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Principled Pragmatic Stare Decisis in Constitutional Cases

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NOTES

PRINCIPLED PRAGMATIC STARE DECISIS IN CONSTITUTIONAL CASES

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INTRODUCTION

As an allegedly integral part of the "rule of law," stare decisis receives copious academic attention. The present academic discourse focuses on the Court's lack of a coherent philosophy on when it will overrule past precedent.[1] Critics contend stare decisis has become "a doctrine of convenience, to both conservatives and liberals . . . [whose] friends . . . are determined by the needs of the moment."[2] Both academics and practitioners seem quite concerned about the future of stare decisis on the Supreme Court. I share their concern. However, I am not concerned with defining precise or appropriate boundaries for stare decisis. Rather, I am concerned stare decisis will persevere despite its shortcomings when leaving it behind is clearly the better policy choice. As such, this Note argues stare decisis in constitutional interpretation should be a purely pragmatic tool. My argument echoes that of William S. Consovoy.[3] However, Mr. Consovoy crafts his call to arms after determining stare decisis standards are unworkable and demonstrating the damage unprincipled stare decisis does to the Court. My work here explains why abrogating constitu-

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1 *See, e.g.*, Robert H. Bork et al., *Federalist Society Roundtable Discussion*, 1994 PUB. INT. L. REV. 125, 132 (noting the use of precedent is motivated by political concerns); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 70 ("[W]hen motivated, the Supreme Court will overrule a prior decision of the Court, regardless of age, subject matter, or any other pragmatic consideration.").

2 Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988).

3 Consovoy, *supra* note 1, at 104–06.

tional stare decisis except as a tool for judicial economy is the best policy choice. The jurisprudence of the Rehnquist Court has not pushed us to a position where eliminating constitutional stare decisis is the only option; it has always been the best option. When I use the phrase "principled pragmatic stare decisis" in this Note, I mean stare decisis should be abrogated except when used as a tool for judicial economy. In this way, its use is consistent (principled) and still prevents judges from having to reinvent the wheel with every new constitutional case (pragmatic).

Before I continue, it is important to qualify the type of stare decisis this Note considers. This Note deals with horizontal stare decisis—the respect one court gives to its own prior precedent. Throughout the Note I will discuss the Supreme Court, but my thesis applies to horizontal stare decisis at any level. Under principled pragmatic stare decisis, lower courts are still bound by the precedent of the courts above them. Specifically, this Note addresses constitutional stare decisis. Statutory stare decisis presents separate concerns and generates its own academic literature.[4] After these qualifications my thesis remains the same: horizontal, constitutional stare decisis should be principled and pragmatic. Stare decisis should be only a tool of judicial economy.

Part I of this Note details a brief history of stare decisis, Part II more fully sketches out what my theory entails and contains two small sample passages of a principled pragmatic opinion, and Part III defends my theory as the best policy.

I. A Brief History of Stare Decisis

In the eighteenth and early nineteenth centuries, English courts began to develop "a qualified obligation to abide by past decisions."[5] At the beginning of the eighteenth century William Blackstone noted "it is an established rule to abide by former precedents, where the same points come again in litigation."[6] Blackstone outlined many of the same policy concerns modern writers use to justify stare decisis. He thought litigants would need to rely on precedent, having a system of precedent would increase the credibility of the court, and prece-

4 *See, e.g.*, William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 2467 (1990); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177 (1989).

5 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 661 (1999).

6 1 William Blackstone, Commentaries *69.

dent would increase stability because the law would not change rapidly.[7] Importantly, however, Blackstone's concept of the law was quite different from the modern realist understanding. In the positivist tradition of his time, Blackstone believed judges discovered law, writing "it sometimes may happen that the judge may *mistake* the law."[8]

At the end of the eighteenth century, the English courts and commentators firmly established the doctrine of stare decisis.[9] Courts would follow prior precedent when promulgated by a superior court, the House of Lords would follow its own prior decisions, and the Court of Appeals would usually follow the past decisions of both the specific court the case was in front of and other coordinate courts of the same level.[10] There were three limits on the doctrine: (1) the rule would not be followed if it were "plainly unreasonable" or (2) courts of equal authority developed conflicting decisions, and (3) the binding force of the decision was the actual "principle or principles necessary for the decision," not the words or reasoning used to reach the decision.[11]

