2001

An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah

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ARTICLE

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INTRODUCTION

Late in the evening of December 12, 2000, five Justices of the Supreme Court of the United States effectively selected a new president, seating Governor George W. Bush of Texas in the Oval Office for the next four years. Even the most disengaged political neophyte knows well the turgid facts surrounding this remarkable decision. The popular vote in Florida proved to be excruciatingly close, giving rise to a tsunami of litigation in the days and weeks following November 7, 2000.[1] The U.S. Supreme Court's per curiam opinion in *Bush v. Gore* makes for interesting reading even if, on its own terms, the Justices' "consideration [was] limited to the present circumstances, for the problem of equal protection in election processes presents many complexities."[2]

Unsurprisingly, *Bush v. Gore* has provoked much and immediate scholarly commentary.[3] From debates about the desirability of abolishing the Electoral

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1. *See* Dan Balz & Charles Lane, *Divided Justices Cite Concerns With Timeframe*, WASH. POST, Dec. 13, 2000, at A1; David Brion Davis et al., *The Election Mess*, N.Y. REV. BOOKS, Feb. 8, 2001, at 48; *The Loony Election*, N.Y. REV. BOOKS, Dec. 21, 2000, at 96.

2. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam).

3. *See generally* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001); Michael S. Flaherty, *The Constitution Outside the Courts and the Pursuit of a Good Society*, 69 FORDHAM L. REV. 2073 (2001); Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237 (2001); Richard B. Moriarty, *Law Avoiding Reality: Journey Through the Void to the Real*, 50 DEPAUL L. REV. 1105 (2001); Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and Ensuing Litigation*, 2000 SUP. CT. REV. 1; Laura K. Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); David A. Strauss, *What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Laurence H. Tribe, eroG v. hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001); Symposium, *The Law of Presidential Elections*, 29 FLA. ST. L. REV. 325 (2001); Symposium, *Bush v.*

College,[4] to arguments about the long-term effects of the decision for equal protection jurisprudence,[5] to impassioned denunciations of the majority's transparent partisanship,[6] the case has created a new cottage industry in constitu-

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Gore, 68 U. CHI. L. REV. 613 (2001); Note, *Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170 (2001); Richard A. Epstein, *The Legacy of Election 2000: Constitutional Litigation Will Return to Normal, But the Political Battles Are Just Getting Started*, REASON, Mar. 1, 2001, at 47; Pamela Karlan & Richard Posner, *The Triumph of Expedience*, HARPER'S MAG., May 2001, at 31; Jeffrey Rosen, *The Supreme Court Commits Suicide. Disgrace*, THE NEW REPUBLIC, Dec. 25, 2000, at 18.

4. *See* Ann Althouse, *Electoral College Reform: Deja Vu*, 95 NW. U. L. REV. 993 (2001) (reviewing and critiquing arguments for and against the Electoral College); Robert W. Bennett, *Popular Election of the President Without a Constitutional Amendment*, 4 GREEN BAG 2D 241 (2001) (hypothesizing that popular election of the President could be achieved without abolishing Electoral College if a small number of states appointed electors based on candidate that won nationwide popular vote); Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089 (2001) (reviewing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 (2000)); Akhil Reed Amar, *The Electoral College, Unfair From Day One*, N.Y. TIMES, Nov. 9, 2000, at A23 (describing the purpose and effects of the Electoral College system); E.J. Dionne, Jr., *Scrap This System*, WASH. POST, Nov. 9, 2000, at A29 (arguing that Electoral College should be abolished because Electors "are the product of a system created in less democratic times by Founders who wanted to temper the popular will"); Eric Foner, *Partisanship Rules*, THE NATION, Jan. 1, 2001, at 6 (calling for abolition of Electoral College because it was "created by generation fearful of democracy[,] . . . unfairly enhances the power of the least populous states and can produce the current spectacle of a candidate receiving a majority of the votes but losing the election"); Lani Guinier, *A New Voting Rights Movement*, N.Y. TIMES, Dec. 18, 2000, at A27 (describing Electoral College system as unfair and calling for "a system that apportions a state's electoral votes based on the popular vote received by each candidate in that state").

