Intragenerational Constitutional Overruling

L.A. Powe Jr.

The University of Texas School of Law, spowe@law.utexas.edu

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Constitutional Law Commons

Recommended Citation

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
INTRAGENERATIONAL CONSTITUTIONAL OVERRULING

L.A. Powe, Jr.*

INTRODUCTION

The oral argument over affirmative action in Fisher v. University of Texas1 began with a question of Fisher’s standing, but after a few brief exchanges, Justice Stephen Breyer changed the subject to the potential overruling of Grutter v. Bollinger2. Was Fisher asking that Grutter be overruled? Justice Breyer explained that Grutter said affirmative action would last for twenty-five years and “I know that time flies, but I think only nine of those years have passed.”3 Grutter was not from another era and had engaged the Court’s “thought and effort,” so why overrule it?4 Fisher’s counsel understood the question and disclaimed any interest in “chang[ing] the Court’s disposition of the issue in Grutter.”5

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

© 2014 L.A. Powe, Jr. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the Notre Dame Law Review, and includes this provision in the copyright notice

* Anne Green Regents Chair, The University of Texas. I would like to thank Thomas Krattenmaker, Michael Gerhardt, and Justin Driver for helpful suggestions on earlier drafts of this Article.
1 133 S. Ct. 2411 (2013).
3 Transcript of Oral Argument at 8, Fisher, 133 S. Ct. 2411 (No. 11-345).
4 Id.
5 Id.
where formal adherence to stare decisis would counsel them not to. We can also see if the Justices' views on stare decisis and overruling have changed over time.

I. CASEY

Today, the formal legal standard governing the decision to overrule is embodied in Planned Parenthood of Southeastern Pennsylvania v. Casey.6 By the early 1990s, Roe v. Wade7 had been under increasing assault at the Supreme Court for a decade,8 so with the confirmation of Justice Clarence Thomas both pro-choice and pro-life activists believed that Roe would soon be overruled by either a six-to-three or five-to-four vote.9 Instead, in Casey, the Court created a newly minted version of Roe, then saved that version by overruling two post-Roe decisions,10 all the while offering the modern era’s most detailed explanation of when the values of stare decisis should yield to the demands to overrule.11

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

---

7 410 U.S. 113 (1973).
8 Rust v. Sullivan, 500 U.S. 173 (1991) (upholding, five to four, over First Amendment objections a requirement that forbade any person engaged in federally funded pregnancy counseling from mentioning the possibility of an abortion or providing a referral to someone who would); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (holding constitutional, five to four, a requirement that physicians perform a test to determine viability, but also, five to four, refusing to overrule Roe); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating, six to three, a statute requiring use of abortion procedure that provides the most protection of the life of the fetus in a post-viability abortion); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (holding, six to three, requirements that second trimester abortions be performed in hospitals, that women be informed about the consequences of abortion, and that a twenty-four hour waiting period prior to an abortion all are violations of Roe).
10 Thornburgh, 476 U.S. at 747; City of Akron, 462 U.S. at 416.
11 For the prior era, Justice Brandeis’s dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410–11 (1932), was the leading authority as illustrated by a student note. Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990) (trying, just two years before Casey, to improve on the arguments in the then-current Webster decision). In another student note, William Rehnquist’s son devoted several pages to Brandeis’s Burnet opinion. James C. Rehnquist, Note, The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 B.U. L. Rev. 345, 350–53 (1986). On this Note, see infra note 40.
13 Id.
14 Id.
the underlying facts changed or come to be seen differently so as to rob the rule of justification.\textsuperscript{15}

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

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

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

\begin{thebibliography}{9}
\bibitem{id} Id.
\bibitem{16} Id. at 860–61.
\bibitem{17} Id. at 856.
\bibitem{18} Id. at 857.
\bibitem{19} Id. at 860.
\bibitem{15} Id. at 860–61.
\bibitem{20} Lochner v. New York, 198 U.S. 45 (1905).
\bibitem{21} 165 U.S. 537 (1896).
\bibitem{22} \textit{Casey}, 505 U.S. at 864.
\bibitem{23} Id. at 862.
\bibitem{24} Id. at 864.
\end{thebibliography}
ing” was important; its various applications less so and hence less entitled to the benefits of stare decisis for reasons that remain somewhat obscure.

