ESSAY

DEAD PRECEDENTS

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INTRODUCTION

Shaun McCutcheon's was the "next big campaign finance case to go before the Supreme Court."[1] When the Alabama GOP warned the conservative businessman that his 2010 federal campaign contributions might soon exceed a congressionally imposed limit, he decided to "take a stand."[2] Together, McCutcheon and the Republican National Committee (RNC)—which "wish[ed] to receive the contributions that McCutcheon and similarly situated individuals would like to make" in the absence of such aggregate contribution limits[3]—challenged the responsible statutory regime[4] on First Amendment grounds and attracted national attention en route to a victory before the Supreme Court.[5]

But while McCutcheon and the RNC prevailed in their case, they failed in another noteworthy regard—Chief Justice Roberts's controlling opinion declined their request to squarely overrule a relevant portion of the landmark campaign

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1 Paul Blumenthal, *Next* Citizens United*?* McCutcheon *Supreme Court Case Targets Campaign Contribution Limits*, HUFFINGTON POST (July 31, 2013), http://www.huffingtonpost.com/2013/07/31/mccutcheon-supreme-court_n_3678555.html.

2 Shaun McCutcheon, *Donation Caps Hurt Democracy*, POLITICO (Oct. 6, 2013), http://www.politico.com/story/2013/10/mccutcheon-how-campaign-spending-caps-hurt-american-democracy-097834.

3 McCutcheon v. FEC, 134 S. Ct. 1434, 1443 (2014) (plurality opinion).

4 *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), *amended by* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

5 A plurality of the Supreme Court sided with McCutcheon, holding the aggregate limits McCutcheon complained of "invalid under the First Amendment." *McCutcheon*, 134 S. Ct. at 1442.

finance case *Buckley v. Valeo*.[6] The *McCutcheon* Court's hesitance to overrule a precedent like *Buckley* was no new phenomenon. On the contrary, it was characteristic of a broader trend: today's Supreme Court is as reluctant as ever to overrule Supreme Court cases, even when the precedential value of such cases will be undermined by the Court's holding in the case at bar.[7]

Just how pronounced is this tendency, how is it best explained, and what are its ramifications? These questions are the subject of this Essay, which proceeds in two parts. Part I explores the Roberts Court's reluctance to overrule Supreme Court precedents more thoroughly. Part II provides a modest account for this phenomenon. Section II.A considers the relationship between the Roberts Court's reluctance to overrule Supreme Court precedents and its law declaration bent. Section II.B evaluates this reluctance in light of the doctrinal commitment of stare decisis. Finally, Section II.C examines the link between the Roberts Court's treatment of dying precedents and its trademark adherence to the constitutional avoidance doctrine.

I. LIMITED TO ITS FACTS: THE NOT-SO-CURIOUS CASE OF *J.I. CASE CO. V. BORAK*

What is the modern significance of *J.I. Case Co. v. Borak*?[8] With respect to this case and countless others still technically on the books in the United States Reports, the answer is "very little." Once a critical pillar of the Supreme Court's implied rights of action jurisprudence,[9] *Borak* has, for all intents and purposes, been relegated to the dustbin of history.[10] Indeed, one case after another has followed in *Borak*'s direct line, and each has deepened the Court's departure from its purposive rationale.[11]

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6 424 U.S. 1 (1976) (per curiam).

7 *See infra* Part I.

8 377 U.S. 426 (1964).

9 For a small sampling of articles in this area, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986); Jonathan A. Marcantel, *Abolishing Implied Private Rights of Action Pursuant to Federal Statutes*, 39 J. LEGIS. 251 (2013); Marc I. Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME L. REV. 33 (1979).

10 *See, e.g.*, C. Steven Bradford, *The Possible Future of Private Rights of Action for Proxy Fraud: The Parallel Between* Borak *and* Wilko, 70 NEB. L. REV. 306, 307 (1991) (observing that the Court has "allowed the narrow holding[] of . . . *Borak* to survive" in spite of the fact that its "foundation" has been "demolished"); *see also id.* at 308 ("*Borak* would not survive under the new standard, but so far the Court has treated [it] as a historical anomaly, *regretfully wrong but nevertheless valid*." (emphasis added)).

11 *Borak* represents "[t]he high water mark of judicially inferred remedies." RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 739 (7th ed. 2015). Its broad holding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose," *Borak*, 377 U.S. at 433, has since been undermined repeatedly. With the adoption of a brand new four-factor analysis just eleven years later, the Court began to backpedal from its holding in *Borak*, and by 1979 a handful of Supreme Court cases had essentially limited the case to its facts. *See* Cort v. Ash, 422 U.S. 66, 78 (1975) (announcing a four-prong functional test in an area previously dictated by *Borak*'s

