor Standards Act to cover state public employees).

64 *Id.* at 852.

65 517 U.S. 44 (1996).

66 *Id.* at 59–60.

67 469 U.S. 528 (1985).

68 *Id.* at 546–47.

69 *See* EEOC v. Wyoming, 460 U.S. 226, 229 (1983) (holding that state agencies must comply with federal age discrimination law); FERC v. Mississippi, 456 U.S. 742, 770 (1982) (forcing consideration but not adoption by state utility commissions of federal proposals); United Transp. Union v. Long Island R.R., 455 U.S. 678, 682 (1982) (holding that Congress's authority to regulate the railroad industry reaches even state-owned railroads); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981) (holding that private businesses must restore strip-mined land).

70 *EEOC*, 460 U.S. at 229.

71 517 U.S. 44 (holding Congress lacks Article I power to override the states' Eleventh Amendment immunity from suit in federal court).

72 *Id.* at 64.

power?—regardless of its underlying rationale. Unworkability hardly seems a sufficient explanation for such an easily applied rule.

A better explanation for the overruling was that *Union Gas* "essentially eviscerated [the] decision in *Hans*."[73] It did so by a "misreading of precedent" and a "misplaced" reliance on a case[74] that had relied on Section 5 of the subsequent Fourteenth Amendment.[75] To this, the majority noted that a majority in *Union Gas* also "expressly disagreed with the rationale of the plurality."[76] Thus, *Seminole Tribe* appears the opposite of *Garcia*. The latter overruled because subsequent developments eroded *National League of Cities*, while the former overruled *Union Gas* because it was inconsistent with previous developments—which if they were to be followed means that *Union Gas* was wrong the day it was decided. In any case, neither *Garcia* nor *Seminole Tribe* seems truly an opinion on unworkability, and this indicates that this factor may prove empty.

The best example of unworkability is presented by *Casey* itself in its acknowledgement that *Roe*'s trimester approach was becoming increasingly obsolete. As O'Connor recognized in her first abortion opinion—a dissent—medical advances both allowed for earlier viability and made later third-trimester abortions safer.[77] *Casey* substituted for *Roe*'s trimester approach the new rationale that *Roe* rested on a "central holding" that a woman's right to choose an abortion before viability cannot be unduly burdened by government regulation.[78] The plurality recognized that *Roe*'s trimesters were no longer workable, "[a]nd there is no line other than viability which is more workable."[79]

Casey's other three categories—reliance, erosion, and changed facts—may not each be sufficient, in and of themselves, to generate overruling but each is discussed in order. This will be followed by a discussion of "wrong the day it was decided" to which *Seminole Tribe* offers an offshoot—inconsistent with prior decisions.

B. Reliance

It is easy to dismiss reliance. The reliance cited in *Casey*—where the claim that women organize their lives in reliance on the ability to have an abortion (and, apparently, not contraceptives or the morning after pill) is

73 *Id.* The Court was referring to *Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890), which held that states are immune from suit by their own citizens in federal court.

74 *Seminole Tribe*, 517 U.S. at 65 (discussing the plurality's reliance on Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976), which held that Congress, under the Fourteenth Amendment, may authorize suits against states in federal court).

75 *Id.*

76 *Id.* at 66.

77 City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 456–57 (1983) (O'Connor, J., dissenting).

78 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

79 *Id.* at 870–71.

not the most credible assertion[80]—is an illustration of why reliance is rarely a factor in any decision about stare decisis in a case that does not involve economics. But rare is not never. In *Dickerson v. United States*[81] the Court offered something like reliance[82] as the rationale for leaving *Miranda v. Arizona*[83] standing. Perhaps reliance in the noneconomic sphere internalizes, as *Casey* articulated,[84] the Court's view of the likely public reaction to a formal overruling.

C. Erosion

The most prevalent explanation for overruling in the modern era is that the precedent being overruled had been eroded by subsequent developments in the law.[85] This rationale was invoked frequently during the heyday of the Warren Court, as the majority undertook its wide-scale transformation of constitutional law, especially casting aside previously conceived federalism constraints to nationalize the Bill of Rights.[86] The bulk of the overruling cases citing doctrinal erosion were decided during this period.

Mapp v. Ohio, holding the exclusionary rule to be a necessary remedy for a Fourth Amendment violation,[87] is the first of these cases. While the Court stated that the "factual considerations"[88] underlying *Wolf v. Colorado*[89] had changed, all the changes stemmed from judicial decisions. In the twelve years since the Court had rejected the exclusionary rule in *Wolf*, "more than half of those [states] since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered" to the exclusionary rule.[90] At the time of *Wolf* the Court thought there might be other remedies for a Fourth Amendment violation, but *Irvine v. California*[91] recognized "the obvious futility" of relying on such measures.[92] The *Wolf* Court thought the exclusionary rule was, in the words of Judge Benjamin Cardozo, "either too strict or too lax," but "the force of that reasoning has been largely vitiated by

80 *Id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part).

81 530 U.S. 428 (2000).

82 *Id.* at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

83 384 U.S. 436 (1966).

84 *Casey*, 505 U.S. at 865–68 (plurality opinion).

85 One day we may see this announced with respect to *Miranda*, as Friedman, *supra* note 41, at 25, illustrates. Or maybe *Miranda* will just be gutted to a hollow shell and left for the ages.

86 *See* POWE, *supra* note 33, at 494.

87 Mapp v. Ohio, 367 U.S. 643, 657 (1961).

88 *Id.* at 651, 653.

89 338 U.S. 25, 33 (1949) (finding the Fourth Amendment's exclusionary rule inapplicable to states), *overruled by Mapp*, 367 U.S. 643.

90 *Mapp*, 367 U.S. at 651.

91 347 U.S. 128, 136 (1954) (holding admissible evidence from multiple warrantless police break-ins of home in state trials).

92 *Mapp*, 367 U.S. at 652–53.

later decisions of this Court."[93] With the way cleared, *Mapp* overruled *Wolf* and brought Fourth Amendment doctrine in the state courts into harmony with the federal courts.

Although Justice Hugo Black's opinion in *Gideon v. Wainwright* treated *Betts v. Brady*[94] as wrong the day it was decided,[95] Justice John Harlan's concurring opinion suggests it was eroded away.[96] The pre-*Gideon* rule was not "no counsel for indigents"; it was that counsel had to be provided only when there were special circumstances requiring it. Capital cases always required counsel.[97] For the decade after *Betts v. Brady* cases "found special circumstances to be lacking, but usually by a sharply divided vote."[98] After 1950, however, special circumstances were found in every case as the "Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel."[99] In effect Harlan was stating that *Betts* had already been overruled, and that *Gideon* just formalized the rule.

Mapp and *Gideon* set the stage for the rapid discarding of decisions that had refused to apply the Fifth Amendment's Self-Incrimination Clause to the states. *Malloy v. Hogan* formally incorporated the Fifth Amendment,[100] and then both *Murphy v. Waterfront Commission*[101] and *Spevack v. Klein*[102] overruled earlier cases that did not conform to the now-applicable federal rule.

Just as incorporation of the Self-Incrimination Clause led to quick application overrulings, so too did the incorporation of the Double Jeopardy Clause.[103] *Ashe v. Swenson*[104] held collateral estoppel was an aspect of Double Jeopardy. The Court also held that introduction into evidence of a

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93 *Id.* at 653 (quoting People v. Defore, 150 N.E. 585, 588 (N.Y. 1926)).

94 316 U.S. 455 (1942).

95 Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (overruling Betts v. Brady, 316 U.S. 455, which had refused to extend the Sixth Amendment's guarantee of counsel for indigent federal defendants to the states).

96 *Id.* at 350–51 (Harlan, J., concurring).