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

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

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

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

27 See Webster, 492 U.S. at 518.
29 See id. at 176; id. at 220 (Blackmun, J., dissenting).
30 Interestingly, the Court in the modern era has held that only it is entitled to apply this rule. Hicks v. Miranda, 422 U.S. 332, 344 (1975). Lower courts have been admonished not to depart from Supreme Court precedent but rather to apply that precedent faithfully unless or until the Supreme Court itself jettisons the precedent. Id.
Further, as the doctrinal (shall we say?) elasticity underlying *Casey* shows, “overruling” is not a simple on/off switch. *Casey* totally reconceived *Roe*’s logical basis, completely rewrote the rules of *Roe*, overruled two of *Roe*’s ancillary decisions, and then pronounced that respect for stare decisis counseled that *Roe* should not be overruled. “Applying precedents requires interpreting them, interpreting them frequently entails modifying them, and modifying them often entails extending or contracting them.”32 Slightly differently put, because the Court has freedom to do whatever pleases it at the moment,33 overruling is merely one of many options available to the Court in drafting (and crafting) an opinion, as *Casey* itself reveals. Inconsistent precedent can be ignored.34 Or it can be disingenuously distinguished.35 Express overrulings are infrequent compared to decisions that render prior law irrelevant.36 Even less frequent are cases where the Court says it reaches a result under the Constitution because precedent compels it notwithstanding that some of the Justices find the result untenable.37 There must be, then, a fair amount of bobbing and weaving going on in the Court’s interpretation of its precedents.38

35 Just as *Federal Communications Commission v. Pacifica*, 438 U.S. 726 (1978), forbidding saying “fuck” and six other dirty words over the public airways, does to *Cohen*. Thomas G. Krattenmaker & L.A. Powe, Jr., *Television Violence*, 64 Va. L. Rev. 1123, 1229–31 & nn.638, 639, 642 (1978) (comparing various possibilities: averting the eyes v. even turning off the radio leaves the harm intact; no evidence of anyone powerless to avoid Cohen’s jacket v. one actual complaint about Pacifica’s broadcast; thirty days in jail v. potential loss of millions if broadcast license revoked).
Finally, the *Casey* treatment of overruling has an almost pristine naiveté about it, suggesting that overruling takes place only when something internal to law has changed—and therefore that that something is neither the composition of the Court nor the ideologies of the Justices. Deciding whether to change the law, the Court would have us believe, requires simply the application of four fairly objective tests whose outcomes should not be greatly affected by the ideologies, backgrounds, or political ambitions of those applying them. *Casey* seems to suggest that the decision whether or not to overrule depends not on changes in the Court’s personnel but rather changes in society. The counterpoint to this view was expressed by Justice Antonin Scalia three years before *Casey* when he wrote that “[o]verrulings of precedent rarely occur without changes in the Court’s personnel.” 39 What would we perceive if we look at intragenerational constitutional overrulings through the lens of a shifting personnel make-up rather than the *Casey* factors?

These reflections on *Casey* lead to two conclusions at the outset. First, any study of overrulings needs to account for two factors in addition to those cited in *Casey*: (1) Was the precedent wrong when decided (however that may be determined), and (2) have changes in the Court’s personnel made the precedent untenable or abhorrent to a new majority? Second, even with these amendments to the list of *Casey* factors, a study of overrulings needs to be taken with a grain of salt. 40 As *Casey* itself proves, whether subsequent Case *B* overrules earlier Case *A* is often a matter of interpretation and the choice to hollow out an unwanted precedent is all too available and much solved the constitutional issue present since *Schenck* [*v. United States*, 249 U.S. 47 (1919)], by implicitly holding that all the cases that upheld convictions were wrongly decided. The only problem with such an interpretation is that the Court cited *Dennis* [*v. United States*, 341 U.S. 494 (1951)], favorably even though the test articulated only the requirement that the possibility of attempted overthrow of the government at some unspecified later date when conditions were ripe outweigh the minimal intrusion on free speech. Furthermore, *Brandenburg* quoted *Noto v. United States* [*v. United States*, 367 U.S. 290 (1961)], on the advocacy–incitement distinction without noting that in a companion case, *Scales v. United States*, 367 U.S. 203 (1961), the defendant went to jail.” (footnotes omitted)).