In the meantime, the Supreme Court's approach to statutory interpretation has undergone momentous change,[12] implied rights of action doctrine has shifted markedly,[13] and *Borak*'s contemporary irrelevance has become well-settled.[14] But still, the case persists. Limited to its narrowest facts, *Borak* bears the same red flag on Westlaw as more famous relics like *Swift v. Tyson*[15] and *Plessy v. Ferguson*.[16]

But while *Borak* admittedly differs from these legal artifacts by retaining staying power within a limited legal domain,[17] its principal distinction from these cases lies in the *reason* for its red flag. Unlike these cases of legal eras past, *Borak* has never been squarely overruled,[18] by "stealth"[19] or otherwise. On the contrary,

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purposive approach); *see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (refusing to imply a private right of action under *Cort* test); Cannon v. Univ. of Chi., 441 U.S. 677, 689–709 (1979) (inferring a private right of action but evaluating case under *Cort* factors); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60–72 (1978) (refusing to imply a right of action under *Cort* test); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37–42 (1977) (same). If any doubt remained as to *Borak*'s state, the Court's 2001 ruling in *Alexander v. Sandoval* placed a nail in the lifeless case's coffin. 532 U.S. 275 (2001). There, the Court completed an about-face thirty-seven years in the making, abandoning *Borak* in both style and substance. Where *Borak*'s approach to the statutory question at issue was purposive, Justice Scalia's majority opinion in *Sandoval* was unmistakably textualist. *See id.* at 287 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").

12 The rise of "new textualism" stemmed from Justice Scalia's profound influence on the field of statutory interpretation. Indeed, as Justice Kagan famously observed, "we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench." Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/; *see also* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2054 (2017) ("First things first. No one had a more important impact on the modern theory and practice of statutory interpretation than did Justice Scalia.").

13 *See supra* note 11 and accompanying text.

14 *See Sandoval*, 532 U.S. at 287.

15 41 U.S. 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

16 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

17 Indeed, *Borak* is still good and important law within the sphere of the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.). In keeping with its general reluctance to "overturn[] earlier decisions that had recognized a private right of action under a more liberal approach," the Court subsequently "reaffirmed [a] private right of action [in another section of the statute from which the *Borak* Court implied a federal right of action]." FALLON ET AL., *supra* note 11, at 740; *see also* Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983); Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

18 *Borak*'s red flag stems from the Court's recognition of its abrogation in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) ("Since our decision in *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one. . . . Just last Term it was noted that we 'abandoned' the view of *Borak* decades ago, and have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'" (quoting *Sandoval*, 532 U.S. at 287)).

19 *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 6–16 (2010); Richard L. Hasen, *Anticipatory Overrulings,*

it has been left to wither on the precedential vine by a long line of cases that have signaled its fate loudly and clearly. *Cort v. Ash*'s sharp break from its reasoning in 1975 was exacerbated by each subsequent case applying *Cort*'s more stringent test in place of *Borak*'s liberal approach. *Alexander v. Sandoval*'s official abrogation of *Borak*—which had by then been besieged by twenty-six years of critical cases—finally put the case out of its misery from a practical standpoint, but to "abrogate" is not to "overrule."

In a 1989 concurrence, Justice Scalia observed the "four courses" the Court might choose in any case: "reaffirm [the prior case]," "overrule it explicitly," "overrule it *sub silentio*," or "avoid the question."[20] Professor Barry Friedman has noted a fifth common option that Justice Scalia left out: "distinguish[ing] the precedent."[21] Some cases, in addition, are overridden directly by Congress,[22] or even, in rare circumstances, by constitutional amendment.[23]

The Court's roundabout abrogation of *Borak* does not fit neatly within either of these categories. Clearly, however, it is *not* an explicit overruling. That plainest form of judicial departure from precedent is a power that the Supreme Court wields exclusively, for where lower courts may observe the abrogation of a Supreme Court precedent by subsequent Supreme Court decisions, statutes, and the like, the high court alone can clearly articulate to the rest of the country that one of its prior cases has been extinguished.[24]

With respect to a case of *Borak*'s limited stature and narrow importance, searching for an appropriate categorization along these lines may be a pointless endeavor. In some subsequent decisions it was distinguished and in others it was criticized outright, but regardless, practitioners, lower courts, and professors know well by now that the case's holding governs merely in the context of the single federal statute it considered, and that its purposive rationale has fallen out of favor.[25] However, countless other cases share *Borak*'s fate from a practical standpoint but remain standing as precedents of vague legal worth. Whether this is a problem or not, it is certainly an observable phenomenon. Indeed, former Solicitor General Paul Clement once described his practice of inviting the Justices

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Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law, 61 EMORY L.J. 779 (2012).

20 Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Scalia, J., concurring in part and concurring in the judgment).

21 Friedman, *supra* note 19, at 8.

22 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (offering a historical overview of congressional overrides of judicial statutory interpretations).