5. *See* Balkin, *supra* note 3, at 1447–48 (suggesting that *Bush v. Gore* might signal a renewed commitment to vigorous enforcement of the Equal Protection Clause in the context of voting rights); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 758 (2001) (considering and discussing potential future effect of *Bush v. Gore* opinion and possibility of an enhanced equal protection jurisprudence going forward); Foner, *supra* note 4, at 6–7 ("[B]y extending the issue of equal protection to the casting and counting of votes, the Court has opened the door to challenging our highly inequitable system of voting. Claims of unequal treatment by voters in poorer districts are not likely to receive a sympathetic hearing from the current majority. But *Bush v. Gore* may galvanize demands for a genuine equality of participation in the democratic process that legislatures and a future Court may view sympathetically."); Guinier, *supra* note 4, at A27 ("[T]he Court's choice of language [in *Bush v. Gore*], explicitly valuing no person's vote over another's, may . . . launch a citizen's movement."); Charles Lane, *Court May Have Mapped New Territory;* Bush v. Gore *Could Be Entree Into State Election Disputes*, WASH. POST, Dec. 14, 2000, at A24 (same); Marianne Lavelle & Chitra Ragavan, *And Now, Sound and Fury, But What Does the 5-4 Ruling Mean Long-Term?*, U.S. NEWS & WORLD REP., Dec. 25, 2000, at 36 (describing various views on the possible future effect of the decision for equal protection jurisprudence).

6. Balkin, *supra* note 3, at 1435–37 (suggesting that the votes of the Justices comprising the majority "were shaped by their own partisanship"); Frank I. Michelman, *Suspicion, Or the New Prince*, 68 U. CHI. L. REV. 679, 679 (2001) ("A great many Americans suspect that a certain five Justices of the United States Supreme Court, or some of them, acted reprehensibly in *Bush v. Gore*."); Bruce Ackerman, *Anatomy of a Coup*, LONDON REV. BOOKS, Feb. 8, 2001, at 5 (arguing that the Supreme Court's intervention represented a form of illegitimate partisan behavior); Davis et al., *supra* note 1, at 48 (describing the Supreme Court's intervention in the Florida recount as "no less reprehensible than the partisan resolution of the election of 1876"); Jack Newfield, *The Supreme Pretenders Mock Court's Judicial History*, N.Y. POST, Dec. 14, 2000, at 106 ("Justices Scalia, Thomas, Rehnquist, O'Connor, and Kennedy . . . went with the political party that gave them their robes."). Some have, of course, expressed a different point of view. *See, e.g.*, RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS, 153–57, 185–87, 252–57 (2001) (defending the majority's decision as both legally defensible and pragmatic and arguing that "given the importance of the Constitution as a framework for orderly government, and the threat of disorder posed by a struggle between the branches of a

tional law circles. In my view, the particulars of the decision are, perhaps, less important than the behavior of the individual Justices in deciding the case.

To be clear, I voted for Vice President Gore and firmly believe that more Florida voters attempted to register their preference for him—however ineffectually in some instances.[7] Of course, a profound sense of disappointment regarding the outcome of an election—even a Presidential election—does not justify a lengthy effort at serious legal scholarship. State and federal judges regularly make bad or regrettable decisions, yet most such cases do not generate high dudgeon on the part of the nation's legal academics.

A conventional understanding of the *Bush v. Gore* case goes something like this: The evil Supreme Court majority, bent on securing conservative appointees to the federal judiciary, engaged in blatant results-oriented reasoning to rule in favor of Governor Bush.[8] Along the way, members of the evil majority abandoned all prior principles regarding respect for state courts and judicial restraint.[9] The decision, accordingly, lacks legitimacy.[10]

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state government over the selection of the electors of the President, it was appropriate for the Supreme Court . . . to consider the consequences for the orderly process of Presidential succession."); Leedes, *supra* note 3, at 246 (arguing that "it is scandal mongering to assert that the Court's opinions in [*Bush v. Gore*] camouflage dishonorable motives").