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

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

II. Which Cases?

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

42 Hicks v. Miranda, 422 U.S. 332 (1975).
44 Powe, supra note 33, at 29.
ruled within a generation (21 years)\textsuperscript{47} of their being handed down.\textsuperscript{48} This significantly limits the number of cases to be considered because the “average lifespan of an overruled precedent is 29.2 years.”\textsuperscript{49} Furthermore, because there were few overrulings in the first century of the Supreme Court and, more specifically, because the entire “constitutional universe” changed after President Roosevelt’s Court-packing plan, I limit the data to the opinions where the overruled case was decided after 1937.\textsuperscript{50}

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

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


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

\textsuperscript{49} GERHARDT, supra note 31, at 11.

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

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

\textsuperscript{52} 428 U.S. 153 (1976) (reinstating capital punishment).


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

\textsuperscript{55} For instance both the Congressional Research Service and Gerhardt list \textit{Miller v. California}, 413 U.S. 13 (1973), as overruling \textit{Memoirs v. Massachusetts}, 383 U.S. 413 (1966). See S. Doc. No. 108-17, app. at 2395 (2004); GERHARDT, supra note 31, app. at 225. To be
tainly are examples of hollowed out precedents as Barry Friedman shows, but my focus is on changes in the law where all agree Case B overrules Case A. During the post-1937 period the Congressional Research Service lists 189 cases, both statutory and constitutional, as having been overruled. The subset I discuss is a little over one-sixth of the total. They are listed chronologically in the Appendix. Almost two-thirds of them were decided during the chief justiceships of Earl Warren and Warren Burger: fourteen during the Warren Court (of which seven were its own) and nine during the Burger Court (seven from the Warren era, two of its own).

III. **Casey’s Categories Applied**

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

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

56 See supra note 41.


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

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


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

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

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

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

\textsuperscript{63} 426 U.S. 833 (1976) (holding that Congress may not expand the Fair Labor Standards Act to cover state public employees).
\textsuperscript{64} \textit{Id.} at 852.
\textsuperscript{65} 517 U.S. 44 (1996).
\textsuperscript{66} \textit{Id.} at 59–60.
\textsuperscript{67} 469 U.S. 528 (1985).
\textsuperscript{68} \textit{Id.} at 546–47.
\textsuperscript{70} \textit{EEOC}, 460 U.S. at 229.
\textsuperscript{71} 517 U.S. 44 (holding Congress lacks Article I power to override the states’ Eleventh Amendment immunity from suit in federal court).
\textsuperscript{72} \textit{Id.} at 64.
power?—regardless of its underlying rationale. Unworkability hardly seems a sufficient explanation for such an easily applied rule.

A better explanation for the overruling was that *Union Gas* “essentially eviscerated [the] decision in *Hans.*”73 It did so by a “misreading of precedent” and a “misplaced” reliance on a case74 that had relied on Section 5 of the subsequent Fourteenth Amendment.75 To this, the majority noted that a majority in *Union Gas* also “expressly disagreed with the rationale of the plurality.”76 Thus, *Seminole Tribe* appears the opposite of *Garcia.* The latter overruled because subsequent developments eroded *National League of Cities,* while the former overruled *Union Gas* because it was inconsistent with previous developments—which if they were to be followed means that *Union Gas* was wrong the day it was decided. In any case, neither *Garcia* nor *Seminole Tribe* seems truly an opinion on unworkability, and this indicates that this factor may prove empty.