The American Founders expressed similar attitudes towards stare decisis. They were all certain it was necessary to some degree but differed strongly on what it entailed and when it should be abandoned.[12] Alexander Hamilton advocated "strict rules and precedents" to prevent "arbitrary discretion in the courts."[13] However, it is difficult to extract from Hamilton's work whether he believed in strong horizontal stare decisis rather than just strong vertical stare decisis.[14] Madison, on the other hand, was less strict, arguing the principle had limits and when past precedent contained clear error about the law, it should be overruled.[15] Early legal commentators evinced a similar philosophy that stare decisis was important for legitimacy and past precedent should be rarely overruled.[16]

The first significant development in the doctrine of constitutional stare decisis came during the post-Civil War cases dealing with the fed-

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7 *Id.*

8 *Id.* at *71.

9 Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 502 (1945).

10 *Id.*

11 *Id.* at 503.

12 Consovoy, *supra* note 1, at 67.

13 THE FEDERALIST NO. 78, at 407 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

14 Consovoy, *supra* note 1, at 68.

15 *Id.* Consovoy notes there may never have "been a theory of stare decisis that did not include a 'clear error' exception." *Id.* at 69 n.74.

16 *Id.* at 69.

eral government's power to issue legal tender. In the first case, *Hepburn v. Griswold*, the Court held a statute authorizing the federal government to issue note money was unconstitutional because it exceeded Congress's Article I power.[17] Soon after the decision, the President appointed two new members to the Court, Justice Story and Justice Bradley.[18] On May 1, 1871, the Court, deciding a number of cases known as the *Legal Tender Cases*, overruled *Hepburn*.[19] The majority took the then controversial position that constitutional decisions received less precedential value than any other cases.[20] Surprisingly, while modern courts require a "special justification" for overruling prior cases, the *Legal Tender Cases* Court simply reasoned the original court was wrong, and that was sufficient.[21]

The most popular example of the abrogation of constitutional stare decisis is probably *Brown v. Board of Education*,[22] which overruled *Plessy v. Ferguson*'s[23] "separate but equal" doctrine. While lauding the historical effect and sociological benefits of *Brown* is easy, explaining why the Court chose to overrule *Plessy* is a bit more difficult. Some argue the facts before the Court changed, while others claim the *Brown* Court, much like the Court in the *Legal Tender Cases*, simply recognized the earlier court was wrong.[24]

The Rehnquist Court is quite radical when it comes to overturning past constitutional precedent. In fact, the Rehnquist Court overturned more precedent during the 1991 term than any court before it.[25] The Rehnquist Court's stare decisis jurisprudence is inconsistent across cases, Justices, and even individual Justices have been inconsistent.[26] The Court has set forth some traditional factors for overturning prior precedent: workability, reliance, intervening developments in the law, and changed or perceived changes in fact, in addition to

17 75 U.S. (8 Wall.) 603, 617–18, 626 (1869), *overruled in part by* The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).

18 Lee, *supra* note 5, at 719–20.

19 The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 528 (1871).

20 *Id.* at 554.

21 Consovoy, *supra* note 1, at 72.

22 347 U.S. 483 (1954).

23 163 U.S. 537 (1896).

24 *See* Consovoy, *supra* note 1, at 74 n.113 (citing differing opinions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Use of History*, 13 J.L. & POL. 809, 814 (1997)).

25 Bork et al., *supra* note 1, at 132.

26 Consovoy, *supra* note 1, at 76 ("Some Justices appear to give one factor more emphasis than the others. This provides for an inconsistency in stare decisis jurisprudence. Perhaps more troubling is when one Justice places considerable emphasis on one factor, only to ignore that factor in a subsequent similar case.").

some other nontraditional factors: margin of victory, age of the prior decision, and merits of the prior decision.[27]