7. *See* Laura Parker, *Judge Set to Rule Today on Request for Revote in Palm Beach County*, USA TODAY, Nov. 20, 2000, at 3A ("Gore's lawyers have gathered thousands of affidavits from voters who say the ballot's design caused them to either vote mistakenly for Reform Party candidate Pat Buchanan or invalidate their ballots by punching holes for both Buchanan and Gore."). The recent project sponsored by several major news organizations has confirmed this intuition. *See* Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush, But Study Finds Gore Might Have Won Statewide Tally of All Uncounted Ballots*, WASH. POST, Nov. 12, 2001, at A1.

8. *See* Balkin, *supra* note 3, at 1442 ("In one sense, *Bush v. Gore* looks like a strong confirmation of both legal realism and Critical Legal Studies."); Chemerinsky, *supra* note 3, at 1112 ("Not surprisingly, a large segment of the American public—especially the forty-nine million people who voted for Gore—see the decision as a purely partisan ruling."); Michelman, *supra* note 6, at 679 ("The suspicion is that these [J]ustices, who cast judicial votes in that case to terminate the process of the year 2000 [P]residential election, were prompted to their actions by a prior personal preference for a Bush victory."); Strauss, *supra* note 3, at 737–38 ("The conclusion that emerges, in my view, is that several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore, at least if that ruling significantly enhanced the Vice President's chances of winning the election."); Hendrik Hertzberg, *Eppur Si Muove*, NEW YORKER, Dec. 25, 2000, at 55–56 (arguing that the Justices in the majority acted in bad faith by allowing partisan preferences to prefix an outcome); Rosen, *supra* note 3, at 18 (arguing that the Justices "have . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law").

9. *See* Strauss, *supra* note 3, at 737–38 (arguing that several Supreme Court Justices had already decided that the Florida Supreme Court's decision should be reversed before considering the legal basis for that reversal and used legal analysis to achieve a predetermined outcome because of their perception that the Florida Supreme Court would improperly give the election to Gore); Randall Kennedy, *Contempt of Court*, 12 THE AM. PROSPECT, Jan. 1–15, 2001, at 15–17 (arguing that because conservative Justices handed the election to Bush for partisan and not legal reasons, Democrats must strongly resist Bush's attempts to appoint more conservatives to the federal judiciary); Rosen, *supra* note 3, at 18 ("[T]he five conservatives . . . have made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor.").

10. *See* Michelman, *supra* note 6, at 679 ("The feeling is that they would not have done the same had the positions of the political parties and their nominees been reversed in an otherwise identical

Nothing pleases me more than a good story. The popular rendition of *Bush v. Gore* certainly has the makings of an epic. That said, the facts are a bit more complicated. It is certainly true that members of the majority showed more interest in expanding equal protection principles than they have in the past.[11] Moreover, respect for the decisional authority of state supreme courts also took something of a drubbing at the hands of Justices usually expected to afford state courts (and state governments generally) a high degree of deference.[12] It would

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case—had it been Gore not Bush whom a Democratic Secretary Harris sought to declare victorious, Bush not Gore seeking recounts from Republican-appointed judges on the state supreme court bench, and so forth. The suspicion is not baseless."); Scheppele, *supra* note 3, at 1416 ("The U.S. Supreme Court majority in the story of the 2000 election seems to have taken its inspiration from the Knights Who Say NI! in the Monty Python version of the Arthurian legend. Dressed in dark uniforms and towering above the petitioners who came before them, the Justices of the Supreme Court possessed the magic words that, when shouted in chorus, caused those who needed their permission to proceed to cower before them."); Strauss, *supra* note 3, at 737–38 ("The conclusion that emerges, in my view, is that several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice President Gore, at least if that ruling enhanced the Vice President's chances of winning the election."); Sunstein, *supra* note 5, at 764, 772 (arguing that the Court failed to dispel the suspicion that the decision was based on partisan and not legal grounds because the majority was comprised of the five most conservative Justices, was not unanimous, and was not supported by precedent or history; the legitimacy of the decision was further undermined because the Court did not allow Florida Supreme Court to address the issues of Florida law); Rosen, *supra* note 3, at 18 (arguing that "by not even bothering to cloak their willfulness in legal arguments intelligible to people of good faith who do not share their views, these four vain men and one vain woman have . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of [the Justices comprising the majority]").