23 *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by* U.S. CONST. amends. XIII, XIV; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

24 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

25 Indeed, thousands of law students are instructed as such each year. *See, e.g.*, FALLON ET AL., *supra* note 11, at 739–41.

to consider the option of overruling a precedent that is unhelpful to his position as "the axe behind the proverbial pane of glass: 'break in case of emergency only.'"[26]

Advocates like Clement certainly take their cues from the Supreme Court, but objective evidence confirms Clement's observation as well. While the Supreme Court has always been loath to arouse the stare decisis ramifications that come with overturning a prior case, the Roberts Court has been particularly cautious. Indeed, the Court issued only nine overruling decisions in the Chief Justice's first twelve terms.[27] Its institutional predecessor, the Rehnquist Court, overruled at least one precedent in every forty-one cases over its nineteen-year span.[28] And the Burger and Warren Courts were even more prolific overrulers than the Rehnquist Court, overturning at least one precedent in about three decisions per year.[29] The upshot is clear: the Rehnquist Court overruled Supreme Court precedent less frequently than the Burger and Warren Courts, but still overruled prior decisions at more than double the rate of the Roberts Court.

At least in theory, this discrepancy seems counterintuitive, as the Roberts Court inevitably oversees a larger body of Supreme Court precedent than any other Court has. While broader factors such as congressional inaction[30] and the Court's shrinking docket[31] may account for some of this disparity, it is unlikely that external factors are entirely responsible for the Roberts Court's particular hesitance to overrule Supreme Court precedents.

Although several commentators have considered the value (or lack thereof) of pruning dead or flawed precedents from the long and winding branch of Supreme Court cases,[32] this Essay takes no position in this normative debate.

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26 Paul Clement, *Vaughan Lecture: Paul Clement*, YOUTUBE (Oct. 26, 2015), https://www.youtube.com/watch?v=EvNfU1ErcqM. Clement, the 43rd Solicitor General of the United States, is the most prolific Supreme Court advocate of the modern era. *Paul D. Clement*, BANCROFT PLLC, http://www.bancroftpllc.com/who-we-are/paul-clement/ (last visited Aug. 15, 2017) ("Mr. Clement has argued more Supreme Court cases since 2000 than any lawyer in or out of government.").

27 *See* U.S. GOV'T PUBL'G OFFICE, SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION 2614–15 (2017). During Chief Justice Roberts's tenure of twelve years and counting, this averages to less than one of the roughly eighty cases that the Supreme Court hears annually.

28 *See id.* at 2613–14.

29 The Burger and Warren Courts issued fifty-five and forty-three overruling decisions respectively. *See id.* at 2608–13.

30 *See, e.g.*, Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2217 (2013) ("Gridlock has Congress in a headlock. Gripped by stalemate, America's chief lawmaking body can barely muster the ability to make law.").

31 *See, e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006).

32 *Compare, e.g.*, Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) ("[L]ess rides on the strength of stare decisis than is commonly supposed. . . . [T]he prohibition upon advisory opinions, the obligation of lower courts to follow Supreme Court precedent, the Court's certiorari standards, its rule confining the question at issue to the one presented by the litigant, and the fact that the Court is a multimember institution whose members have life tenure are all factors that work together to contribute to continuity in the

Instead, Part II examines how a trio of strong doctrinal commitments may contribute to this tendency of the Roberts Court.

II. EXPLAINING THE ROBERTS COURT'S RELUCTANCE TO OVERRULE PRECEDENTS

This Part explores the relationship between the Roberts Court's keen preference for distinguishing cases like *Borak* and its predispositions in three other areas. Needless to say, this list of explanatory factors is far from exhaustive, as each unique case brings a unique set of considerations. Along with typical analyses of text, history, precedent, structure, and policy, commentators have noted how factors as wide-ranging as politics[33] and law clerks[34] influence Supreme Court decisionmaking. Professor Richard Hasen has observed the "many ways" by which "Justices can move the law,"[35] and each of these methods may also bear on the outcome of any case. Indeed, "[w]hether to overrule a dubious precedent is" always "one of the most significant and complex questions that judges confront."[36] As a result, it would be foolish to propose a one-size-fits-all explanation for the slow pace at which the Roberts Court has overruled Supreme Court precedents.[37] Still, it is worthwhile to consider how certain overarching concerns of the Roberts Court contribute to such an outcome.

A. The Roberts Court as a "Law Declaration" Enterprise

If the primary role of the Supreme Court is to announce and declare the law, then why overrule a precedent that can otherwise be distinguished or just left alone? This central question flows naturally out of the "law declaration" model of the judicial function and may explain much of the Roberts Court's relative hesitance to overrule Supreme Court precedents.

There is little doubt that the Roberts Court views itself as a law-declaring enterprise—or, at the very least, that it *acts* that way. The immense volume of cases presented by our overflowing administrative state[38] and extensive assortment

law."), *with, e.g.*, Thomas W. Merrill, Essay, *The Conservative Case for Precedent*, 31 HARV. J. L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

33 *See, e.g.*, Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347 (2008).

34 *See, e.g.*, Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008).

35 Hasen, *supra* note 19, at 799.

36 Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 180 (2014).