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

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

**B. Reliance**

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

---

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

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

75 *Id.*

76 *Id.* at 66.


79 *Id.* at 870–71.
not the most credible assertion—is an illustration of why reliance is rarely a factor in any decision about stare decisis in a case that does not involve economics. But rare is not never. In Dickerson v. United States the Court offered something like reliance as the rationale for leaving Miranda v. Arizona standing. Perhaps reliance in the noneconomic sphere internalizes, as Casey articulated, the Court’s view of the likely public reaction to a formal overruling.

C. Erosion

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

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

---

80 Id. at 956 (Rehnquist, C.J., concurring in part and dissenting in part).
82 Id. at 443 (“Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).
84 Casey, 505 U.S. at 865–68 (plurality opinion).
85 One day we may see this announced with respect to Miranda, as Friedman, supra note 41, at 25, illustrates. Or maybe Miranda will just be gutted to a hollow shell and left for the ages.
86 See Powe, supra note 33, at 494.
88 Id. at 651, 653.
89 338 U.S. 25, 33 (1949) (finding the Fourth Amendment’s exclusionary rule inapplicable to states), overruled by Mapp, 367 U.S. 643.
90 Mapp, 367 U.S. at 651.
92 Mapp, 367 U.S. at 652–53.
later decisions of this Court.\textsuperscript{93} With the way cleared, \textit{Mapp} overruled \textit{Wolf} and brought Fourth Amendment doctrine in the state courts into harmony with the federal courts.

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

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

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

\textsuperscript{93} Id. at 653 (quoting People v. Defore, 150 N.E. 585, 588 (N.Y. 1926)).
\textsuperscript{94} 316 U.S. 455 (1942).
\textsuperscript{95} Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (overruling Betts v. Brady, 316 U.S. 455, which had refused to extend the Sixth Amendment’s guarantee of counsel for indigent federal defendants to the states).
\textsuperscript{96} Id. at 350–51 (Harlan, J., concurring).
\textsuperscript{97} See Hamilton v. Alabama, 368 U.S. 52, 55 (1961). There was similar dicta in existence when \textit{Betts v. Brady} was decided. See, e.g., Avery v. Alabama, 308 U.S. 444, 445–46 (1940).
\textsuperscript{98} Gideon, 372 U.S. at 351 (Harlan, J., concurring).
\textsuperscript{99} Id.
\textsuperscript{100} 378 U.S. 1, 6, 8 (1964) (holding the Fifth Amendment privilege against self-incrimination applicable to the states and overruling Adamson v. California, 332 U.S. 46 (1947)).
\textsuperscript{102} 385 U.S. 511, 514 (1967) (holding that an attorney cannot be disbarred for invoking Fifth Amendment privilege and overruling Cohen v. Hurley, 366 U.S. 117 (1961)).
\textsuperscript{103} Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding the Double Jeopardy Clause applicable to the states).
\textsuperscript{104} 397 U.S. 436, 441, 445 (1970) (holding that collateral estoppel is part of double jeopardy and overruling Hoag v. New Jersey, 356 U.S. 464 (1958)).
non-testifying co-defendant’s confession violated the Confrontation Clause.\(^\text{105}\)

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

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

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

As Establishment Clause jurisprudence changed even as the tripartite *Lemon*\(^\text{115}\) test survived (despite heavy conservative criticism even coming

---


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

\(^\text{107}\) *Id.* at 669.


\(^\text{109}\) *Id.* at 818.


\(^\text{111}\) For evidence that *Swain* was appreciated as such, see Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 Calif. L. Rev. 1101, 1130–39 (2012).

\(^\text{112}\) 476 U.S. 79 (1986).

\(^\text{113}\) *Id.* at 93.


\(^\text{115}\) Lemon v. Kurtzman, 403 U.S. 602, 607, 612–13 (1971) (holding that state salary supplements to teachers of secular subjects in private schools violate the Establishment Clause and articulating the test that requires statutes to have a secular purpose, to have a principal or primary effect that does not advance religion, and to not foster an excessive entanglement of government and religion).
from the Solicitor General), the Court in the 1990s was more accommodating of government assistance to religious institutions. Agostini v. Felton overruled a pair of cases and allowed secular teachers to teach in religious schools, noting that “recent cases have undermined the assumptions upon which [the overruled cases] relied.”