11. *Compare* Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (refusing to permit manual recounts of ballots undertaken in response to Florida Supreme Court's opinion, which ordered that "intent of the voter" be discerned, but which did not supply specific standards to ensure uniform treatment, reasoning that recount did not comport with minimum requirement for nonarbitrary treatment of voters necessary under Equal Protection Clause to secure the fundamental right to vote for President), *with* McCleskey v. Kemp, 481 U.S. 279 (1987) (refusing to strike down Georgia death penalty statute on equal protection grounds in spite of admittedly discriminatory application because defendant could not demonstrate discriminatory legislative purpose), *and* Nguyen v. INS, 533 U.S. 53 (2001) (upholding against equal protection challenge an immigration statute making U.S. citizenship more difficult to attain for children of U.S.-citizen fathers born out of wedlock than for children of U.S.-citizen mothers born out of wedlock).

12. *See, e.g.*, Bush v. Gore, 531 U.S. at 111–22 (per curiam) (Rehnquist, C.J., concurring) (departing from usual practice of deferring to the decisions of state courts out of comity and respect for federalism because the Constitution imposes a duty on state legislatures to appoint electors for President and Vice President); United States v. Printz, 521 U.S. 898, 905–10 (1997) (striking down federal statute requiring local law enforcement officials to conduct background checks on handgun purchasers); Brecht v. Abrahamson, 507 U.S. 619, 635–36 (1993) (refusing on comity and federalism grounds to hold state courts to more stringent federal harmless error standard); New York v. United States, 505 U.S. 144, 161–66 (1992) (observing that Congress has no power to regulate states, only individuals); Teague v. Lane, 489 U.S. 288, 308–10 (1989) (refusing to apply new constitutional rules retroactively to state convictions on habeas review because of states' interest in finality); Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (refusing to review constitutional decisions of state courts when courts could have rested decision on state law grounds); *cf.* Chemerinsky, *supra* note 3, at 1109–12 (criticizing the majority's decision to render a binding interpretation of an ambiguous state statute and noting that "[f]rom a federalism perspective, it is inexplicable why the five Justices in the majority—usually the advocates of states' rights on the Court—did not remand the case to the Florida Supreme Court to decide under Florida law whether the counting should continue").

be a mistake, however, to limit criticism of the decision to the Justices in the majority.

Two of the four dissenting Justices also adopted some surprising rhetoric, at least as measured against past statements and voting patterns. Justice Ruth Bader Ginsburg's explanation that "[s]urely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal constitutional law than to a state high court's interpretation of its own state's law"[13] comes as something of a surprise. The balance of her dissenting opinion celebrates the importance of respecting state court decisions. Of course, such an approach to federal-state judicial comity is entirely reasonable. It is not particularly congruous, however, with Justice Ginsburg's prior voting patterns in cases involving disputes over the proper boundaries of state and federal power.[14]

One would be hard-pressed to condemn the instrumental judging of the majority while at the same time casting a blind eye toward the instrumental judging of some of the dissenters. In this sense, seven of the nine members of the U.S. Supreme Court diminished both their individual credibility and their Court's collective claim to principled decisionmaking in *Bush v. Gore*.[15]

The idea that judges act in partisan—as opposed to merely ideological—ways when discharging their professional duties is hardly a new idea. Legal realists have recognized that, at some level, the law consists of what judges make it out to be on a ongoing basis.[16] More recently, members of the critical legal studies movement have advanced legal realist claims more aggressively, suggesting that

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13. Bush v. Gore, 531 U.S. at 129 (Ginsburg, J., dissenting).

14. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 303–06 (2001) (Stevens, J., dissenting, with whom Souter, Ginsburg, and Breyer, JJ., join) (noting that a private party can bring an action to enforce Title VI of the Civil Rights Act when a state agency's regulation has a discriminatory effect); United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting, with whom Stevens, Ginsburg, and Breyer, JJ., join) (indicating that Congress has the power under the Commerce Clause to pass a law regarding violence against women when it is shown that such violence, in the aggregate, has a substantial effect on interstate commerce); *Morrison*, 529 U.S. at 655 (Breyer, J., dissenting, with whom Stevens, Souter, and Ginsburg, JJ., join) (highlighting difficulty in drawing lines between what does and does not come within federal power); United States v. Printz, 521 U.S. 898, 938–70 (1997) (Stevens, J., dissenting, with whom Souter, Ginsburg, and Breyer, JJ., join) (explaining that the federal government has the power to enlist the help of local police officers in identifying people who should not have handguns pursuant to a federal statute); United States v. Lopez, 514 U.S. 549, 614–31 (1995) (Breyer, J., dissenting, with whom Stevens, Souter, and Ginsburg, JJ., join) (suggesting that the Commerce Clause provides Congress with the necessary authority to make it a crime to possess a gun in or near a school).

15. Justices Souter and Breyer voted to sustain the equal protection (or due process) claim regarding local canvassing boards using inconsistent standards to ascertain the intent of voters when examining undervotes. *See* Bush v. Gore, 531 U.S. 98, 129 (2000) (per curiam) (Souter, J., dissenting); Bush v. Gore, 531 U.S. at 144 (per curiam) (Breyer, J., dissenting). These votes were consistent with their prior treatment of equal protection claims and, therefore, appear to be principled. *See infra* text and accompanying notes 185–92.

16. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 169–212 (1992); LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 3–44 (1986); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1219–40 (1985); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468–503 (1988).

judges recognize their own status as political actors and exercise discretion to advance their personal policy preferences.[17] Casting *Bush v. Gore* as proof that adherents of the critical legal studies movement have a vision may be entertaining, but it would not be very enlightening.[18]

Can anything useful be said about *Bush v. Gore*? Perhaps the decision, although possessed of "sound and fury," may have little lasting jurisprudential effect, ultimately "signifying nothing."[19] This conclusion, although facially appealing, also seems wide of the mark. *Bush v. Gore* is a significant case—not because it represents a radical break from the past, but rather because it confirms a trend that has been growing over the last several decades within the federal courts: that is, federal judges generally, and members of the Supreme Court in particular, do not hold themselves bound by precedents that they dislike. Stare decisis, in my view, is an endangered species. *Bush v. Gore* simply shows how far the process of adopting a "jurisprudence *du jour*" work ethic has advanced in the United States Supreme Court.[20]

So, with this in mind, I would like to invoke a tradition of ancient Athens. In ancient Athens, custom dictated that the death of a hero in battle required a formal funeral oratory, or *epitaphios*.[21] The *epitaphios* consisted of two parts: the *epainesis* and the *parainesis*.[22] In the *epainesis*, the orator praised the fallen and extolled his virtues, presenting them as a model for the community to emulate. In the *parainesis*, the orator drew lessons for the living from the example of the hero's life and death.[23] The metaphor to ancient Athens may

17. *See* MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46–52, 197–202 (1988); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 33–41 (1984); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995); Girardeau A. Spann, *Baby M and the Cassandra Problem*, 76 GEO. L.J. 1719, 1734–39 (1988).

18. *See* Balkin, *supra* note 3, at 1441–47 (noting that adherents of critical legal studies may find *Bush v. Gore* supportive of their general claim that the Supreme Court's adjudication of constitutional claims is fundamentally a political exercise); Mark V. Tushnet, *Renormalizing* Bush v. Gore: *An Anticipatory Intellectual History*, 90 GEO L.J. 113, 113 (2001) (reporting that "the immediate reaction I have described was readily translated into the thought that *Bush v. Gore* demonstrated, much to the dismay of many, that critical legal studies arguments, or at least legal realist ones, were correct").

19. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 5, sc. 5, lines 26–28 (Nicholas Brooke ed., Oxford University Press 1990).

20. *See generally*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 5–9, 173–75 (2001) (arguing that the decision was blatantly political if not "corrupt," but was "certainly not the first bad Supreme Court ruling," and suggesting that because of the Supreme Court's behavior "many Americans who believed that the Court was an institution that could be trusted to remain above partisan politics are now experiencing a genuine loss of confidence in the impartiality of the judicial branch of our government").