97 *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961). There was similar dicta in existence when *Betts v. Brady* was decided. *See, e.g.*, Avery v. Alabama, 308 U.S. 444, 445–46 (1940).

98 *Gideon*, 372 U.S. at 351 (Harlan, J., concurring).

99 *Id.*

100 378 U.S. 1, 6, 8 (1964) (holding the Fifth Amendment privilege against self-incrimination applicable to the states and overruling Adamson v. California, 332 U.S. 46 (1947)).

101 378 U.S. 52, 79–80 (1964) (holding that one jurisdiction in the federal system may not, absent an immunity provision, compel a witness to give testimony that could incriminate him in another jurisdiction). *Murphy* overruled *Feldman v. United States*, 322 U.S. 487 (1944), *Knapp v. Schweitzer*, 357 U.S. 371 (1958), and *Mills v. Louisiana*, 360 U.S. 230 (1959). *Murphy*, 378 U.S. at 52, 54.

102 385 U.S. 511, 514 (1967) (holding that an attorney cannot be disbarred for invoking Fifth Amendment privilege and overruling Cohen v. Hurley, 366 U.S. 117 (1961)).

103 Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding the Double Jeopardy Clause applicable to the states).

104 397 U.S. 436, 441, 445 (1970) (holding that collateral estoppel is part of double jeopardy and overruling Hoag v. New Jersey, 356 U.S. 464 (1958)).

non-testifying co-defendant's confession violated the Confrontation Clause.[105]

Along with criminal procedure, equal protection was another area of explosive change during the Warren Court era. *Harper v. Virginia Board of Elections*[106] invalidated a state poll tax because the Court's voting rights law had changed and, more bluntly, so had the times: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[107] Thus, because of the shift in voting decisions once *Baker v. Carr* cleared the way by declaring them to be justiciable controversies, *Moore v. Ogilvie*[108]—dealing with ballot access—could note simply that the earlier decision it was overruling was "out of line with our recent reapportionment cases."[109]

When *Swain v. Alabama* refused to put an end to racially discriminatory peremptory challenges,[110] it was wildly out of line with the Warren Court's entire jurisprudence dismantling Jim Crow.[111] The Burger Court remedied the error in *Batson v. Kentucky*[112] by noting that standards to make out a prima facie case of racial discrimination under the Equal Protection Clause had "developed" since *Swain*.[113]

A notable development after 1963 was the dismantling of the loyalty-security programs that had been created early in the Cold War. New York's Feinberg Law was struck down on vagueness grounds in an opinion that itself was hopelessly vague but rejected the right-privilege distinction, once relied upon but steadily undermined for a decade.[114]

As Establishment Clause jurisprudence changed even as the tripartite *Lemon*[115] test survived (despite heavy conservative criticism even coming

105 Bruton v. United States, 391 U.S. 123, 126 (1968) (holding that non-testifying co-defendant's confession cannot be introduced in trial of defendant). *Bruton* overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957). *Bruton*, 391 U.S. at 126.

106 383 U.S. 663, 666 (1966) (holding that a poll tax violates Fourteenth Amendment and overruling Breedlove v. Suttles, 302 U.S. 277 (1937), and Butler v. Thompson, 341 U.S. 937 (1951)).

107 *Id.* at 669.

108 394 U.S. 814, 819 (1969) (dealing with ballot access and residential requirements and overruling MacDougall v. Green, 335 U.S. 281 (1948)).

109 *Id.* at 818.

110 Swain v. Alabama, 380 U.S. 202, 221–22 (1965).

111 For evidence that *Swain* was appreciated as such, see Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CAL. L. REV. 1101, 1130–39 (2012).

112 476 U.S. 79 (1986).

113 *Id.* at 93.

114 Keyishian v. Bd. of Regents, 385 U.S. 589, 605, 609 (1967) (holding unconstitutionally vague several aspects of New York's anti-communist Feinberg Law and overruling Adler v. Board of Education, 342 U.S. 485 (1952)).

115 Lemon v. Kurtzman, 403 U.S. 602, 607, 612–13 (1971) (holding that state salary supplements to teachers of secular subjects in private schools violate the Establishment Clause and articulating the test that requires statutes to have a secular purpose, to have a principal or primary effect that does not advance religion, and to not foster an excessive entanglement of government and religion).

from the Solicitor General),[116] the Court in the 1990s was more accommodating of government assistance to religious institutions. *Agostini v. Felton*[117] overruled a pair of cases and allowed secular teachers to teach in religious schools, noting that "recent cases have undermined the assumptions upon which [the overruled cases] relied."[118]

In the last year of the Warren Court, *O'Callahan v. Parker* held that members of the armed services could not be tried by courts martial for crimes unrelated to the military.[119] The opinion relied on history and an unstated skepticism about the fairness of military justice.[120] *Solorio v. United States* presented multiple justifications for overruling *O'Callahan*.[121] The history offered in the earlier case was "less than accurate," the earlier case departed from prior law, and later decisions had emphasized the primary responsibility of Congress in the area.[122]

D. New Facts

The earliest overrulings, in the Jehovah's Witness cases, exhibit two different ways that facts can be newly perceived to justify overruling. *Murdock v. Pennsylvania* saw selling religious pamphlets as a religious activity,[123] not a commercial business as *Jones v. Opelika* had.[124] More significantly, *West Virginia State Board of Education v. Barnette* treated the objection to the flag salute as involving individuals' rights not to be compelled to say something they did not believe[125] rather than a justifiable burden on their free exercise of religion as *Minersville School District v. Gobitis* held.[126]

Mapp offered a more sanguine view of the empirical effects of the exclusionary rule than *Wolf* did.[127] The Court believed there would be no deterrence without the exclusionary rule and that any costs it imposed on the police were manageable.[128]

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116 "The problem is *Lemon*." Brief for the United States as Amicus Curiae Supporting Petitioners at 20, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014) (holding that prayer at high school graduation violates the Establishment Clause). It is likely that *Lemon* survived because the new conservative majority was just as able to tame it as the former majority had been to manipulate it for liberal ends.

117 521 U.S. 203, 222 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), and School District of Grand Rapids v. Ball, 473 U.S. 373 (1985)).

118 *Id.*

119 O'Callahan v. Parker, 395 U.S. 258, 274 (1969).

120 *Id.* at 263–68.

121 Solorio v. United States, 483 U.S. 435, 442, 447 (1987).

122 *Id.*

123 Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("[I]t plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture.").

124 Jones v. Opelika, 316 U.S. 584, 598 (1942) ("[W]e view these sales as partaking more of commercial than religious . . . transactions . . . .").

125 W. Vir. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).

126 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 592 (1940).

127 *See supra* text accompanying notes 87–93.

128 *See supra* text accompanying notes 87–93.

A major cultural and political change involved the exclusion of women from jury service. *Hoyt v. Florida*,[129] decided in 1961 before Betty Friedan published *The Feminine Mystique* and launched the modern feminist movement,[130] rested its decision to permit exclusion of women from jury duty on the conclusion that the "woman is still regarded as the center of home and family life."[131] But *Taylor v. Louisiana*[132] was decided in the 1970s after those events and while the Equal Rights Amendment looked like an easy bet for ratification. *Taylor*'s conclusion that *Hoyt* was "no longer tenable" matched the times.[133]

The capital punishment overrulings have consistently asserted changed facts. There can be little doubt that *Gregg v. Georgia*[134] resulted from the changed atmosphere surrounding the death penalty.[135] It was possible at the time of *Furman v. Georgia*[136] to believe capital punishment was at an end. But when thirty-five states reinstated their death penalties, it was obvious that the Court's reading of the public had been wrong.[137] *Atkins v. Virginia*[138] explicitly invoked the "evolving standards of decency that mark the progress of a maturing society" to ban the execution of the mentally retarded.[139] When the Court had ruled the other way only two states had barred those executions, but in the ensuing twelve years sixteen more had joined them.[140] Holding that crimes committed by juveniles could not be subject to capital punishment was more of a stretch, but the Court found that five additional states precluding it showed a "consistency [in the] direction of change."[141]

Two further important cases deserve mention even though neither expressly overruled a precedent. *Baker v. Carr* found legislative apportionment a justiciable issue;[142] until then it was assumed to be nonjusticiable.[143] *Gonzales v. Carhart*[144] upheld a congressional ban on so-called partial birth abortions. Seven years earlier the Court had invalidated a similar Nebraska law.[145]

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129 368 U.S. 57 (1961). A later case, *Taylor v. Louisiana*, 419 U.S. 522 (1975), declined to follow *Hoyt*.