Justice Souter's jurisprudence regarding stare decisis has received detailed academic attention and is described as "pragmatic."[28] Based on Justice Souter's decisions in *James B. Beam Distilling Co. v. Georgia*,[29] *Payne v. Tennessee*,[30] and *Lee v. Weisman*,[31] David Koehler concludes, "depending upon whether a particular decision and course of action was desirable or undesirable, Souter either applied or distinguished *stare decisis* to justify the desired result."[32] In *Planned Parenthood v. Casey*,[33] Justice Souter went so far as to read the part of the decision regarding stare decisis from the bench. *Casey* dealt with a constitutional challenge to *Roe v. Wade* based on a Pennsylvania statute limiting the availability of, and setting certain requirements on, abortions in that state.[34] In the words of a dissenting Chief Justice Rehnquist, "[i]nstead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion . . . contains an elaborate discussion of *stare decisis*."[35] Based on that "elaborate discussion," *Casey* creates a three-prong test deciding whether prior constitutional precedent should be overruled: whether the prior precedent created reliance and overruling would create inequity and undue hardship, whether the rule has proven unworkable, and whether the rule has become, by virtue of legal development, insignificant or an anachronism.[36] While *Casey* maintained the essential holding of *Roe* (the constitutional right to abortion), the fact it upheld other statutory provisions requiring informed consent, parental consent, and a twenty-four hour waiting period indicates *Casey* is not an endorsement of the broadest reading possible of *Roe*.[37] Thus, it appears Justice Souter's stare decisis concerns allow him to take the "good" parts of a holding and cast the rest aside depending on the consequences of a particular decision.

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27 *Id.* at 76–80.

28 *See* David K. Koehler, Comment, *Justice Souter's "Keep-What-You-Want-and-Throw-Away-the-Rest" Interpretation of* Stare Decisis, 42 BUFF. L. REV. 859, 861 (1994).

29 501 U.S. 529 (1991).

30 501 U.S. 808 (1991).

31 505 U.S. 557 (1992).

32 Koehler, *supra* note 28, at 875.

33 505 U.S. 833 (1992).

34 *Id.* at 844.

35 *Id.* at 953–54 (Rehnquist, C.J., dissenting).

36 *Id.* at 854–55.

37 *Id.* at 880–87, 899.

II. PRINCIPLED PRAGMATIC STARE DECISIS

I take special note of Justice Souter's alleged stare decisis jurisprudence because though it is labeled pragmatic, it is precisely the type of stare decisis that is the problem. Justice Souter's stare decisis jurisprudence is described as "The Law of Consequences."[38] "Souter is not concerned about whether a precedent is absolutely right or wrong, but whether it still works."[39] I do not dispute whether the word pragmatic is an appropriate word to describe this approach. Rather, I argue we should adopt a different understanding of "pragmatic" as it relates to stare decisis—a principled understanding of pragmatism. Simply put, stare decisis should just be a judicial shortcut. By maintaining prior precedent a judge simply says in short hand: "I agree with the previous case, its reasoning, and its interpretation of the Constitution, so I feel no need to write anything more on this particular issue." In this way stare decisis is pragmatic; its only function is judicial economy and it is not a sacred legal doctrine, yet it is also principled; it cannot be used, as in *Casey*, to support an arguably incorrect interpretation of the Constitution because the judge agrees with the result or believes the prior decision is just too important to overturn.

Before I delve too much deeper into my own theory, it is important to dispense with an argument raised recently by the Eighth Circuit in *Anastasoff v. United States*.[40] In *Anastasoff*, Judge Richard Arnold argued stare decisis was a constitutional requirement under Article III of the Constitution.[41] The issue in *Anastasoff* was the constitutionality of the Eighth Circuit decision to issue unpublished opinions that cannot be cited as precedent.[42] Judge Arnold argued "stare decisis was such an established and integral feature of the common law that it was implicit in the founding generation's understanding of what it meant to exercise judicial power."[43] As such, when the Constitution vested the judicial power[44] the Founders expected a certain degree of respect for prior precedent. Thus, stare decisis is a

38 Koehler, *supra* note 28, at 883.

39 *Id.* at 885.

40 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

41 *Id.* at 900–05.

42 *Id.* at 905.

43 Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 45 (2001).