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

D. New Facts

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

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

---

116 “The problem is Lemon.” Brief for the United States as Amicus Curiae Supporting Petitioners at 20, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014) (holding that prayer at high school graduation violates the Establishment Clause). It is likely that Lemon survived because the new conservative majority was just as able to tame it as the former majority had been to manipulate it for liberal ends.
118 Id.
120 Id. at 263–68.
122 Id.
123 Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (“[I]t plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture.”).
124 Jones v. Opelika, 316 U.S. 584, 598 (1942) (“[W]e view these sales as partaking more of commercial than religious . . . transactions . . . .”).
127 See supra text accompanying notes 87–93.
128 See supra text accompanying notes 87–93.
A major cultural and political change involved the exclusion of women from jury service. *Hoyt v. Florida*, 129 decided in 1961 before Betty Friedan published *The Feminine Mystique* and launched the modern feminist movement,136 rested its decision to permit exclusion of women from jury duty on the conclusion that the “woman is still regarded as the center of home and family life.”131 But *Taylor v. Louisiana*132 was decided in the 1970s after those events and while the Equal Rights Amendment looked like an easy bet for ratification. *Taylor*’s conclusion that *Hoyt* was “no longer tenable” matched the times.133

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

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

131 *Hoyt*, 368 U.S. at 62.
133 *Id.* at 537.
135 *Id.* at 179.
137 *Gregg*, 428 U.S. at 179.
139 *Id.* at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)) (internal quotation marks omitted).
140 *Id.* at 314–15.
Many states had not redistricted for decades, and in the 1950s urban
governments looked to the nation’s capital rather than state capitals for aid.
Justice William “Brennan’s Court papers contain a contemporaneous Univer-
sity of Virginia study showing that nationally ‘big city voters have less than
one-half the representation of people in open-country areas.”146 Chief Justic
Earl Warren believed (myopically) that if the country had reapportioned
earlier, Brown would have been unnecessary.147 Bluntly, the Baker majority
perceived the adverse costs of malapportionment as vastly more consequen-
tial than the Court had in the aftermath of World War II. And, as with Brown,
the Justices understood that if they did not act, no one would because, given
incumbency, politics, and constitutional structure, no one could.

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

E. Wrong the Day It Was Decided

There are several ways to say “wrong the day it was decided.” Lawrence v.
Texas151 was blunt: Bowers v. Hardwick152 “was not correct when it was
decided.” The most subtle was Gideon. In holding that an indigent defen-
dant must be provided counsel, the Court relied solely on cases decided
before Betts v. Brady—the case Gideon was overruling.154

Four years later Justice Black, the author of Gideon, used the same tech-
nique to overrule Perez v. Brownell, which upheld a federal statute inflict-
ing involuntary loss of citizenship upon a naturalized American who voted in a
foreign election.155 The opinion in Afroyim v. Rusk156 cited only two opin-
ions in text: the 1824 Chief Justice Marshall opinion in Osborn v. Bank of the
United States157 was cited favorably,158 and Chief Justice Taney’s Dred Scott

146 P OWE, supra note 33, at 202 (quoting ED CRAY, CHIEF JUSTICE 380 (1997)).
147 G. E DWARD WHITE, EARL WARREN 189 (1982).
148 Gonzales, 550 U.S. at 159.
149 Id. at 141.
150 Id. at 159.
151 539 U.S. 558 (2003) (holding that a statute punishing homosexual sodomy violated
liberty under the Due Process Clause).
153 Lawrence, 539 U.S. at 578.
455 (1942)).
156 387 U.S. 253.
158 Afroyim, 387 U.S. at 261 (“[The naturalized citizen] becomes a member of the soci-
ety, possessing all the rights of a native citizen, and standing, in the view of the constitu-
tion, on the footing of a native. The constitution does not authorize Congress to enlarge
decision was (naturally) cited unfavorably.159 Both cases, as well as the murky legislative history of the Fourteenth Amendment, were asserted to point to a lack of power in Congress to denaturalize involuntarily.160 Afroyim is unlike Gideon, however, because in footnotes it acknowledged that subsequent to Perez the Court had struck down statutory involuntary denaturalization on a case-by-case basis.161