21. *See* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 41–42, 49, 59–62 (1992); *see also* A.H. JONES, ATHENIAN DEMOCRACY 43 (1957); NICOLE LORAUX, THE INVENTION OF ATHENS: THE FUNERAL ORATION IN THE CLASSICAL CITY 42–54, 58–64, 79–88, 98–118, 262–77, 313–14 (Alan Sheridan trans., 1986).

22. *See* WILLS, *supra* note 21, at 59; *see also* PLATO, MENEXENUS, *reprinted in* PLATO WITH AN ENGLISH TRANSLATION 329–81 (R.G. Bury trans., 1929) (providing an example of an *epitaphios*).

23. *See* WILLS, *supra* note 21, at 59–62.

seem bizarre. But, although I do not profess to be a modern Pericles, I believe the principle of stare decisis in modern constitutional adjudication, like a fallen hero, merits a decent burial. Its death has been both slow and labored; indeed, most commentators have failed to observe its passing.[24] In the balance of this Article, I will offer an *epainesis* for stare decisis and posit a world in which the law tomorrow bears more than a passing resemblance to the law yesterday.

This article, like an *epitaphios*, will proceed in two main parts. The first part, the *epainesis*, will consider the theoretical and practical benefits of stare decisis as a cornerstone principle of constitutional adjudication within the U.S. Supreme Court. Along the way, it will examine the roots of the doctrine, its relationship to judicial legitimacy, and its substantial decline—particularly in cases presenting constitutional questions—over the past fifty or so years. With increasing frequency, the Justices serving on the U.S. Supreme Court have sacrificed institutional values to pursue ends that, at least at the time, seem more important than the precise means used to achieve them. This trend, the emerging "jurisprudence of *Oprah!*," elevates personal feelings and strongly desired outcomes in particular cases over more abstract obligations, such as promoting consistency in constitutional adjudication, appearing to decide cases in a principled fashion, or for that matter, even seeming minimally consistent over time. The trend manifests itself through practices including disregard of prior precedents, invocation of prior precedents without meaningful adherence to them ("cite and switch"), and perpetual dissent. In many respects, *Bush v. Gore* was not—and is not—a break with the Supreme Court's modus operandi, but rather constitutes a foreseeable consequence of problematic trends that have been present for several decades.

Having defined the problem and its scope, Part II, the *parainesis*, will proceed to consider the present and future effects of the jurisprudence of *Oprah!* and suggest some potential solutions to the problem. In particular, a renewed commitment to legal process values would go a long way toward restoring the perception that the Justices actually are engaged in principled decisionmaking grounded in some meaningful way in the text of the Constitution. Respect for stare decisis—including a willingness on the part of each of the Justices to accept and apply decisions the Justice dislikes or with which the Justice disagrees—would constitute an indispensable part of this effort.

I. THE *EPAINESIS*

A. NEUTRAL PRINCIPLES AND THE JUDICIAL TASK

Almost fifty years ago, Professor Herbert Wechsler argued for "neutral principles" in constitutional adjudication.[25] By this, he meant that judges should

24. *But see* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991); Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

25. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV 1, 15–20 (1959). Subsequent commentators have cited Professor Wechsler's article with great frequency. *See*

develop and apply legal rules consistently across cases. According to Professor Wechsler, "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[26] Wechsler's meaning was both nuanced and rich.

First, he meant that judges should not decide cases based on their own personal preferences with respect to the parties before them, but rather should decide the case before them in the same way even if the interests or parties were transposed: "But must [judges] not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?"[27] For Wechsler, it is "the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed."[28]

Second, in Wechsler's view, judges must not decide cases based on personal morality or a desire for a particular outcome, however badly a judge desires it:

> The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law.[29]

If judges abandon principle in favor of obtaining particular results, chaos will result,[30] and judges will secure only Pyrrhic victories. This is because, in doing so, the unprincipled judge "acquiesces in the proposition that a man of different sympathy but equal information may no less properly conclude that he approves" a diametrically opposed result.[31]

Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1995) (listing *Toward Neutral Principles of Constitutional Law* as the second most-cited law review article in the United States).