44 U.S. CONST. art III, §1, cl. 1.

constitutional requirement; prior precedent can only be overturned when the reasons for doing so are "convincingly clear."[45]

Preliminarily, I remark *Anastasoff* does not have any current legal force. After it was decided an en banc panel of the Eighth Circuit vacated the decision because the actions of the parties rendered it moot.[46] Judge Arnold wrote the en banc opinion and noted the question of the constitutionality of nonprecedential opinions, and thus stare decisis, is still open in the Eighth Circuit.[47]

It is also worth noting that no other federal court agrees with Judge Arnold's opinion and makes stare decisis a constitutional requirement. Moreover, the Supreme Court's opinions and overturning of precedent certainly give no indication the Court believes it is a constitutional requirement either. However, Judge Arnold could argue the Supreme Court tacitly endorses his theory because it justifies its departures from past precedent, thus implicitly looking for a "convincingly clear reason" to depart from past precedent. It is important to address this argument because if stare decisis is in any way a constitutional requirement, principled pragmatic stare decisis cannot stand because it does not require a convincingly clear reason to overturn past precedent other than the judge's belief the past precedent is wrong.

Thomas Healy takes issue with Judge Arnold's reading of history, concluding "as this history makes clear, for most of its life the common law operated without a doctrine of stare decisis."[48] Turning to the colonial understanding of stare decisis, Healy notes "[t]he defining characteristic of law in colonial America was its mutability . . . . [F]rom their earliest years [the colonists] demonstrated a marked preference for adaptability over certainty, for latitude over restraint."[49] Colonial judges showed a willingness to innovate because "not all common law rules and practices were suited for the colonies."[50]

Following the Revolution, judges adopted a pragmatic view of the law, overturning law "they saw as impractical, illogical, or unjust."[51] Early legal scholars, such as Kent and Blackstone, viewed precedent as important, but neither saw it is a matter of responsibility or an obliga-

45 *Anastasoff*, 223 F.3d at 905.

46 Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

47 *Id.*

48 Healy, *supra* note 43, at 55–56. For his entire discussion of the English common law tradition, see *id.* at 56–73.

49 *Id.* at 73.

50 *Id.* at 75.

51 *Id.* at 78.

tion of judicial power.[52] The Supreme Court took an even more lax approach to issuing opinions than most state courts when it was founded, indicating the original Court did not evince Judge Arnold's strict understanding of stare decisis. The Court did not have any rules regarding the reporting of its opinions, and in fact, issued most of them orally.[53] The Court did not begin officially filing written opinions until the 1830s.[54]

Moreover, early Supreme Court opinions did not show much respect for precedent. "Many early justices wrote page after page without citing authority."[55] Probably the most famous of the early Court members, Chief Justice Marshall, displayed "a marked disdain for reliance on precedent."[56] This demonstrates, at least, the early Court and its members did not see precedent as important as Judge Arnold imagines, and they certainly did not understand stare decisis as a constitutional mandate.

Thus, it seems from the history of the common law and the early Supreme Court, precedent did not have the effect Judge Arnold imagines it has under the Constitution. The historical evidence, coupled with a lack of textual support and a dearth of evidence in the opinions of the Court, undercuts Judge Arnold's argument such that I feel it is of no further consequence to this Note.[57]

The theory of principled pragmatic constitutional stare decisis is deceptively simple. Judges should not be constrained by past constitutional precedent. If a judge agrees with a previous case's interpretation of the law, the judge should simply state the present case is controlled by the prior precedent and reaffirm. If the judge disagrees, she does not need to craft a compelling reason other than that the previous opinion is incorrect.

Having sketched out the basic thesis of principled pragmatic stare decisis (constitutional precedent is only useful as a tool of judicial economy and should only be used when the author of the current opinion agrees with the holding and reasoning of the prior case) and dispensed with a preliminary constitutional objection, I will now present two brief sample opinions demonstrating what principled prag-

52 JAMES KENT, COMMENTARIES ON AMERICAN LAW 474–80 (John M. Gould ed., 14th ed. Cambridge Univ. Press 1896) (1826).

53 WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 7 (1996).

54 *Id.* at 8–9.