130 *See* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

131 *Hoyt*, 368 U.S. at 62.

132 419 U.S. 522 (1975).

133 *Id.* at 537.

134 428 U.S. 153 (1976).

135 *Id.* at 179.

136 408 U.S. 238 (1972).

137 *Gregg*, 428 U.S. at 179.

138 536 U.S. 304, 314 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)).

139 *Id.* at 312 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)) (internal quotation marks omitted).

140 *Id.* at 314–15.

141 Roper v. Simmons, 543 U.S. 551, 566 (2005) (overruling Stanford v. Kentucky, 492 U.S. 361 (1989)).

142 Baker v. Carr, 369 U.S. 186, 237 (1962).

143 *See* Colegrove v. Green, 328 U.S. 549, 556 (1946).

144 550 U.S. 124, 168 (2007).

145 Stenberg v. Carhart, 530 U.S. 914, 946 (2000).

Many states had not redistricted for decades, and in the 1950s urban governments looked to the nation's capital rather than state capitals for aid. Justice William "Brennan's Court papers contain a contemporaneous University of Virginia study showing that nationally 'big city voters have less than one-half the representation of people in open-country areas.'"[146] Chief Justice Earl Warren believed (myopically) that if the country had reapportioned earlier, *Brown* would have been unnecessary.[147] Bluntly, the *Baker* majority perceived the adverse costs of malapportionment as vastly more consequential than the Court had in the aftermath of World War II. And, as with *Brown*, the Justices understood that if they did not act, no one would because, given incumbency, politics, and constitutional structure, no one could.

Gonzales also reflected a new perception of facts. The opinion accepted a buyer's remorse view of abortions (as offered in an amicus brief)[148] and coupled it with a moral judgment against what it deemed a particularly gruesome procedure.[149] Thus the Court asserted that women come to regret having abortions because an abortion denies the natural love between mother and child.[150]

E. Wrong the Day It Was Decided

There are several ways to say "wrong the day it was decided." *Lawrence v. Texas*[151] was blunt: *Bowers v. Hardwick*[152] "was not correct when it was decided."[153] The most subtle was *Gideon*. In holding that an indigent defendant must be provided counsel, the Court relied solely on cases decided before *Betts v. Brady*—the case *Gideon* was overruling.[154]

Four years later Justice Black, the author of *Gideon*, used the same technique to overrule *Perez v. Brownell*, which upheld a federal statute inflicting involuntary loss of citizenship upon a naturalized American who voted in a foreign election.[155] The opinion in *Afroyim v. Rusk*[156] cited only two opinions in text: the 1824 Chief Justice Marshall opinion in *Osborn v. Bank of the United States*[157] was cited favorably,[158] and Chief Justice Taney's *Dred Scott*

146 POWE, *supra* note 33, at 202 (quoting ED CRAY, CHIEF JUSTICE 380 (1997)).

147 G. EDWARD WHITE, EARL WARREN 189 (1982).

148 *Gonzales*, 550 U.S. at 159.

149 *Id.* at 141.

150 *Id.* at 159.

151 539 U.S. 558 (2003) (holding that a statute punishing homosexual sodomy violated liberty under the Due Process Clause).

152 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

153 *Lawrence*, 539 U.S. at 578.

154 Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942)).

155 356 U.S. 44, 62 (1958), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253 (1967).

156 387 U.S. 253.

157 22 U.S. (9 Wheat.) 738, 827 (1824).

158 *Afroyim*, 387 U.S. at 261 ("[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge

decision was (naturally) cited unfavorably.[159] Both cases, as well as the murky legislative history of the Fourteenth Amendment, were asserted to point to a lack of power in Congress to denaturalize involuntarily.[160] *Afroyim* is unlike *Gideon*, however, because in footnotes it acknowledged that subsequent to *Perez* the Court had struck down statutory involuntary denaturalization on a case-by-case basis.[161]

The Court's most common way to demonstrate that a precedent was wrong the day it was decided is to refute the reasoning of the prior case without suggesting that anything has changed in the intervening years. This was done in the most famous quick overruling in the modern era.[162] *Barnette*, holding that a state cannot punish children who will not participate in the flag salute, contains a point-by-point refutation of the rationales offered in the three-year-old eight-to-one decision in *Gobitis*.[163] *Reid v. Covert*, invalidating courts martial overseas for civilian dependents of service members,[164] flatly rejected the Article III reasoning of *Kinsella v. Krueger*.[165] *Frank v. Maryland*[166] "must be overruled," *Camara v. Municipal Court*[167] concluded, because the "reasons put forth . . . are insufficient to justify [the result]."[168] Similarly, when the Court concluded that victim impact statements were admissible in the penalty phase of a capital case, the Court stated that the overruled cases, two and four years old, were "wrongly decided."[169]

Like results came with the instant overruling of *Jones v. City of Opelika*. *Murdock* claimed the *Jones* majority was "distort[ing] . . . the facts of record to describe [Jehovah's Witnesses'] activities as the occupation of selling books and pamphlets."[170] Then there was *National League of Cities*, which noted that

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or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." (alteration in original) (quoting *Osborne*, 22 U.S. (9 Wheat.) at 827)).

159 *Id.* at 262 (discussing the negative reaction to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

160 *Id.* at 267.

161 *Id.* at 255 & nn.4–5.

162 The most famous quick overruling is, of course, in the *Legal Tender Cases*. *See infra* text accompanying notes 246–47.

163 *See supra* notes 125–26 and accompanying text.

164 Reid v. Covert, 354 U.S. 1, 3, 5 (1957).

165 *Id.* at 41 (overruling Kinsella v. Krueger, 351 U.S. 470 (1956)).

166 359 U.S. 360 (1959) (holding that municipal inspectors do not need search warrants), *overruled in part by* Camara v. Mun. Court, 387 U.S. 523 (1967).

167 387 U.S. at 528.

168 *Id.* at 534.

169 Payne v. Tennessee, 501 U.S. 808, 830 (1991) (overruling Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989)).

170 Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

Maryland v. Wirtz[171] had relied on dicta from a 1936 case that was "simply wrong."[172]

Two cases, *Hudgens v. NLRB*[173] and *Citizens United v. Federal Election Commission*,[174] while purporting to rely on subsequent decisions, look like decisions claiming the overruled case was wrong the day it was decided. Labor picketing at a strip mall had been protected by the Warren Court[175] but was undermined a couple of years later when the Court allowed a large shopping mall to ban leafleting that was unrelated to the mall's operation.[176] Then in *Hudgens* the Burger Court sided with the second of the two inconsistent decisions to overrule the protection of labor picketing.[177] There was a reverse progression in campaign finance leading to the *Citizens United* decision resting on its rejection of the later view that excessive spending independent of a candidate could equal corruption.[178] The Court believed it was confronted with conflicting lines of precedent where the overruled case was "not well reasoned" and "undermined by experience."[179]

Finally, *Seminole Tribe*'s overruling of *Union Gas* because the latter was inconsistent with pre-existing developments offers another window into "wrong the day it was decided" because being inconsistent with pre-existing precedent matters only if the existing precedents should have been followed. *Casey* once again also fits this category because in overruling two prior cases it noted they were "inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn."[180] In other instances the Court has offered statements like a "short-lived departure,"[181] "essentially disregarded" conflicting cases,[182] "undermined impor-

171 392 U.S. 183 (1968) (ruling that the Fair Labor Standards Act applied to public hospitals), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

172 *Usery*, 426 U.S. at 855, *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

173 424 U.S. 507 (1976) (holding that there is no First Amendment right to picket on private property open to the public).