26. Wechsler, *supra* note 25, at 15; *see also* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 362–77 (1987); Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 1014–27 (1999); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 590–602 (1987).

27. Wechsler, *supra* note 25, at 15.

28. *Id.*; *see also* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 651–59 (1995) (arguing that the essence of legitimate judging consists of offering reasons in support of decisions that a reasonable observer would find persuasive and that the judge is willing to credit and apply in a future case presenting similar facts).

29. Wechsler, *supra* note 25, at 12; *see also* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 526–30 (1986) (arguing that judges feel constrained to act in ways that appear principled and that precedent and a variety of prudential concerns exert some checking pressure on a judge's ability to reach a desired result).

30. *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (arguing that stare decisis in constitutional adjudication serves both constitutional and prudential values and suggesting that abandonment of the doctrine would effectively cripple the federal judiciary).

31. Wechsler, *supra* note 25, at 12.

Professor Wechsler describes the problem of results-oriented jurisprudence as "the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics."[32] Even though results-oriented judging inevitably proves to be self-defeating, this does not preclude judges from engaging in the behavior. Nevertheless, Wechsler believes that "[a] principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[33] If a court cannot muster sufficiently principled reasons for disallowing a particular course of action by either a coordinate branch of the federal government or a state government entity, it should defer to the policy choice made by the other governmental actor. "When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive."[34]

Third and finally, Professor Wechsler condemns unprincipled judging because it undermines, and will eventually destroy, the legitimacy of the federal judiciary. "[A]s Holmes said in his first opinion for the Court, 'a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions . . . .'"[35] For Wechsler, "[t]he virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed."[36]

With this in mind, applying Wechsler's proposed test to *Bush v. Gore* raises some troubling questions. Would Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas have decided the case identically if the application of the rule set forth would have favored Vice President Gore?[37] If the roles

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32. *Id.*

33. *Id.* at 19. *But cf.* Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

34. Wechsler, *supra* note 25, at 19; *see also* Schauer, *supra* note 28, at 649–51, 656–58 (arguing that when judges give reasons in support of a particular outcome, they must be prepared to bind themselves and their successors to either respect the reason or provide a principled explanation of why the reason does not apply in an arguably analogous case).

35. Wechsler, *supra* note 25, at 19 (quoting Otis v. Parker, 187 U.S. 606, 609 (1903)).

36. *Id.* at 19–20.

37. It is not difficult to imagine hypothetical facts presenting such a question. Suppose that Vice President Gore won the initial vote count in Florida by a few hundred votes. Suppose further that Governor Bush believed that, because of a poor ballot design in Palm Beach County, Florida, many undervotes and overvotes, if examined by hand, would reflect support for him and Dick Cheney. Upon litigating the matter in the Florida courts, the Florida Supreme Court orders a recount on terms identical to the recount actually ordered. In this scenario, finding an equal protection violation would favor the interests of Gore over Bush.

had been reversed, with Governor Bush seeking a hand recount, would the same Justices have voted in the same way? One should take care to pose the same question to the four dissenting Justices too. Would Justice Ginsburg have been as concerned with the dignity of the Supreme Court of Florida if that court's decision had favored Bush? It is, of course, impossible to know for certain how each Justice would vote on the hypothetical facts. Given their prior voting patterns, however, it seems reasonable to infer that different facts would have resulted in a different set of votes.[38]

As such, viewed in legal process terms, the decision in *Bush v. Gore* was not legitimate because the same rules would not have applied to different facts. And an unprincipled decision is problematic because it eats away at the institutional legitimacy of the federal courts.[39]

As Alexander Bickel famously observed, federal courts, armed with the power of judicial review, represent an anomaly in a representative democracy.[40]

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38. *See infra* text and accompanying notes 160–94; DERSHOWITZ, *supra* note 20, at 95–120; Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1725–26 (2001); Michelman, *supra* note 6, at 679–80.