55 Healy, *supra* note 43, at 85.

56 David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 661 (1982).

57 For a more thorough critique of Judge Arnold's argument, see Healy, *supra* note 43.

matic stare decisis would look like in maintaining and then overturning prior precedent. Each of these opinions deals with the Second Amendment right to bear arms and the holding in *United States v. Miller*[58] that possession of a particular weapon must have "some reasonable relationship to the preservation or efficiency of a well regulated militia."[59] I have selected this issue because it is rarely litigated and fairly simple. Thus, I can write a relatively short opinion that still demonstrates principled pragmatic stare decisis. For the purpose of these opinions, assume the Second Amendment has been incorporated against the states.

A. An Opinion Upholding Prior Precedent

This case deals with a state law banning the use of shotguns with barrels of less than eighteen inches. Petitioner raised the issue of whether her right to own such a gun is protected as a right to bear arms under the Second Amendment.[60] Properly respecting vertical stare decisis, the federal court of appeals held the Second Amendment did not protect her right as we held in *United States v. Miller*.[61]

In *Miller* we held a federal law outlawing the transport of a shotgun with a barrel less than eighteen inches in interstate commerce did not violate the Second Amendment of the United States Constitution.[62] Today, we maintain the holding of that case as the correct reading of the Second Amendment of the United States Constitution. Though this case involves a state law, rather than the federal power under the Commerce Clause, the analysis is substantially similar.

Justice McReynolds wrote the *Miller* opinion. Justice McReynolds looked at the history surrounding the creation of the Second Amendment, noting the Constitution originally gave Congress the power to call forth the militia, and the Second Amendment was created to maintain such a fighting force.[63] Justice McReynolds further noted the weapon in question was not "any part of the ordinary military equipment or that its use could contribute to the common defense."[64]

Based on Justice McReynolds's compelling reading of the history and text of the Second Amendment we maintain the Court's holding today. It is the proper interpretation of the Second Amendment and

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58 307 U.S. 174 (1939).
59 *Id.* at 178.
60 U.S. CONST. amend. II.
61 307 U.S. 174.
62 *Id.* at 178, 183.
63 *Id.* at 178.
64 *Id.*

the facts before us today are not substantially different from those before the Court in 1939.

B. An Opinion Setting Aside Prior Precedent

Today, the Court reverses the Second Amendment jurisprudence set forth in *United States v. Miller*. Justice McReynolds's reading of the Second Amendment is not supported by the history he cites or by the text of the Second Amendment.

Anytime we interpret the Constitution we should start with its text. The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[65] This is one of the few amendments that contains its own justification and we agree the Amendment should be read with that justification in mind. However, we think the Court made a mistake in holding the firearm must bear a reasonable relation to the maintenance of a militia. Today, we overturn *Miller* and hold the Second Amendment protects all firearms from government regulation.

Justice McReynolds reads the history of the Second Amendment he cites incorrectly. He notes at the time of the Constitutional Convention, in all the colonies and in England there was an obligation that all adult males possess weapons and work for the defense of the town or colony.[66] Moreover, the General Court of Massachusetts in 1784 required all men between sixteen and forty equip themselves "and be constantly provided with a fire arm."[67]

This reading of history makes clear the breadth of the Second Amendment. Though this Court does not feel constrained by the strict original understanding of the Constitution, we are not blind to history. The *Miller* opinion misreads the text and history of our Constitution. Thus, we overturn it today and affirm the right of all Americans to keep and bear arms.

C. A Return to Theory

I hope these small sample opinions make the concept of principled pragmatic stare decisis clear. Of course, judicial opinions should be more detailed and probably draw on more outside sources than I have. However, these opinions still demonstrate the working basics of principled pragmatic stare decisis. In the first, we see precedent up-

65 U.S. CONST. amend. II.
66 *Miller*, 307 U.S. at 179–80.
67 *Id.* at 180.

held because it is correct and stare decisis saving the judge the trouble of writing an entirely new opinion. In the second, we see precedent overruled without special justification; just an explanation the prior opinion was wrong. Neither opinion hinges on the result. The discussion is about the Constitution and what it means. Before moving on to address the policy arguments on this issue, I think it would be valuable to list the tenets of my theory.

1. Principled pragmatic stare decisis recognizes horizontal constitutional stare decisis is only a tool for judicial economy.

2. Principled pragmatic stare decisis respects the decisions of the past in terms of their reasoning and understanding of history as long as the reasoning and understanding is correct.