The Court’s most common way to demonstrate that a precedent was wrong the day it was decided is to refute the reasoning of the prior case without suggesting that anything has changed in the intervening years. This was done in the most famous quick overruling in the modern era.162 Barnett, holding that a state cannot punish children who will not participate in the flag salute, contains a point-by-point refutation of the rationales offered in the three-year-old eight-to-one decision in Gobitis.163 Reid v. Covert, invalidating courts martial overseas for civilian dependents of service members,164 flatly rejected the Article III reasoning of Kinsella v. Krueger.165 Frank v. Maryland166 “must be overruled,” Camara v. Municipal Court167 concluded, because the “reasons put forth . . . are insufficient to justify [the result].”168 Similarly, when the Court concluded that victim impact statements were admissible in the penalty phase of a capital case, the Court stated that the overruled cases, two and four years old, were “wrongly decided.”169

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

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

159 Id. at 262 (discussing the negative reaction to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).
160 Id. at 267.
161 Id. at 255 & nn.4–5.
162 The most famous quick overruling is, of course, in the Legal Tender Cases. See infra text accompanying notes 246–47.
163 See supra notes 125–26 and accompanying text.
164 Reid v. Covert, 354 U.S. 1, 3, 5 (1957).
165 Id. at 41 (overruling Kinsella v. Krueger, 351 U.S. 470 (1956)).
167 387 U.S. at 528.
168 Id. at 534.
Maryland v. Wirtz\textsuperscript{171} had relied on dicta from a 1936 case that was “simply wrong.”\textsuperscript{172}

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

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

\begin{itemize}
\item \textsuperscript{172} Usery, 426 U.S. at 855, \textit{overruled by} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
\item \textsuperscript{173} 424 U.S. 507 (1976) (holding that there is no First Amendment right to picket on private property open to the public).
\item \textsuperscript{174} 558 U.S. 310 (2010) (holding that there is a First Amendment right to contribute unlimited sums of money to organizations that are independent of a candidate in order to influence elections).
\item \textsuperscript{175} Amalgamated Food Empls. Union Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308 (1968), \textit{abrogated by} Hudgens, 424 U.S. 507.
\item \textsuperscript{176} Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972).
\item \textsuperscript{177} Hudgens, 424 U.S. at 518.
\item \textsuperscript{178} Citizens United, 558 U.S. at 365, 368 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), and overruling in part McConnell v. FEC, 540 U.S. 93 (2003)).
\item \textsuperscript{179} Id. at 363–64.
\item \textsuperscript{180} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).
\item \textsuperscript{181} Jackson v. Denno, 378 U.S. 368, 384 (1964) (holding that the judge, not jury, must rule on voluntariness of confessions and overruling Stein v. New York, 346 U.S. 156 (1953)).
\item \textsuperscript{182} Chimel v. California, 395 U.S. 752, 760 (1969) (limiting searches incident to a lawful arrest in a home and overruling United States v. Rabinowitz, 339 U.S. 56 (1950)).
\end{itemize}
tant principles of this Court’s . . . jurisprudence,”\textsuperscript{183} or “so far depart[ed] from proper equal protection analysis”\textsuperscript{184} to illustrate departure.\textsuperscript{185}