174 558 U.S. 310 (2010) (holding that there is a First Amendment right to contribute unlimited sums of money to organizations that are independent of a candidate in order to influence elections).

175 Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308 (1968), *abrogated by Hudgens*, 424 U.S. 507.

176 Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).

177 *Hudgens*, 424 U.S. at 518.

178 *Citizens United*, 558 U.S. at 365, 368 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), and overruling in part McConnell v. FEC, 540 U.S. 93 (2003)).

179 *Id.* at 363–64.

180 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

181 Jackson v. Denno, 378 U.S. 368, 384 (1964) (holding that the judge, not jury, must rule on voluntariness of confessions and overruling Stein v. New York, 346 U.S. 156 (1953)).

182 Chimel v. California, 395 U.S. 752, 760 (1969) (limiting searches incident to a lawful arrest in a home and overruling United States v. Rabinowitz, 339 U.S. 56 (1950)).

tant principles of this Court's . . . jurisprudence,"[183] or "so far depart[ed] from proper equal protection analysis"[184] to illustrate departure.[185]

Wrong the day it was decided may be so ubiquitous that a number of cases where the Court relies on doctrinal erosion—like *Batson* on racial peremptory challenges—or changed facts, like with partial-birth abortions—are really examples of the overruled case being deemed by the new majority to have been wrong the day it was decided. *Casey*'s intentional failure to mention what appears to be the principal factor in overruling seriously undermines the credibility of its treatment of stare decisis.

IV. The Dissenters

We know what the *Casey* dissenters thought about the decision not to overrule *Roe*. They were acidic about the failure to overrule a case they believed was wrong the day it was decided:

> The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon [political pressure], and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition. . . . What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. . . . [But if] our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us

183 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (holding federal racial classifications subject to strict scrutiny and overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

184 City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (holding that grandfathering two businesses from regulatory regime does not violate equal protection and overruling Morey v. Doud, 354 U.S. 457 (1957), which had held that excluding American Express by name does not violate equal protection). *Dukes* also noted that *Morey* was "the only case in the last half century to invalidate a wholly economic regulation . . . on equal protection grounds." *Dukes*, 427 U.S. at 306.

185 Other cases in this category are *Hudson v. United States*, 522 U.S. 93 (1997) (holding that civil and then criminal penalties for same conduct do not constitute double jeopardy and overruling United States v. Halper, 490 U.S. 435 (1989)), *Solorio v. United States*, 483 U.S. 435 (1987) (holding that the military may use courts martial for off-base non-service related crimes and overruling O'Callahan v. Parker, 395 U.S. 258 (1969)), *Illinois v. Gates*, 462 U.S. 213 (1983) (holding that totality of the circumstances is the appropriate standard for deciding when to issue a search warrant based on an unnamed informant and overruling both Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969)), and then just last term, *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that a jury not judge must find facts necessary to increase a mandatory minimum statutory sentence and overruling Harris v. United States, 536 U.S. 545 (2002)).

> can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.[186]

But what about the dissenters in the cases that did in fact overrule (because with three exceptions—*Gideon*,[187] *Dukes*,[188] equal protection in the economic sphere, and *Murphy v. Waterfront Commission*,[189] self-incrimination between jurisdictions—there were always dissents)? What, beyond a mere appeal to stare decisis, did they offer?

A surprising answer is the infrequency of the appeal to stare decisis prior to the mid-1980s. Dissents did not follow Justices O'Connor, Kennedy, and Souter in *Casey* in refusing to assert the correctness of the original case; all of the dissents went to the merits to claim that the overruled case had been correctly decided.

The failure to assert stare decisis by the dissenters in the early Jehovah's Witness cases, *Murdock* and *Barnette*, and the civilian dependent court martial case, *Reid v. Covert*, might be explicable by the recent vintage of the overruled case. But once the 1960s started, overruled cases had a more mature pedigree. Yet only in *Mapp* did a dissenter join stare decisis with an argument on the merits. Thereafter, as the Warren Court transformed constitutional law at an increasing pace, the conservative dissenters did not bother to wave the flag of stare decisis. Then, in 1974 when the Burger Court overruled the Warren Court's *Hoyt v. Florida* on excluding women from juries, then-Justice William Rehnquist relied on stare decisis without invoking it by name: "The complete swing of the judicial pendulum 13 years later must depend for its validity on the proposition that during those years things have changed in constitutionally significant ways. I am not persuaded . . . ."[190]

Two years later, liberals were on the losing end in major cases: free speech on another's open property in *Hudgens*, federal power to apply the Fair Labor Standards Act to state employees in *National League of Cities*, and the resumption of capital punishment in *Gregg*. Yet their dissents never invoked stare decisis. Similarly, when *Illinois v. Gates*[191] overruled the warrant requirements of *Aguilar v. Texas*[192] and *Spinelli v. United States*,[193] Justice

186 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000–01 (1992) (Scalia, J., concurring in part and dissenting in part) (citation omitted).

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

188 *Dukes*, 427 U.S. at 297.

189 378 U.S. 52 (1964).

190 Taylor v. Louisiana, 419 U.S. 522, 540 (1975) (Rehnquist, J., dissenting).

191 462 U.S. 213, 230–31 (1983) (stating that when dealing with a warrant request based on an unnamed informant the "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied" (footnote omitted), and overruling Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969) (providing for tightened standards for magistrates issuing search warrants based on information of unnamed informant)).

192 378 U.S. at 108.

193 393 U.S. at 410.

William J. Brennan (with Justice Thurgood Marshall) dissented, but only to show that the overruled cases had the correct rule.

For reasons that are not clear, two years after *Gates* in the mid-1980s both conservative and liberal dissenters began to appeal to stare decisis in addition to defending the original case on the merits. This movement began with overruling *National League of Cities* in *Garcia* and continued with barring racially motivated peremptory challenges in *Batson*. Then, in *Solorio*, with its allowance of courts martial for crimes committed off duty and off base, liberals joined in.

By the time of *Casey*, therefore, both sides of the Court had been invoking stare decisis for only about seven years and this would continue in the 1990s when liberals lost on two of their strongly held constitutional beliefs—a high wall of separation between church and state in *Agostini*[194] and affirmative action in *Adarand Constructors*.[195] The liberal dissenters in *Seminole Tribe*, however, did not mention stare decisis when arguing for the power of the federal government to override a state's Eleventh Amendment immunity, undoubtedly because there had been no majority opinion in *Pennsylvania v. Union Gas*.

Two culture war cases, *Lawrence v. Texas*[196] and *Gonzales v. Carhart*,[197] each produced dissenters arguing stare decisis. Justice Scalia clearly enjoyed twitting Justices O'Connor, Kennedy, and Souter for refusing to follow their *Casey* opinion and instead protecting same-sex sexual conduct by overruling the seventeen-year-old *Bowers*.[198] Justice Ginsburg felt equally strongly about abortion (even partial-birth abortion) and claimed that the majority—written by Justice Kennedy (from the *Casey* majority)—"is hardly faithful to [*Casey*'s] invocations of 'the rule of law' and the 'principles of *stare decisis*.'"[199] Justices Scalia and Ginsburg were subsequently joined by Justice Stevens's impassioned dissent in *Citizens United*.[200] Like all Justices, he recognized that stare decisis had its limits but felt the unlimited corporate campaign spending issue was too important to ignore the past.[201]

When the conservatives lost on the ability to execute juveniles (who had committed a murder) and the mentally retarded, they dissented on the merits[202] but did not invoke stare decisis even though in the new century its invocation had become almost routine. Perhaps it is the intensity the dissenters feel about the issue that determines whether a claim of stare decisis will be attached to a defense on the merits (as if their intensity should override

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

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

196 539 U.S. 558 (2003).