3. Principled pragmatic stare decisis demands opinion authors write for the future when they set out precedent because opinions will not stand the test of time without being properly reasoned.

4. Principled pragmatic stare decisis demands authors respect past opinions and explain fully why these opinions are wrong when the authors overturn past precedent.

III. Policy Concerns of Principled Pragmatic Stare Decisis

As we have seen in Parts I and II of this Note, the Constitution does not require stare decisis; it is a policy choice. Thus, my final task is to demonstrate principled pragmatic stare decisis is a good policy choice. First, I detail the disadvantages of the current state of stare decisis and demonstrate how principled pragmatic stare decisis overcomes each. Next, I explain three policy arguments supporting the current state of stare decisis and show how pragmatic stare decisis meets each. Finally, I highlight some new policy advantages of principled pragmatic stare decisis.

The disadvantages of a strict model of stare decisis are as follows: (1) applying stare decisis in wrong cases only perpetuates illegitimate and unconstitutional holdings, (2) strict stare decisis cannot accommodate changing social and political understandings, (3) stare decisis leaves the power to overturn bad constitutional law solely in the hands of Congress, and (4) activist judges can dictate the policy for future courts while those judges that respect stare decisis are stuck agreeing with them.[68]

Principled pragmatic stare decisis avoids all of these pitfalls. By keeping courts free to overturn precedent we can be sure illegitimate and unconstitutional decisions are overturned because they will not

68 Consovoy, *supra* note 1, at 54–55.

be maintained out of some misplaced reverence for the history of the Court. Courts will be able to adapt to changing social and political understandings in a responsible way. Under principled pragmatic stare decisis, courts are still obligated to explain why they are departing from prior precedent and why their precedent should be followed in the future, providing a measure of protection against courts following a social or political fad rather than a principle that stands the test of time.

Principled pragmatic stare decisis also allows the Court and Congress to be partners in overturning bad law. Congress and the President maintain the traditional checks on the federal courts including appointment,[69] jurisdiction control,[70] and lawmaking power,[71] while the Court is able to protect the interests of the minority through its judicial power. While Congress may not be able to muster the political capital to overturn an unconstitutional law, the Court will be free to do so without having to overcome the vague stare decisis power of past precedent. Finally, principled pragmatic stare decisis should give comfort to those who decry activist judges and their power to illegitimately change the Constitution for years to come. Under my theory, judges will be able to overturn precedent that is wrong and will be unshackled from the poor decisions of the past to generate sound, correct decisions that will stand the test of time.

This argument prompts a possible problem with the theory. What should a judge do if she agrees with a particular holding as a matter of law but does not agree with the reasoning supporting the holding? Applying the thesis of principled pragmatic stare decisis the judge should not overturn the case and thus maintain the holding. However, the judge must do the extra work and explain the new reasoning behind the decision so a future Court can look to the new reasoning as an update and make a more informed judgment about the future of the law as laid down in prior cases.

Moving to the advantages of stare decisis, three common arguments on behalf of stare decisis are: (1) it legitimizes judicial institutions (2) it "promotes judicial economy," and (3) it "allows for predictability."[72] Constitutional stare decisis advocates claim that "by adhering to precedent, in all but the rarest of circumstances, courts not only show deference to their predecessors but also give weight to current decisions because the citizenry recognizes the lasting impact

69 U.S. CONST. art. II, § 2.

70 *Id.* art. III, § 2.

71 *Id.* art. I.

72 Consovoy, *supra* note 1, at 54.

these decisions will have."[73] I would like to analyze this claim by debunking its "deference" and "lasting impact" segments separately.