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

\section*{IV. The Dissenters}

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

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

\textsuperscript{183} Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (holding federal racial classifications subject to strict scrutiny and overruling \textit{Metro Broad., Inc. v. FCC}, 497 U.S. 547 (1990)).
\textsuperscript{184} City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (holding that grandfathering two businesses from regulatory regime does not violate equal protection and overruling \textit{Morey v. Doud}, 354 U.S. 457 (1957), which had held that excluding American Express by name does not violate equal protection). \textit{Dukes} also noted that \textit{Morey} was “the only case in the last half century to invalidate a wholly economic regulation . . . on equal protection grounds.” \textit{Dukes}, 427 U.S. at 306.
can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better.186

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

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

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

Two years later, liberals were on the losing end in major cases: free speech on another’s open property in Hudgens, federal power to apply the Fair Labor Standards Act to state employees in National League of Cities, and the resumption of capital punishment in Gregg. Yet their dissents never invoked stare decisis. Similarly, when Illinois v. Gates191 overruled the warrant requirements of Aguilar v. Texas192 and Spinelli v. United States,193 Justice

188 Dukes, 427 U.S. at 297.
191 462 U.S. 213, 230–31 (1983) (stating that when dealing with a warrant request based on an unnamed informant the “totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific ‘tests’ be satisfied” (footnote omitted), and overruling Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969) (providing for tightened standards for magistrates issuing search warrants based on information of unnamed informant)).
192 378 U.S. at 108.
193 393 U.S. at 410.
William J. Brennan (with Justice Thurgood Marshall) dissented, but only to show that the overruled cases had the correct rule.

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

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

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

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

198 See, e.g., Lawrence, 550 U.S. at 586-87 (Scalia, J., dissenting).
199 Gonzales, 550 U.S. at 191 (Ginsburg, J., dissenting).
201 Id. at 408-09 (Stevens, J., dissenting).
the probably equal intensity the majority feels about the issue under consideration).

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

V. Those Who Changed Their Minds

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

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

206 Bruton v. United States, 391 U.S. 123 (1968) (holding that non-testifying co-defendant’s confession cannot be admitted at trial).
208 Justice Black dissented in both Jackson v. Denno, 378 U.S. 368, 401 (1964) (holding regarding the taking of the issue of voluntariness of a confession from the jury) (Black J., dissenting in part and concurring in part), and the overruling of Stein v. New York, 346 U.S. 156, 197 (1953) (Black, J., dissenting), but the Stein dissent was on a different point.
The Burger Court, perhaps the most difficult modern Court to characterize successfully, began with an overruling case in which a Justice switched votes. The case was *Ashe v. Swenson*, and the issue was double jeopardy collateral estoppel. Justice Harlan changed an earlier opposite position, although only by acceding to subsequent developments (that he had opposed). The Burger Court also decided the case that tied *Murdock* for the single largest number of switches taking place. The case was *Taylor v. Louisiana*. Justices Douglas, Brennan, and Potter Stewart all changed the position they took in *Hoyt v. Florida* to hold that women could not automatically be excluded from jury service. *Taylor* reflected the *force majeure* of the modern feminist movement.

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

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

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

---


211 *Id.* at 525.


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


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

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

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

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

---

225 I have excluded those Justices who served only briefly: Justices Reed, Burton, Minton, Whitaker, Goldberg, and Fortas.
226 Using a much larger time frame and different (and much larger) data set, Jeffrey A. Segal and Harold J. Spaeth reach a different conclusion: “Conservative justices are more restrained, toward precedent at least, than are liberal justices.” *Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited* 301 (2002).
227 For purposes of this discussion it is irrelevant because none of the appointees of either President George W. Bush or Barack Obama have switched an initial vote in an overruling case.
228 I am treating Justice Lewis Powell, a southern Democrat, as a Republican, which he surely would have become once the South became Republican.
230 Justice Breyer, like Justice Harlan in *Ashe v. Swenson*, 397 U.S. 436 (1970), changed a vote based on acquiescing in an opinion he believed was wrongly decided. *See Alleyne v.*
Most shocking, given his flip-flopping career, Justice Stevens never changed in an overruling case. To be sure there were not the number of significant constitutional cases decided within the generation that were overruled, but the consistency of these Justices in holding to their initial positions offers a contrast with their predecessors. Perhaps the difference stems from the earlier Justices being men of national reputation in public affairs and the later ones having prior careers on lower courts and thus perhaps feeling a stronger tug of stare decisis (at least when they had participated in the original majority).