197 550 U.S. 124 (2007).

198 *See, e.g.*, *Lawrence*, 539 U.S. at 586–87 (Scalia, J., dissenting).

199 *Gonzales*, 550 U.S. at 191 (Ginsburg, J., dissenting).

200 Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010).

201 *Id.* at 408–09 (Stevens, J., dissenting).

202 *See* Roper v. Simmons, 543 U.S. 551, 587 (2005) (O'Connor, J., dissenting); *id.* at 607 (Scalia, J., dissenting, joined by Rehnquist, C.J. & Thomas, J.); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (Rehnquist, C.J., dissenting, joined by Scalia & Thomas, JJ.).

the probably equal intensity the majority feels about the issue under consideration).

Just as the decision to overrule rather than distinguish seems random, so, too, does the decision by dissenters to invoke stare decisis. All one can say is that although contemporary dissenters do not always invoke stare decisis, they do so more often than their counterparts did twenty-five years ago.

V. Those Who Changed Their Minds

How often have individual Justices contributed to overruling by changing their minds? The early 1940s mea culpa of Justices Black, William O. Douglas, and Frank Murphy on the treatment of Jehovah's Witnesses is probably the most famous example of Justices switching on an issue—especially since they had so recently taken the opposite position.[203] For the next four decades, individual Justices changed their minds from Case *A* to Case *B* with some frequency, but with a single exception there was always a number of years between the initial case and the one that overruled it.

The two next overrulings, now in the 1950s and 1960s, also saw a Justice switching his position. *Reid v. Covert*, the civilian court-martial case, resulted in part from Justice Harlan's changing his mind over the summer and, with Justice Frankfurter, creating the new majority by adding their votes to those of Chief Justice Warren and Justices Black and Douglas.[204] *Mapp*'s five-to-four result also was the result of a change of mind as Justice Black, who had agreed with the *Wolf* result, concocted the absurd theory that the Fifth Amendment privilege against self-incrimination was a sufficient supplement to the Fourth Amendment to require that illegally seized evidence be excluded at trial.[205] This allowed him to switch. The real contrast between *Barnette*, *Reid*, and *Mapp* and subsequent cases is that the former had Justices who changed their minds; in the future there were fewer switches. Thus, following *Mapp* and *Baker v. Carr* (where Justices Black, Douglas, and Frankfurter held to their original positions), in the eight subsequent overruling cases only two Justices, Chief Justice Warren in *Bruton v. United States*[206] and Justice Brennan in *Afroyim v. Rusk*,[207] changed from their original position.[208]

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203 Melvin I. Urofsky, Division and Discord 110–11 (1997); 12 William M. Wiecek, The Birth of the Modern Constitution 227–28 (2006).

204 *See* Reid v. Covert, 354 U.S. 1, 1 (1957) (Black, J., writing for the majority and joined by Warren, C.J., and Douglas & Brennan, JJ.).

205 *See* Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring).

206 Bruton v. United States, 391 U.S. 123 (1968) (holding that non-testifying co-defendant's confession cannot be admitted at trial).

207 387 U.S. 253 (1967).

208 Justice Black dissented in both *Jackson v. Denno*, 378 U.S. 368, 401 (1964) (holding regarding the taking of the issue of voluntariness of a confession from the jury) (Black J., dissenting in part and concurring in part), and the overruling of *Stein v. New York*, 346 U.S. 156, 197 (1953) (Black, J., dissenting), but the *Stein* dissent was on a different point.

The Burger Court, perhaps the most difficult modern Court to characterize successfully, began with an overruling case in which a Justice switched votes. The case was *Ashe v. Swenson*, and the issue was double jeopardy collateral estoppel.[209] Justice Harlan changed an earlier opposite position, although only by acceding to subsequent developments (that he had opposed). The Burger Court also decided the case that tied *Murdock* for the single largest number of switches taking place. The case was *Taylor v. Louisiana*.[210] Justices Douglas, Brennan, and Potter Stewart all changed the position they took in *Hoyt v. Florida* to hold that women could not automatically be excluded from jury service.[211] *Taylor* reflected the *force majeure* of the modern feminist movement.

Justice Stewart switched two other times: in *Hudgens v. NLRB*[212] on the issue of picketing on private property, and in *Gregg*, on the issue of capital punishment, in which Justice Byron White also switched to hold that murderers could be executed.[213] Justices White and Brennan both switched again to forbid racially motivated peremptory challenges in *Batson*.[214] Justice Brennan was the sole Justice remaining from the one case invalidating an economic regulation on equal protection grounds, *Morey v. Doud*,[215] and he joined its unanimous overruling in *Dukes v. New Orleans*.

The Warren Court Justices were appointed during the era (1932–1968) of Democratic dominance and, as noted, they were certainly willing to switch and overrule. From Justices Black and Douglas's switch in the Jehovah's Witness cases[216] to Justices Brennan and White's flip on racially based peremptory challenges, Justices who served on the Warren Court changed their votes between Case *A* and Case *B* eighteen times.

Justices Brennan[217] and Stewart[218] led the switches with four each. Justices Black,[219] Douglas (thirty-one years apart, longer than all but a handful

209 Ashe v. Swenson, 397 U.S. 436, 441, 445 (1970) (holding that collateral estoppel is part of double jeopardy and overruling Hoag v. New Jersey, 356 U.S. 464 (1958)).

210 419 U.S. 522 (1975).

211 *Id.* at 525.

212 424 U.S. 507 (1976).

213 Gregg v. Georgia, 428 U.S. 153, 169, 207 (1976).

214 *See* Batson v. Kentucky, 476 U.S. 79, 81 (1986) (Powell, J., writing for the majority and joined by Brennan, White, Marshall, Blackmun, Stevens, & O'Connor, JJ.).

215 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

216 See Murdock v. Pennsylvania, 319 U.S. 105 (1943), and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), for the early Jehovah's Witness cases, which for these purposes I am treating as a single case.

217 *See, e.g.*, *Batson*, 476 U.S. 79 (involving racial peremptory challenges); *Dukes*, 427 U.S. 297 (involving economic equal protection); Taylor v. Louisiana, 419 U.S. 522 (1975) (involving women on juries); Afroyim v. Rusk, 387 U.S. 253 (1967) (involving involuntary denaturalization).

218 *See, e.g.*, *Gregg*, 428 U.S. 153; Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Hudgens v. NLRB, 424 U.S. 507 (1976); *Taylor*, 419 U.S. 522.

219 *See* Mapp v. Ohio, 367 U.S. 643 (1961); *Barnette*, 319 U.S. 624; *Murdock*, 319 U.S. 105.

of Justices have served),[220] Harlan,[221] and White[222] each switched twice. Chief Justice Warren[223] and Justice Clark[224] changed once, while Justices Frankfurter and Marshall never changed votes in an overruling when they had participated in Case *A*.[225] What is striking is that liberals and conservatives did not differ in their willingness to change their minds even against a background of stare decisis.[226]

The era of Republican dominance commenced with President Nixon and extended to either the Clinton or Obama presidency,[227] and Republicans gained a majority on the Court during President Nixon's first term[228]—leading to the overrulings in *National League of Cities* and *Gregg*. Both Justices Stewart and White changed their minds in the latter, but going forward the Justices appointed by Republican Presidents (and they were all appointed by Republicans for the quarter-century after Justice Thurgood Marshall took his seat) proved extraordinarily reluctant to change a previously held position.