The notion of showing deference to past courts only has power if that deference promotes a positive reaction to the judiciary among the body politic. If deference demonstrates a lack of careful consideration and causes people to question the court's legitimacy as an institution, then it is not particularly valuable. It seems that in particularly controversial cases, a court would have a tough time showing deference to its predecessors solely as a matter of law. Rather, a court would have to justify its decision either to stick with precedent or overrule it. Imagine, in the near future, the Supreme Court's membership is made up of at least five members who believe *Roe v. Wade*[74] is an incorrect interpretation of the Constitution and the states are free to regulate and criminalize abortion as they wish. If a case came before the Court and it upheld *Roe*, pro-life activists would be upset, particularly if the Court chooses to uphold *Roe* solely as a matter of stare decisis. Conversely, pro-choice activists would be upset if the Court summarily announced it was overturning *Roe* without any mention of the merits of the original opinion. Principled pragmatic stare decisis demands the Court do neither. Rather, the Court must show respect to the original opinion. The Court would be obligated to explain why the original opinion was wrong, or given the controversy, why it was a correct interpretation of the Constitution. Principled pragmatic stare decisis demands a high level of skill from opinion writers. By explaining reasoning, rather than appealing to stare decisis, the Court respects the opinions of the past while giving respect properly due to the citizens of the present. At least, in the example above, if the Court wrote a careful constitutionally based opinion, advocates on both sides could attempt to understand the *legal* reasoning, rather than blaming/lauding the opinion based on *political* results. Thus, the deference shown to the Court is genuine and earned through careful reasoning and opinion writing.

The second prong of this justification for traditional stare decisis is that decisions will have lasting impact because citizens will know they are going to be followed in the future. This increases the legitimacy of the Court as a body of judgment rather than a series of individuals imposing their collective political will on the population. First, as I have discussed above, principled pragmatic opinions will have a lasting impact because they will be carefully reasoned and explain to future courts why they are correct interpretations of the Constitution.

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73 *Id.*

74 410 U.S. 113 (1973).

Moreover, it seems unlikely principled pragmatic stare decisis would change how citizens follow the law very much. Presently, the Court follows the opinions of the past most of the time, and I think underlying those opinions is the notion those decisions were correct. Principled pragmatic stare decisis would just force the Court to own up to the belief past decisions are correct rather than just correct as a matter of their age. Furthermore, citizens will give greater weight to opinions because they will see how carefully cases are decided to stand the test of time, rather than appearing to be arbitrary and just an exercise of the Court's power to cast down decisions for the future.

The second argument for stare decisis is it supports judicial economy. Principled pragmatic stare decisis requires that stare decisis be only a tool for judicial economy, so it appears to meet this policy choice. However, because judicial economy is designed "to reduce caseloads and create[ ] disincentives to relitigation of precedent cases,"[75] one might argue principled pragamtic stare decisis would encourage relitigation because one would never know when a court might overturn a case. I think this is disingenuous. Skilled attorneys presently know when a court is likely to overturn a case based on the court's composition, the social climate, and the age of the precedent. In fact, the Supreme Court has noted these factors as possible reasons for overturning prior precedent.[76] Moreover, my theory allows courts to reduce caseloads by simply noting it agrees with the previous holding and the reasoning that supported it.

Finally, I would like to note principled pragmatic stare decisis supports authentic judicial economy. We should not endorse judicial economy for the sake of judicial economy. Our goal should be to reduce caseloads in a way that encourages alternative dispute resolution or eliminates claims without merit. We should not discourage litigants from challenging the current interpretation of the Constitution. The separate but equal doctrine was only changed through a clever and complex litigation strategy. Principled pragmatic stare decisis encourages such litigation because litigants know they will get a fair shake from the Court, while strict stare decisis discourages such innovation. Judicial economy for the sake of judicial economy is not fair to litigants and does not comport with traditional notions of justice. Principled pragmatic stare decisis ensures manageable dockets, encourages innovation, and never compromises justice for the sake of time.

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75 Consovoy, *supra* note 1, at 54.

76 *See supra* note 25 and accompanying text.

The third justification for traditional stare decisis is that it allows for predictability because "individuals are able to conform their behavior to a certain set of guidelines, and in return they are rewarded with the knowledge that this behavior, in line with the judicial determination, will be protected under law."[77] I think this justification applies more to statutory interpretation questions that I do not deal with in this Note. People traditionally conform their behavior to guidelines in the law and judicial interpretation of the law. However, even as this justification applies to constitutional interpretation I do not think it is a problem for principled pragmatic stare decisis. As I have discussed above, there are factors a potential litigant could look at to determine whether a change in precedent is likely. Moreover, what if the behavior an individual expects to be protected does not comport with a proper interpretation of the Constitution? That individual is protected while those who believe his behavior is unconstitutional are disgusted the Court will maintain prior precedent when it is blatantly wrong.