37 It would be equally foolish to simplify the thought process that goes into overruling a case. *See id.* at 180–81 ("The topic has, quite properly, received considerable attention in case law, scholarly commentary, and political discourse." (footnotes omitted)).

38 *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) ("[T]he federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies.").

of federal rights[39] forces the Court to pick and choose its cases carefully.[40] This selectivity has led the Court to adopt a "law declaration" conception of the judicial role, which reads Article III's extension of federal "judicial Power" to certain categories of "Cases" and "Controversies"[41] to create a federal judiciary that is "not . . . a mere settler of disputes, but rather . . . an institution with a distinctive capacity to declare and explicate norms that transcend individual controversies."[42] As a result, the competing "dispute resolution" model of the judicial role has been generally supplanted in all but a few (although vitally important) justiciability doctrines.[43] In reality, of course, the models intersect, as no degree of practical significance can, by itself, form a legitimate basis for judicial review.[44] But the dominance of the "law declaration" model is clear[45] and manifests itself in the internal rules that the Court uses to channel its discretionary consideration of cert

39 While it cannot truly be said that for "every right . . . withheld [there is a] remedy," federal statutes have created a vast patchwork of mechanisms for the judicial enforcement of federal rights. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803). Thank you to Professor Amy Coney Barrett for this helpful characterization.

40 As most every lawyer knows, the Supreme Court grants between 100 and 150 of the more than 7,000 cert petitions it is presented with each year. *See Supreme Court Procedures*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Aug. 14, 2017).

41 U.S. CONST. art. III, § 2, cl. 1. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of the Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) for a compelling argument that, contrary to conventional wisdom, the terms "case" and "controversy" were intended by the Framers to have distinct meanings and legal significance.

42 FALLON ET AL., *supra* note 11, at 74.

43 The Supreme Court has embraced the "dispute resolution" model of the judicial power in a handful of key justiciability doctrines. Most notably, the Court "eschew[s] any role as a general overseer of government conduct" through a rich body of case law imposing strict and unbending standing requirements. *Id.* at 73; *see, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (restating the three elements of modern standing law: (1) "injury in fact" that is "concrete and particularized" and "not 'conjectural' or 'hypothetical'"; (2) a "causal connection between the injury and the conduct complained of"; and (3) likelihood "that the injury will be 'redressed by a favorable decision'" (citations omitted)).

44 For a complete discussion, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984).

45 See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) for such an observation. Fallon and Meltzer point to a set of modern doctrines in support of their finding that "adjudication . . . functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes." *Id.* at 1800. Several commentators have welcomed and encouraged this development. *See, e.g.*, Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 290–91 (1990) ("Where a constitutional issue is presented without sufficient concrete adversity, the Court should not decide it. Sufficient concrete adversity, however, is a quality which varies from case to case, and *should not be a rigid barrier to jurisdiction*." (emphasis added) (footnote omitted)); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1371 (1973) ("Because the Court has the 'special function' in our frame of government to declare authoritatively the meaning of the Constitution, . . . the Court may properly render such pronouncements *whether or not recognizable private interests are involved*." (emphasis added)).

petitions.[46] Indeed, all three factors that the Supreme Court explicitly contemplates in deciding whether to grant certiorari have clear roots in the "law declaration" conception:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on [an] important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
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> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[47]

This set of considerations demonstrates that the Court is not in the business of resolving disputes between individual litigants or correcting erroneous rulings by lower courts, but is instead interested in declaring the law and ensuring its uniform application throughout our federal system. As if to remove any lingering doubt, Rule 10 declares pointedly that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[48] In other words, no matter how badly wronged an individual litigant, or how juicy an individual dispute, the Supreme Court will intervene only if the law at issue requires clarification or unification.

This overarching perspective may play a key role in explaining the Roberts Court's peculiar reluctance to explicitly part ways with Supreme Court precedents that are bereft of continued doctrinal significance. Indeed, if the Court's primary objectives are to declare the law and ease the uncertainty that accompanies state and circuit splits, then it is hardly beneficial to eliminate Supreme Court precedents that can be limited to their facts. A case that is limited to its facts continues to control in future cases that raise similar factual scenarios, and can be useful in a fact-intensive area like the one governed by *Borak*.[49] In many areas, then, the benefit of *distinguishing* a prior law declaration outweighs the cost of *extinguishing* a precedent that has fallen out of the direction in which the Court is moving the law.

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46 SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

47 *Id.*

48 *Id.*

49 *See supra* note 17 and accompanying text.