Justice Harry Blackmun, the weakest link in *National League of Cities*, declared the case unworkable when he wrote the overruling *Garcia* opinion. Justice O'Connor changed her mind on same-sex sexual conduct, going from the fifth vote in the *Bowers* majority to an irrelevant sixth vote (on different—equal protection—grounds) in *Lawrence*.[229] Justice Kennedy changed his mind on capital punishment for those who committed murder as juveniles as well as for those who are mentally retarded. In the juvenile murder case he became the overruling fifth vote. In the mental retardation case Justice O'Connor also switched and a six-to-three overruling resulted.

Justices appointed in the last third of the twentieth century, whether liberal or conservative or moderate, just did not change their minds in overruling. Chief Justice Burger never did, nor did Chief Justice Rehnquist or Justices Scalia or Thomas. Justice Lewis Powell didn't either. Liberals were just as stubborn: Justices Ginsburg, Breyer,[230] and Souter never changed.

220 *See Taylor*, 419 U.S. 522; *Barnette*, 319 U.S. 624; *Murdock*, 319 U.S. 105.

221 *See* Ashe v. Swenson, 397 U.S. 436 (1970); Reid v. Covert, 354 U.S. 1 (1957).

222 *See Batson*, 476 U.S. 79; *Gregg*, 428 U.S. 153.

223 Bruton v. Maryland, 391 U.S. 123 (1968) (involving a co-defendant confession at joint trial).

224 Harper v. Va. Bd. of Elec., 383 U.S. 663 (1966).

225 I have excluded those Justices who served only briefly: Justices Reed, Burton, Minton, Whittaker, Goldberg, and Fortas.

226 Using a much larger time frame and different (and much larger) data set, Jeffrey A. Segal and Harold J. Spaeth reach a different conclusion: "Conservative justices are more restrained, toward precedent at least, than are liberal justices." JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 301 (2002).

227 For purposes of this discussion it is irrelevant because none of the appointees of either President George W. Bush or Barack Obama have switched an initial vote in an overruling case.

228 I am treating Justice Lewis Powell, a southern Democrat, as a Republican, which he surely would have become once the South became Republican.

229 Lawrence v. Texas, 539 U.S. 558, 579 (2003).

230 Justice Breyer, like Justice Harlan in *Ashe v. Swenson*, 397 U.S. 436 (1970), changed a vote based on acquiescing in an opinion he believed was wrongly decided. *See* Alleyne v.

Most shocking, given his flip-flopping career,[231] Justice Stevens never changed in an overruling case. To be sure there were not the number of significant constitutional cases decided within the generation that were overruled, but the consistency of these Justices in holding to their initial positions offers a contrast with their predecessors. Perhaps the difference stems from the earlier Justices being men of national reputation in public affairs[232] and the later ones having prior careers on lower courts and thus perhaps feeling a stronger tug of stare decisis (at least when they had participated in the original majority).

A second possible reason for the lack of switches was the changing nature of significant overruled cases in the aftermath of *Casey*. They involved hot-button issues—abortion, gay rights, affirmative action, capital punishment, campaign finance—on which the Justices (at least after *Casey*) maintained strong positions that proved quite impervious.[233] The best reason may be more careful vetting of potential nominees, especially of Republicans, following the development by each political party of a distinctive constitutional vision.[234] Republicans, who care passionately about taking over the Supreme Court (and the judiciary generally), wanted no more Souters: hence the cry of conservative opponents to the mention of Alberto Gonzales—"Gonzales is Spanish for Souter."[235] And there was reason behind their fears.[236] With two exceptions, every Justice who changed between Case *A* and Case *B* (including Justices Harlan and Kennedy) went from a more con-

United States, 133 S. Ct. 2151 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)). If *Apprendi v. New Jersey*, 530 U.S. 466 (2000), could be overruled, Justice Breyer would revert to *Harris*.

231 *See* Justin Driver, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1263 (2011); Justin Driver, *The Stevens Myth*, NEW REPUBLIC, Apr. 29, 2010, at 19.

232 With the exception of Justices Brennan and Stewart.

233 There were exceptions, but not among the hard-core conservatives. At the end of his career, Justice Blackmun switched on capital punishment. Callins v. Collins, 510 U.S. 1141, 1143–44 (1994) (Blackmun, J., dissenting). So did Justice Stevens. Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring). Justice O'Connor switched on affirmative action, *compare* Grutter v. Bollinger, 539 U.S. 306 (2003), *with* Aderand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and gay rights, where she had sole occasion among these Justices to switch in an overruling case, *Lawrence*, 539 U.S. 558. And in *Lawrence*, she offered the equal protection rationale which was more limited than the majority. *Id.* at 582–85 (O'Connor, J., concurring).

234 *See generally* H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 641–42 (2004).

235 Dana Milbank, *Bush Picks a Loyalist to Replace a Politician; Counsel Gonzales Often Clashed with Ashcroft*, WASH. POST, Nov. 11, 2004, at A7; *see also* JAN CRAWFORD GREENBURG, SUPREME CONFLICT 246 (2007).

236 What the parties cannot protect against is a change in party position on the Constitution occurring after the party has placed its Justices on the Court. This was illustrated by the hostile reaction to Chief Justice John Roberts's vote to sustain the Affordable Care Act though the case would have been decided by an eight-to-one or seven-to-two ruling had it come up in 2008 (since the constitutional claim against an individual mandate was first articulated in 2009). Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC, June 4, 2012, at 38.

servative position to a more liberal one. And the two exceptions were from over a quarter-century in the past: Justice Stewart went conservative three (*National League of Cities*, *Gregg*, and *Hudgens*) to one (*Taylor*), while Justice White split equally—*Batson* and *Gregg*.

A final, and quite speculative, reason might be a combination of reliance and concern over possible backlash. The Justices know that intense partisans adhere to the Court's existing jurisprudence, and they would erupt (verbally) if the decisions were reversed. With *Bush v. Gore*[237] and *Citizens United v. Federal Election Commission*[238] already on the books, the cry of "politics" would be loud and clear.[239] Indeed, this was articulated by the *Casey* majority.[240]

VI. Changing Composition

I have heretofore taken *Casey* more or less at its word (with appropriate additions and some skepticism). But perhaps more skepticism is in order for, after all, Justice Scalia, shortly after taking his seat, explained his vote to overrule by noting that "[o]verrulings of precedent rarely occur without changes in the Court's personnel."[241] Michael Gerhardt backs this up when he notes that only four cases in the history of the Court have been overruled without a change in the composition of the Court.[242]

At the end of his career, indeed in his last dissent, Justice Thurgood Marshall took the gloves off to complain about the phenomenon of composition affecting results: "Power, not reason, is the new currency of this Court's decisionmaking. . . . Only the personnel of this Court did [change]."[243] But that was Justice Scalia's point, and contra Justice Marshall, "[n]o matter how strongly justices may feel that their decisions are both correct and timeless, they have little sway over how subsequent justices . . . will understand those decisions within the contexts in which they are functioning."[244] There was a perfect example of this in Justice Frankfurter's dissent in *Baker v. Carr*. He believed that the injunction not to enter the political thicket was a timeless truth. Less than two weeks after *Baker* he suffered several strokes that forced his retirement; he attributed them to *Baker*.[245]

Historically Justice Scalia was spot on. The most famous quick overruling involved paper money issued during the Civil War. *Hepburn v. Gris-*

237 531 U.S. 98 (2000).

238 558 U.S. 310 (2010).