A second possible reason for the lack of switches was the changing nature of significant overruled cases in the aftermath of *Casey*. They involved hot-button issues—abortion, gay rights, affirmative action, capital punishment, campaign finance—on which the Justices (at least after *Casey*) maintained strong positions that proved quite impervious. The best reason may be more careful vetting of potential nominees, especially of Republicans, following the development by each political party of a distinctive constitutional vision.

Republicans, who care passionately about taking over the Supreme Court (and the judiciary generally), wanted no more Souters: hence the cry of conservative opponents to the mention of Alberto Gonzales—“Gonzales is Spanish for Souther.” And there was reason behind their fears. With two exceptions, every Justice who changed between Case A and Case B (including Justices Harlan and Kennedy) went from a more con-

---


232 With the exception of Justices Brennan and Stewart.


236 What the parties cannot protect against is a change in party position on the Constitution occurring after the party has placed its Justices on the Court. This was illustrated by the hostile reaction to Chief Justice John Roberts’s vote to sustain the Affordable Care Act though the case would have been decided by an eight-to-one or seven-to-two ruling had it come up in 2008 (since the constitutional claim against an individual mandate was first articulated in 2009). Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC, June 4, 2012, at 38.
servative position to a more liberal one. And the two exceptions were from over a quarter-century in the past: Justice Stewart went conservative three (National League of Cities, Gregg, and Hudgens) to one (Taylor), while Justice White split equally—Batson and Gregg.

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

VI. Changing Composition

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

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

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

239 See Michael J. Klarman, From the Closet to the Altar (2013), for a strong statement of the backlash thesis from its author.
241 South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (asserting that victim impact statements were inadmissible).
242 Gerhardt, supra note 31, at 11.
244 Gerhardt, supra note 31, at 203–04.
245 Powe, supra note 33, at 205.
2120  NOTRE DAME LAW REVIEW  [VOL. 89:5

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

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

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

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

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

246 75 U.S. (8 Wall.) 603 (1869).
247 79 U.S. (12 Wall.) 457 (1871).
252 Butler, 341 U.S. 937.
Cities majority, and he along with Justice White voted as the five new Republicans did in Gregg to reinstate capital punishment. In Hudgens, on labor pickets on private property, the Republican appointees (joined by Justices Stewart and White again) were essential for the overruling of Logan Valley Plaza.

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

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

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

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


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

\textsuperscript{256} Joan Biskupic, O’Connor Says Rulings ‘Dismantled,’; Diversity Crucial to Highest Court, USA TODAY, Oct. 5, 2009, at 1A.

Conclusion

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

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

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

258 JENKINS, supra note 40, at 250.
259 See REFORMING THE COURT (Roger C. Crampton & Paul D. Carrington eds., 2006).
262 Off the record, and to Justice Douglas only, Justice Fortas admitted that he had traded his vote in Ginzburg v. United States, 383 U.S. 463 (1966) (pandering can make non-obscene materials obscene), to convict for Justice Brennan’s vote in Memoirs v. Massachusetts, 383 U.S. 413 (1966) (deciding that Fanny Hill was not obscene because the work had some value), to hold the book not obscene—and that he had been wrong to do so. See L.A. Powe, Jr., The Obscenity Bargain: Ralph Ginzburg for Fanny Hill, 35 J. SUP. CT. HIST. 166, 173 (2010) (noting Justice Fortas’s assertion that “contrary to my principles, I . . . came out against Ginzburg”).
Appendix: Overruling Cases (Chronologically)

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

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


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


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

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

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


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


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


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


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

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


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

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

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


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

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

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


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

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


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

2014] INTRAGENERATIONAL CONSTITUTIONAL OVERRULING 2125

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

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


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


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


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


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


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


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


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


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


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


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


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

NOTRE DAME LAW REVIEW [vol. 89:5

2128