B. Stare Decisis and Shaky Precedents in the Roberts Court

Suggesting that stare decisis influences the Roberts Court's treatment of weak precedents is akin to declaring that water is wet.[50] But the extent to which this doctrine contributes to the Roberts Court's *particular* aversion to overruling cases,[51] and how (if at all) the Roberts Court approaches questions of stare decisis differently than its predecessor Courts, are issues worth examining. This Section considers these questions in two parts. Subsection II.B.1 provides a brief overview of the doctrine of stare decisis. And subsection II.B.2 concludes that, indeed, the Roberts Court seems to accord distinctive weight to considerations of stare decisis and this is a primary contributor to the relatively slow rate at which it has overruled Supreme Court precedents.[52]

1. Stare Decisis Generally

Although stare decisis is not "an inexorable command,"[53] the Court's "practice of citing and relying upon its precedents as modalities of argumentation and sources of decision"[54] is a fixture of the American legal system. Practically, the doctrine takes different shapes in different courts. In the Supreme Court, deference to precedent is "the preferred course."[55] Courts of appeals are not only required to observe and apply Supreme Court precedents,[56] but are also bound by their own prior rulings.[57] Federal district court decisions "may be disregarded in future cases except for the purposes of res judicata and collateral estoppel."[58]

A precedent's stare decisis effect depends not only on the court in which it was decided,[59] but also on its legal subject matter.[60] As Professor Amy Coney

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50 *Cf.* L. FRANK BAUM, THE MARVELOUS LAND OF OZ: BEING AN ACCOUNT OF THE FURTHER ADVENTURES OF THE SCARECROW AND THE TIN WOODMAN 110 (1904) ("How very wet this water is!"). This is a given because "the Supreme Court of the United States has long embraced the doctrine of stare decisis as an appropriate consideration any time the Court considers overruling past precedent." Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2189 (2014).

51 *See supra* notes 27–29 and accompanying text.

52 *See supra* notes 27–29 and accompanying text.

53 Payne v. Tennessee, 501 U.S. 808, 828 (1991).

54 Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008).

55 *Payne*, 501 U.S. at 827.

56 *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the *prerogative to overrule its own decisions*." (emphasis added)).

57 Barrett, *supra* note 32, at 1713.

58 Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 168 (2001); *see also* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003) ("As a general rule, the district courts do not observe horizontal stare decisis.").

59 This is obviously most important for purposes of vertical stare decisis—that is, the extent to which a decision of a court in one layer of our federal judicial system controls the decision of a

Barrett explains, "[s]tatutory precedents receive 'super-strong' stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule."[61] The impetus for this uneven treatment lies in the Court's frank recognition of the relative ease with which Congress can overrule erroneous *statutory* interpretations as compared to the enormous challenge of amending erroneous *constitutional* interpretations under the stringent requirements of Article V.[62]

In applying stare decisis, courts are forced to navigate the persistent tension between allowing the law to be "settled" and ensuring that the law is "right."[63] More often than not, the Supreme Court has prioritized the first of these conflicting goals in adherence to Justice Brandeis's famous sentiment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[64]

This doctrinal commitment is maintained through a handful of "prudential and pragmatic considerations"[65] that function like the semantic and substantive canons of construction applied by courts in statutory interpretation.[66] These considerations include a precedent's "soundness"[67] and "workability,"[68] a precedent's evolution over time and the extent to which it has become doctrinally embedded,[69] and practical factors such as the vote total a precedent garnered when it was decided.[70]

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court in another layer of that system. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

60 Barrett, *supra* note 32, at 1713.

61 *Id.*

62 *Id.* (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting)).

63 *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1843 (2013) ("Constitutional precedents give rise to a jurisprudential tug-of-war. On one side is the value of adhering to precedent and allowing the law to remain settled. On the other side is the value of departing from precedent and allowing the law to improve.").

64 *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

65 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

66 For a thorough summary of these considerations, see Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 416–49 (2010).

67 *See id.* at 416–21; *see also, e.g.*, Citizens United v. FEC, 558 U.S. 310, 363 (2010) (overruling a precedent because it "was not well reasoned").

68 *See* Kozel, *supra* note 66, at 421–25; *see also, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828–30 (1991) (overruling a pair of precedents that "defied consistent application by the lower courts").

69 *See* Kozel, *supra* note 66, at 425–44. The Court's Commerce Clause jurisprudence offers a classic example of this phenomenon. Because overruling a case like *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), would unwind much of the U.S. Code, subsequent cases like *United States v. Lopez*, 514 U.S. 549 (1995), can only refine the edges of *Jones & Laughlin* and its contemporary decisions *even if* those decisions are tragically flawed. Most agree that the functional imperative of maintaining so much of the modern federal government ties the Court's hands in this area, even Justice Thomas, although to a lesser extent. *See Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring) ("Although I might be willing to return to the original

Stare decisis is a doctrine of uncommon influence and is deeply ingrained in our judicial system. Indeed, while overrulings are quite rare, careful defenses of overrulings are not. Detailed stare decisis analyses like the ones performed by the overruling majorities in *Citizens United v. Federal Election Commission*[71] and *Seminole Tribe of Florida v. Florida*[72] have become as common as the blistering dissents which departures from precedent typically provoke.[73] As such, even in the rare cases in which it is *not* honored, stare decisis is a powerful consideration.