239 See Michael J. Klarman, From the Closet to the Altar (2013), for a strong statement of the backlash thesis from its author.

240 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–68 (1992).

241 South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (asserting that victim impact statements were inadmissible).

242 Gerhardt, *supra* note 31, at 11.

243 Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (deciding that victim impact statements were admissible).

244 Gerhardt, *supra* note 31, at 203–04.

245 Powe, *supra* note 33, at 205.

wold[246] held, by a four-to-three vote, that issuing greenbacks was unconstitutional. That very day President Grant sent the nominations of William Strong and Joseph Bradley to the Senate. Once confirmed they voted with the *Hepburn* dissenters to rehear the issue, and in *Knox v. Lee*,[247] the Court reversed itself and held legal tender valid.

Despite the renown of the massive switch of Justices Black, Douglas, and Murphy in the Jehovah's Witness cases, their defection alone could not change *Gobitis* (or for that matter *Jones v. City of Opelika*,[248] in which they announced their change) because Justice Harlan Stone had been the sole dissenter and three plus one still equaled a number less than five. To overrule *Jones* it took the subsequent appointment of Justice Wiley Rutledge—who as a newly minted D.C. Circuit judge had criticized his superiors for the *Gobitis* outcome.[249] Once Justice Rutledge joined Justices Stone, Black, Douglas, and Murphy, there were five sure votes to overrule *Gobitis*. Justice Robert Jackson, who joined the Court after *Gobitis* and who joined the *Jones* majority, cast the sixth vote to create the result in *Barnette* (his greatest opinion).

Baker v. Carr was the last Warren Court overrule before the liberals got their (all but) impregnable fifth vote in Justice Arthur Goldberg (and his replacement Justice Abe Fortas) and, with it, the seeming ability to overrule at will. Justices Black and Douglas in the majority and Justice Frankfurter dissenting all held to their original positions. Chief Justice Warren and Justices Brennan and Stewart provided the necessary votes (with Justice Clark joining in at the end). The new voting rights, criminal procedure, and domestic security results all followed from the change in personnel, especially Justices Goldberg and Fortas.

Thus in *Camara v. Municipal Court*,[250] seven Justices (all but Justices White and Fortas) had participated in *Frank v. Maryland* on warrantless municipal business searches, and all seven voted the same way in *Camara*. *Harper v. Virginia Board of Elections* also was the result of the infusion of new Justices.[251] It is unusual because Justices Black and Douglas were on opposite sides. Justice Douglas wrote the majority and Justice Black dissented, reversing from the earlier positions in which Justice Black was in the majority and Justice Douglas dissented.[252]

With the exception of *Taylor v. Louisiana* and *Garcia*, all the Burger Court's significant overrulings were the result of new appointments. Justice Stewart joined the four Nixon appointees to create the *National League of*

246 75 U.S. (8 Wall.) 603 (1869).

247 79 U.S. (12 Wall.) 457 (1871).

248 316 U.S. 584, 623 (1942), *vacated per curiam*, 319 U.S. 103 (1943).

249 JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT 188–89 (2004).

250 387 U.S. 523 (1967).

251 383 U.S. 663 (1966). Although Justice Clark, undoubtedly because of his vote in *Baker v. Carr*, switched his vote from fifteen years earlier in the summary affirmance of *Butler v. Thompson*, 341 U.S. 937 (1951).

252 *Butler*, 341 U.S. 937.

Cities majority, and he along with Justice White voted as the five new Republicans did in *Gregg* to reinstate capital punishment. In *Hudgens*, on labor pickets on private property, the Republican appointees (joined by Justices Stewart and White again) were essential for the overruling of *Logan Valley Plaza*.

Justices Brennan and White changed their votes in *Batson*, but it was the change in personnel that changed the holding on racial peremptory challenges. And in a switch from liberal to conservative holdings, the warrant requirements of *Aguilar* and *Spinelli* were overruled because of the added Republican Justices.

Since Justices Brennan and Marshall retired to be replaced by Justices Souter and Thomas, the Court and its decisions have had a conservative cast. The two exceptions to that in overrulings were the capital punishment cases in which Justice Kennedy changed from his initial (and very early in his career) vote and in *Lawrence* (in which Justice Kennedy's substitution for Justice Powell changed the outcome).

Given that Justice Souter typically voted the way Justice Brennan did, it is perhaps surprising that his replacement of Justice Brennan changed the Court's conclusion about the constitutionality of admitting victim impact statements in the penalty phase of capital cases.[253] Indeed, replacing Justice Brennan with Justice Souter changed two cases that were but two and four years old.[254] These outcomes may be explicable on the assumption that the recently seated Justice Souter had yet to hit his more liberal stride (or, perhaps, to the fact that victim impact statements accord decedents a measure of dignity that the defendants did not accord them).

The two most consequential post-Brennan appointments were the replacements of Justice Marshall with Justice Thomas, virtually his exact opposite, and Justice O'Connor with Justice Samuel Alito, who is definitely not the centrist Justice O'Connor became following Justice Powell's retirement. Justice Thomas's appointment quickly changed affirmative action in government contracts in *Adarand* and the states' Eleventh Amendment immunity in *Seminole Tribe*. Justice Alito's vote was necessary for the changed result on partial-birth abortions (which Justice Ginsburg noted in her dissent[255] and Justice O'Connor did, too, from her perch in retirement)[256] and much more importantly, in *Citizens United*. Chief Justice Roberts replacing Chief Justice Rehnquist has had no effect on overruling (so far) even as it had a profound effect in sustaining the Affordable Care Act.[257]

253 Payne v. Tennessee, 501 U.S. 808 (1991).

254 South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

255 Gonzales v. Carhart, 550 U.S. 124, 191 (Ginsburg, J., dissenting).

256 Joan Biskupic, *O'Connor Says Rulings 'Dismantled,'; Diversity Crucial to Highest Court*, USA TODAY, Oct. 5, 2009, at 1A.

257 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

CONCLUSION

Justice Scalia's claim about overruling being largely a function of personnel change is certainly more apt than *Casey*'s claim that overruling depends on factors within the judicial process, and his claim supports Chief Justice Rehnquist's 1986 observation that "stare decisis in constitutional law is pretty much of a sham."[258] Furthermore, there is considerable reason to believe that Justice Scalia's claim has become more correct over time because of changes over the past quarter-century, compounded by the slowing of retirements over the past forty years.[259]

Justices seem less willing to rethink previously held positions. Justice Kennedy backed off two of his earliest votes, and Justice O'Connor, who always seemed to have an internal Gallup Poll as a compass,[260] changed with the nation on gay rights. But otherwise the judicial standard for sitting Justices has been once decided, finally decided. Only Justice Breyer, and only by acquiescence in an earlier decision he believes was wrongly decided,[261] among Justices appointed since 1988 has changed a position in an overruling situation. Justices Burger and Powell, along with Chief Justice Rehnquist also fall within that position. By contrast, in the earlier generation only Justices Frankfurter and Marshall held firm.

The reason for the Justices' unwillingness to switch is likely that the dominant rationale for overruling is "wrong the day it was decided." Justices do not like to be on the record as saying "I blew it"[262]—at least not since Justices Black, Douglas, and Murphy did seventy years ago (and well before the era of promoting lower court judges). Basically, for intragenerational overruling that means *Casey's* doctrinal exposition is wrong (and may have been wrong the day it was decided). Changes in the Court's personnel, not doctrinal erosion or new perceptions of facts, determine when a precedent is overruled.

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258 JENKINS, *supra* note 40, at 250.

259 *See* REFORMING THE COURT (Roger C. Crampton & Paul D. Carrington eds., 2006).

260 *See* JEFFREY TOOBIN, THE OATH 50 (2012) (referring to Justice O'Connor as "a reliable vector for public opinion").