In addition to meeting the policy advantages of stare decisis and avoiding its pitfalls, principled pragmatic stare decisis has some advantages of its own. Principally, it encourages careful and skilled opinion writing. As a preliminary matter, judges do not like to be overturned. Judges want their opinions to last, especially regarding constitutional matters. Principled pragmatic stare decisis demands judges write carefully, considering all possible arguments that could be raised to their position. The objections of the dissent remain a specter over the majority as the case could be overturned at any time. Presently, the majority can disregard those objections, but under principled pragmatic stare decisis every effort should be made to answer those and any future objections. Judges have to write with respect for the past and reason for the future courts that may overturn them.

Moreover, judges will have to write to persuade those who have different philosophies on how the Constitution should be interpreted. Because future judges will be able to overturn precedent, opinion writers will want to include persuasive pleas to almost any interpretive philosophy. Alternatively, judges will have to justify their own interpretive choice as the correct one for all courts. Jane S. Schacter provides a model for how to have such a debate in the area of statutory interpretation.[78] Her model "offers litigants a framework for *advocating*, and courts and scholars a framework for *assessing*, interpretive

77 Consovoy, *supra* note 1, at 54.

78 Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

rules in the near term."[79] Professor Schacter's work focuses on the underlying democratic values behind different interpretive strategies. A similar debate could be had in the area of constitutional law. Why is it appropriate the Founders' understanding control law today? What values are we trying to protect? Does a "living Constitution" prevent us from reading any lasting values into the structure and text of the Constitution? I think a debate about the rules of the constitutional debate is a debate worth having. It would allow "us to move beyond the deadening discourse of restraint and activism that has long dominated thinking above interpretive legitimacy."[80] Principled pragmatic stare decisis provides a real reason to have this new discussion and works towards resolving a problem we are not even having a debate about right now.

The final advantage of principled pragmatic stare decisis is that it increases the legitimacy of the judiciary as part of American democracy. The judicial branch will be forced to write careful and considered opinions that are subject to the review and scrutiny of not only higher courts, but future courts as well. Hopefully, these new opinions will help ameliorate some concern that the Court is beholden to special political interests or is simply bound by the faulty decisions of the past.

CONCLUSION

Throughout this Note, I have made the case that courts should adopt principled pragmatic stare decisis as it relates to horizontal, constitutional review. I have demonstrated the history of the judiciary does not compel stare decisis, sketched out what principled pragmatic stare decisis entails, and suggested policy advantages for the proposal. Before concluding my work with a call for change I would like to answer one key objection.

One might object my proposal is simply unworkable. The judiciary has chosen to adopt stare decisis in constitutional cases and as an entrenched feature of the law it would not be wise to change. I have two responses to that objection. First, I do not think we should fear change that would be good for the judiciary, encourage substantive debate, and increase legitimacy. Any problems associated with change will be mitigated by the realized policy advantages. Moreover, I do not think stare decisis is as entrenched in the current Supreme Court as one may think. Various commentators have suggested the Rehnquist Court has functionally abandoned stare decisis in constitutional

79 *Id.* at 661.
80 *Id.* at 660.

cases.[81] We have not seen any disastrous consequences so far. All I am asking courts to do is own up to what they are already doing.

Principled pragmatic stare decisis is workable and it is the best idea for the future of the judiciary in constitutional interpretation. Anytime we are presented with an idea that facilitates judicial candor about the process and appropriate rules for judging we should take that proposal seriously. "[T]he judiciary is often given an elevated level of respect and deference . . . [as] a result of the judiciary's appearance as the most neutral and just branch, detached from politics and personal interest."[82] Strict stare decisis defeats that respect for the reasons I have already discussed. Unprincipled pragmatic stare decisis (stick with the results for their own sake) is neither neutral nor just; it is at best a reflection of the judge's personal political preferences and at worst the easy way out of any given dispute. Principled pragmatic stare decisis evinces precisely what we do and should demand from the judiciary: efficient work that never sacrifices intelligent reasoning and just results.

81 *See, e.g.*, Bork et al., *supra* note 1; Consovoy, *supra* note 1; Cooper, *supra* note 2.

82 Consovoy, *supra* note 1, at 53.