2. How Stare Decisis Explains the Roberts Court's Exceptionally Keen Reluctance to Depart From Precedent

Stare decisis is not a constitutional or statutory commandment,[74] but is instead a doctrine of prudence and restraint[75] that is made and manipulated by courts. In no way, however, does this fact diminish the doctrine's grip on the Supreme Court. Indeed, stare decisis is among a distinct few legal doctrines that truly transcend methodological and ideological differences. Allegiance to stare decisis spans the judicial spectrum; from Justice Scalia—who was criticized[76] for recognizing stare decisis as "a pragmatic exception"[77] to the originalist theory he

understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of s*tare decisis* and reliance interests may convince us that we cannot wipe the slate clean.").

70 *See* Kozel, *supra* note 66, at 444–49; *see also, e.g.*, *Payne*, 501 U.S. at 828–29 (overruling a pair of precedents that "were decided by the narrowest of margins" and "over spirited dissents challenging [their] basic underpinnings").

71 558 U.S. 310. Even though he had already signed on to Justice Kennedy's majority opinion (which itself considered stare decisis implications carefully), Chief Justice Roberts felt compelled to write "separately to address the important principles of judicial restraint and *stare decisis* implicated in [the] case." *Id.* at 373 (Roberts, C.J., concurring).

72 517 U.S. 44 (1996). In overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court committed a fifteen-page stare decisis analysis. *See Seminole Tribe*, 517 U.S. at 59–73.

73 *See, e.g.*, *Citizens United*, 558 U.S. at 395 (Stevens, J., dissenting) ("The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty . . . . Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including [six cases].").

74 And therefore not "an inexorable command." *Payne*, 501 U.S. at 828.

75 *Cf.* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289–90 (1990) ("The inevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law. In the long run, restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights.").

76 *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) ("[Justice Scalia's] opponents argued that [his] willingness to make a pragmatic exception revealed that originalism is unprincipled in theory and unworkable in practice. Some of his allies contended that a principled originalist should not be afraid to depart from even well-settled precedent.").

77 ANTONIN SCALIA, A MATTER OF INTERPRETATION 140 (1997) (emphasis omitted).

espoused[78]—to his personal friend but methodological adversary Justice Ginsburg.[79]

A 2007 study found Justice Thomas most willing to alter precedents in the 535 cases that a full Court heard between 1994 and 2000.[80] However, Thomas voted to break with precedent in a mere 4.3% of those cases—a minor 2.8% uptick from Justice Ginsburg's rate, which was the lowest of the four active Justices included in the study.[81] Chief Justice Roberts[82] and Justices Alito,[83] Sotomayor,[84] Kagan,[85] and Gorsuch[86] are no less committed to stare decisis.

A major reason for this universal commitment may be the increasingly political nature of the judicial confirmation process.[87] This reality prompts senators on both sides of the aisle to "press[] [nominees] in their confirmation hearings to affirm their commitment to the doctrine of stare decisis,"[88] lest a nominee who would be willing to overrule a major Supreme Court precedent slip through the cracks. Paul Clement suspects that this phenomenon is the leading contributor to the "fealty" the Roberts Court accords to Supreme Court

78 See Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989), for a general defense of Justice Scalia's brand of originalism by the late Justice himself.

79 *See, e.g.*, Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 867 (2009) ("Justice Ruth Bader Ginsburg's preference for narrow rulings that adhere closely to precedent . . . is well-known.").

80 Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 140 tbl.B (2007).

81 *Id.*

82 *See* Lash, *supra* note 50, at 2212 n.151.

83 *See id.*

84 *See, e.g.*, Robert Barnes et al., *In Senate Confirmation Hearings, Sotomayor Pledges 'Fidelity to the Law'*, WASH. POST (July 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071301154.html.

85 *See, e.g.*, Michael Hotchkiss, *Kagan Discusses the Constitution, the Supreme Court and Her Time at Princeton*, NEWS AT PRINCETON (Nov. 21, 2014), https://www.princeton.edu/main/news/archive/S41/65/85E33/index.xml?section=featured ("I myself am a big precedent person . . . ." (quoting Justice Kagan)).

86 *See, e.g.*, Evan Halper, *Gorsuch Signals Reluctance to Overturn Long-Standing Court Precedents Like* Roe v. Wade, L.A. TIMES (Mar. 21, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-gorsuch-says-he-would-be-reluctant-to-1490106071-htmlstory.html ("Part of being a good judge is coming in and taking precedent as it stands . . . ." (quoting Justice Gorsuch)).

87 Professor Bill Kelley observed this in the relatively mild political environment of 2009. *See* Meryl J. Chertoff et al., *Federalist Society Panel Discussion: Judicial Selection, Federal and State*, 32 AM. J. TRIAL ADVOC. 453, 456 (2009) ("We've seen a remarkable transformation in just one generation in how the political culture views the federal courts. In the time of President Reagan, judicial nominations were relatively uncontroversial, with very few exceptions. Imagine today about a Richard Posner or Frank Easterbrook being confirmed with little to no controversy, or an Antonin Scalia or Robert Bork to the Court of Appeals. Even Ken Starr was confirmed easily."). Professor Kelley helped guide President George W. Bush and his nominees through dozens of judicial appointments, and is therefore about as expert as one can be in the complex dynamics of this process.