261 *See* Alleyne v. United States, 133 S. Ct. 2151, 2166 (2013) (Breyer, J., concurring) (overruling Harris v. United States, 536 U.S. 545 (2002)); *see also supra* note 230 and accompanying text.

262 Off the record, and to Justice Douglas only, Justice Fortas admitted that he had traded his vote in *Ginzburg v. United States*, 383 U.S. 463 (1966) (pandering can make nonobscene materials obscene), to convict for Justice Brennan's vote in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (deciding that *Fanny Hill* was not obscene because the work had some value), to hold the book not obscene—and that he had been wrong to do so. *See* L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for* Fanny Hill, 35 J. SUP. CT. HIST. 166, 173 (2010) (noting Justice Fortas's assertion that "contrary to my principles, I . . . came out against Ginzburg").

Appendix: Overruling Cases (Chronologically)

Murdock v. Pennsylvania, 319 U.S. 105 (1943): Jehovah's Witnesses selling their literature are engaged in religious, not commercial, activity

Overruled case: *Jones v. City of Opelika*, 316 U.S. 584 (1942)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): Flag salute cannot be made compulsory

Overruled case: *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)

Reid v. Covert, 354 U.S. 1 (1957): Overseas civilian dependents of those in military cannot be tried by courts martial

Overruled case: *Kinsella v. Krueger*, 351 U.S. 470 (1956)

Mapp v. Ohio, 367 U.S. 643 (1961): Fourth Amendment exclusionary rule applies in state criminal trials

Overruled case: *Wolf v. Colorado*, 338 U.S. 25 (1949)

Baker v. Carr, 369 U.S. 186 (1962): Legislative districting is a justiciable controversy in federal courts

Overruled case: *Colegrove v. Green*, 328 U.S. 549 (1946)

Gideon v. Wainwright, 372 U.S. 335 (1963): Indigent state criminal defendants must be provided counsel

Overruled case: *Betts v. Brady*, 316 U.S. 455 (1942)

Malloy v. Hogan, 378 U.S. 1 (1964): Privilege against self-incrimination is applicable to the states

Overruled case: *Adamson v. California*, 332 U.S. 46 (1947)

Murphy v. Waterfront Commission, 378 U.S. 52 (1964): Use of compelled evidence from one jurisdiction cannot be used in a criminal trial in another jurisdiction

Overruled cases: *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)

Jackson v. Denno, 378 U.S. 368 (1964): Issue of voluntariness of a confession is for the judge not the jury

Overruled case: *Stein v. New York*, 346 U.S. 156 (1953)

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966): Poll tax violates equal protection

Overruled case: *Butler v. Thompson*, 341 U.S. 937 (1951)

Spevack v. Klein, 385 U.S. 511 (1967): Lawyer cannot be disbarred merely for asserting the privilege against self-incrimination

Overruled case: *Cohen v. Hurley*, 366 U.S. 117 (1961)

Keyishian v. Board of Regents, 385 U.S. 589 (1967): New York's anti-communist Feinberg Law is unconstitutionally vague and cannot be sustained on the basis that public employment is a privilege not a right

Overruled case: *Adler v. Board of Education*, 342 U.S. 485 (1952)

Afroyim v. Rusk, 387 U.S. 253 (1967): Involuntary denaturalization for living abroad in country of birth is unconstitutional

Overruled case: *Perez v. Brownell*, 356 U.S. 44 (1958)

Camara v. Municipal Court, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967): Fourth Amendment bars prosecution of an individual who refuses to consent to a warrantless municipal inspection of private commercial property

Overruled case: *Frank v. Maryland*, 359 U.S. 360 (1959)

Bruton v. United States, 391 U.S. 123 (1968): Non-testifying co-defendant's confession cannot be introduced at trial

Overruled case: *Delli Paoli v. United States*, 352 U.S. 232 (1957)

Moore v. Ogilvie, 394 U.S. 814 (1969): Ballot access residence requirements are too restrictive under equal protection

Overruled case: *MacDougall v. Green*, 335 U.S. 281 (1948)

Ashe v. Swenson, 397 U.S. 436 (1970): Double jeopardy contains a collateral estoppel component

Overruled case: *Hoag v. New Jersey*, 356 U.S. 464 (1958)

Taylor v. Louisiana, 419 U.S. 522 (1975): Automatic exemptions cannot exclude women from jury duty

Overruled case: *Hoyt v. Florida*, 368 U.S. 57 (1961)

Hudgens v. NLRB, 424 U.S. 507 (1976): There is no First Amendment right to picket on private property open to the public

Overruled case: *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)

National League of Cities v. Usery, 426 U.S. 833 (1976): Fair Labor Standards Act cannot constitutionally be applied to essential state employees

Overruled case: *Maryland v. Wirtz*, 392 U.S. 183 (1968)

City of New Orleans v. Dukes, 427 U.S. 297 (1976): Purely economic regulation need only pass rational basis test

Overruled case: *Morey v. Doud*, 354 U.S. 457 (1957)

Gregg v. Georgia, 428 U.S. 153 (1976): Capital punishment is constitutional

Overruled case: *Furman v. Georgia*, 408 U.S. 238 (1972)

Illinois v. Gates, 462 U.S. 213 (1983): Totality of the circumstances is appropriate standard to determine search warrant based on unnamed informant

Overruled cases: *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969)

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985): Fair Labor Standards Act can be applied to municipal employees

Overruled case: *National League of Cities v. Usery*, 426 U.S. 833 (1976)

Batson v. Kentucky, 476 U.S. 79 (1986): Prosecutors may not base peremptory challenges of jurors solely on the basis of race

Overruled case: *Swain v. Alabama*, 380 U.S. 202 (1965)

Solorio v. United States, 483 U.S. 435 (1987): Military may use courts martial for non-service related crimes committed by military personnel

Overruled case: *O'Callahan v. Parker*, 395 U.S. 258 (1969)

Payne v. Tennessee, 501 U.S. 808 (1991): Victim impact statements are admissible in the penalty phase of a capital trial

Overruled cases: *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992): State may restrict abortions so long as law does not unduly burden a woman's right to choose

Overruled cases: *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995): Affirmative action for federally funded programs is subject to strict scrutiny

Overruled case: *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)

Seminole Tribe v. Florida, 517 U.S. 44 (1996): Federal statute passed under Article I cannot divest states of their Eleventh Amendment immunity from suits in federal courts

Overruled case: *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)

Agostini v. Felton, 521 U.S. 203 (1997): Federal government can pay for secular teaching at religious schools

Overruled cases: *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985)

Atkins v. Virginia, 536 U.S. 304 (2002): Cruel and unusual punishment forbids death penalty for mentally retarded

Overruled case: *Penry v. Lynaugh*, 492 U.S. 302 (1989)

Lawrence v. Texas, 539 U.S. 558 (2003): States may not criminalize homosexual sodomy

Overruled case: *Bowers v. Hardwick*, 478 U.S. 186 (1986)

Roper v. Simmons, 543 U.S. 551 (2005): Cruel and unusual punishment forbids executing people for crimes committed while minors

Overruled case: *Stanford v. Kentucky*, 492 U.S. 361 (1989)

Gonzales v. Carhart, 550 U.S. 124 (2007): Criminalizing partial-birth abortion does not unduly burden a woman's right to choose

Overruled case: *Stenberg v. Carhart*, 530 U.S. 914 (2000)

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010): Government cannot limit the amount contributed or spent to influence an election by private entities unaffiliated with a candidate

Overruled cases: *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

Alleyne v. United States, 133 S. Ct. 2151 (2013): All facts that increase a mandatory minimum sentence must be found by the jury

Overruled case: *Harris v. United States*, 536 U.S. 545 (2002)