88 Lash, *supra* note 50, at 2212.

precedent,[89] and the relative infrequency with which the Roberts Court has overruled precedents[90] shows that he may be right.

C. Avoiding Constitutional Questions and Distinguishing Precedents in the Roberts Court

1. Constitutional Avoidance Generally

The constitutional avoidance doctrine urges courts to "refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."[91] Justice Brandeis's concurrence in *Ashwander v. Tennessee Valley Authority*[92] provides the most prominent summary of the doctrine:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . .
>
> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[93]

In the statutory interpretation context, commentators have observed an important distinction between the avoidance canon recited by Justice Brandeis in *Ashwander* and an earlier version of the canon which required courts to avoid statutory constructions that would be *actually* unconstitutional (as opposed to constitutionally *questionable* or *doubtful*).[94] As Professor John Nagle observes, "[t]he most noticeable difference between the two rules is that the unconstitutionality canon requires a court to decide the constitutional question while the doubts canon allows a court to avoid any such decision."[95]

While the doctrine has drawn a fair amount of criticism,[96] it is not without defenders and persuasive justifications.[97] Regardless, the modern Court is strongly

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89 Clement, *supra* note 26, at 19:14.

90 *See supra* notes 27–29 and accompanying text.

91 Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994).

92 297 U.S. 288 (1936).

93 *Id.* at 347–48 (Brandeis, J., concurring) (citations omitted).

94 For an influential observation of this distinction, see John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495 (1997). The tighter triggering mechanism of *actual* unconstitutionality controlled until the "little remembered case" of *United States* ex rel. *Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909) reformulated it. Nagle, *supra*, at 1495.

95 *Id.* at 1496–97.

96 *See, e.g.*, William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001) (criticizing the canon for its "serious[] intru[sion] upon the roles of both Congress and the Executive in the constitutional scheme").

97 For three "prominent rationale[s]" for the canon, see FALLON ET AL., *supra* note 11, at 80.

committed to the canon.[98] Indeed, since it declared the doctrine's existence "beyond debate" in 1988,[99] the Supreme Court has invoked the canon with tremendous regularity.[100]

2. How the Roberts Court's Affinity for Constitutional Avoidance Influences Its Treatment of Precedents

A pronounced mood of constitutional avoidance pervades much of the Roberts Court's jurisprudence. Indeed, the Court has "deployed the *Ashwander* rules to avoid . . . issu[ing] broad [constitutional] rulings" in a "host of recent cases . . . on some of the most controversial legal issues currently facing the nation—including foreign surveillance, gay marriage, voting rights, the scope of Congress's enumerated powers, affirmative action, and mandatory union dues."[101] A recent article went so far as to call "'interpret[ing]' new words into a major statute in order to avoid holding the statute unconstitutional" "Chief Justice Roberts's *signature move*."[102] Although that characterization is overblown, the Roberts Court displays a regular desire to avoid sticky constitutional questions and the institutional ramifications entailed in answering them.[103]

The first Obamacare case[104] and the chemical-weapons-love-triangle case of *Bond v. United States*[105] represent just two drops in the Roberts Court's bucket of constitutional avoidance decisions.

NFIB v. Sebelius is perhaps the finest example of the Chief Justice's affinity for the doctrine. Under a glaring public spotlight and facing severe political backlash, the Chief Justice famously saved President Barack Obama's signature healthcare legislation by upholding the law's individual mandate as a valid exercise of Congress's power to tax.[106] The Chief Justice cast his curveball to the

98 *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("This cardinal principle . . . has for so long been applied by this Court that it is beyond debate." (citations omitted)).

99 *Id.*

100 In the 1990s alone, Professor Kelley identified around thirty cases in which at least one justice invoked the doctrine. *See* Kelley, *supra* note 96, at 833 n.5.

101 Andrew Nolan, *The Doctrine of Constitutional Avoidance: A Legal Overview*, CONG. RES. SERV. (Sept. 2, 2014), https://fas.org/sgp/crs/misc/R43706.pdf.

102 Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1278–79 (2016) (emphasis added).

103 I personally applaud Chief Justice Roberts for his attentiveness to the Supreme Court's brand, for maintaining the institutional and moral authority of the nation's high court is as noble an objective as any. *See* Adam J. White, *Judging Roberts*, WEEKLY STANDARD (Nov. 23, 2015), http://www.weeklystandard.com/judging-roberts/article/1063131 (quoting an unsigned draft article by the Chief Justice which warned that "the greatest threat to judicial independence occurs when the courts . . . engag[e] in policymaking committed to the elected branches or the states" (alteration in original)).

104 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (opinion of Roberts, C.J.).

105 134 S. Ct. 2077 (2014).

106 *Sebelius*, 132 S. Ct. 2594–96.

legal world[107] in pure constitutional avoidance terms: "[I]t is only because we have a *duty* to construe a statute to save it, if fairly possible, that [the individual mandate] can be interpreted as a tax."[108]

Two years later, Carol Anne Bond invited the Court to squarely address whether federal treaties can criminalize individual behavior when she poisoned the mailbox of her husband's mistress.[109] Justifiably provoked or not, Bond's actions certainly appeared to violate the Chemical Weapons Convention, which provides that "it shall be unlawful for any person knowingly to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[110] Because there was little doubt that Bond intentionally used her chemical weapon of choice (arsenic) against her husband's mistress,[111] she appeared to be plainly guilty under the treaty.

Once again, however, the Court sidestepped the case's ripe "constitutional questions surrounding the Necessary and Proper Clause and the treaty power"[112] by ruling more narrowly that, "[b]ecause our constitutional structure leaves local criminal activity primarily to the States,"[113] Congress must give a "clear indication" of its intent to "dramatically intrude[] upon traditional state criminal jurisdiction" before the Court will interpret its statutes to do so.[114] While there is admittedly a lot going on here—including the Court's application of the state sovereignty canon of *Gregory v. Ashcroft*[115]—the Court's manifest desire to avoid the toughest constitutional questions presented by the case is paradigmatic of its routine adherence to the doctrine of constitutional avoidance.

As others have observed, this tendency of the Roberts Court is an extension of the Chief Justice's judicial philosophy, which calls on judges to "be like umpires calling 'balls and strikes.'"[116] This ideal has shaped a Roberts Court that undoubtedly feels a need to "maintain its institutional legitimacy by deferring to

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107 Indeed, the parties and Justices alike focused sharply on the law's dubious constitutionality under the Commerce Clause during oral argument.

108 *Sebelius*, 132 S. Ct. at 2600–01 (emphasis added).

109 *See* Nina Totenberg, *A Toxic Love Triangle Heads to the Supreme Court*, NPR (Nov. 5, 2013), http://www.npr.org/2013/11/05/243029845/a-toxic-love-triangle-heads-to-the-supreme-court; *see also* Bond v. United States, 134 S. Ct. 2077 (2014).

110 Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229(a)(1) (2012).

111 *Bond*, 134 S. Ct. at 2081.

112 Dean M. Nickles, Recent Case, Bond v. United States, 90 NOTRE DAME L. REV. ONLINE 68, 69 (2015).

113 *Bond*, 134 S. Ct. at 2083.

114 *Id.* at 2088 (alteration in original) (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).

115 501 U.S. 452 (1991).

116 Jeffrey Rosen, Opinion, *John Roberts, the Umpire in Chief*, N.Y. TIMES (June 27, 2015), https://www.nytimes.com/2015/06/28/opinion/john-roberts-the-umpire-in-chief.html?_r=0 (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005)); *see also* Brett M. Kavanaugh, Essay, *The Judge as Umpire: Ten Principles*, 65 CATH. U. L. REV. 683 (2016).

the political branches" in a polarized nation.[117] In my view, this instinct animates much of the Roberts Court's constitutional avoidance jurisprudence (particularly the Chief Justice's opinions involving the hot-button issue of Obamacare) and is critical to understanding its reluctance to overrule Supreme Court precedents.

CONCLUSION

Even a "lion of the law"[118] like Justice Scalia—whose unique approaches to statutory and constitutional interpretation revolutionized the business of the Supreme Court—was rather ordinary in his devotion to precedent.[119] Such devotion transcends ideological and methodological boundaries, and pervades modern confirmation hearings. There is good reason for this, as proper respect for precedent is vital to our judiciary and the government it helps oversee. Firmly rooted cases that retain ongoing legal significance are immensely valuable. Indeed, it is often "more important that the . . . law be settled than that it be settled right."[120]

However, countless other cases linger in the United States Reports as quasi-precedents. Narrowly confined to their most idiosyncratic facts, these cases may retain significance in limited factual domains but are practically dead for most purposes. The Roberts Court's unique reluctance to explicitly overrule Supreme Court precedents will grow the ranks of such cases, and is explained in large part by the factors identified in this Essay.

117 Rosen, *supra* note 116.

118 The Honorable Neil Gorsuch, President Trump Announces Supreme Court of the United States Nominee at 9:14 (Jan. 31, 2017), https://www.whitehouse.gov/featured-videos/video/2017/01/31/president-trump-announces-supreme-court-united-states-nominee.

119 Barrett, *supra* note 76, at 1921 ("Justice Scalia famously described himself as a 'faint-hearted originalist' who would abandon the historical meaning when following it was intolerable [from a stare decisis standpoint]." (quoting Scalia, *supra* note 78, at 864)).

120 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).