39. *See generally* COX, *supra* note 26, at 25–27, 67–71, 257–60, 364 ("The overruling of even the shortest of these lines of settled law . . . would carry some suggestion that constitutional rights depend on the vagaries of individual Justices and the politics of the President who appoints them."). *But see* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 68–69 (2001) (describing and critiquing arguments linking stare decisis with the credibility and legitimacy of the federal courts).

40. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–33 (1962) (arguing that federal courts with the power of judicial review represent a democratic anomaly). Professors Suzanna Sherry and Barry Friedman, however, recently have suggested that constitutional law scholarship devotes far too much time and energy to Bickel's countermajoritarian difficulty. *See* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 933 (2001) ("Despite a growing literature indicating that this particular lens on judicial review is profoundly flawed, many constitutional theorists still insist on seeing their world through it."); Suzanna Sherry, *Too Clever by Half: The Problem with Novelty in Constitutional Law*, 95 NW. U. L. REV. 921, 921–22 (2001) ("While the counter-majoritarian difficulty has inspired some excellent scholarship, the ordinary response to the problem is more troublesome. In particular, the prominent scholars I mentioned earlier share not only an obsession with the counter-majoritarian difficulty, but a common response to it: they try to ground constitutional law on a single grand theoretical foundation."). Professor Sherry complains that "[m]any current 'solutions' to the counter-majoritarian difficulty, then, seem to take on aspects of a crusade," *id.* at 923, while Professor Friedman laments that "the legal academy is stuck in a time warp." Friedman, *supra*, at 937. In part, they seem to be saying that because judicial review is not really all that controversial at the moment, it does not really seem to be in need of detailed theoretical defenses. Friedman also disputes the majoritarian nature of the federal government in general and suggests that the federal courts seldom thwart the popular will in material ways for prolonged periods of time. *See id.* at 936–40. He thinks that constitutional law scholarship would be improved if it were more self-consciously empirical or normative. *See id.* at 941–42. As things stand now, "constitutional theory suffers from a persistent pathology" in which "[o]ur normativity is shrouded by a felt need for a mantle of neutrality, be it text, framing intentions, or something fancier and ultimately even less persuasive." *Id.* at 941–42.

Sherry and Friedman are probably correct to criticize constitutional law scholarship's obsession with the countermajoritarian problem. That said, it does seem reasonable—if normative—to ask how courts can engender confidence in the principled nature of their decisionmaking. It also seems reasonable to ask, given the limited direct accountability the people have over the federal judiciary, why we should accept decisions of the judiciary that we do not like (any more than we choose to flout speed limits and

If the President and members of Congress are freely and fairly elected, they possess legitimacy to act by virtue of their election. Federal judges, appointed by the President for life, with the advice and consent of the Senate, neither seek nor obtain a continuing vote of confidence after their initial appointment.[41] Over a period of years, the political actors who selected a given federal judge could be swept completely from power; yet, the judge, selected by virtue of her perceived ideological consanguinity, remains on the bench (or, if you will, in office).[42] Moreover, this judge has the power to interpose her will against that of the President and popularly elected Congress.

The lack of democratic accountability gives rise to the countermajoritarian difficulty, the idea that permitting electorally unaccountable judges to thwart the will of popularly elected officials seems inconsistent with a basic commitment to democratic self-government.[43] One potential response to the countermajoritarian difficulty is to posit that judges are not really political actors; that constitutional law reflects ideological, but not necessarily partisan, sensibilities; and that judges possess only limited discretion in light of stare decisis.[44]

These responses may not be fully persuasive to some critics, but they are at

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laws against fornication with wild abandon). In short, why should citizens (to say nothing of the coordinate branches of the federal government) credit what the Justices of the Supreme Court say? To put the question differently, might the Justices do themselves a favor by attempting to seem principled, to be engaged in some sort of nondiscretionary enterprise, even if, upon close examination, these propositions do not bear up very well? The practical politics of appearing principled may be important even if one tosses highly theoretical concerns about the "countermajoritarian" problem out the window. *See generally* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (arguing that the Supreme Court must concern itself with both the appearance and reality of principled decisionmaking and suggesting that appearance concerns are inexorably related to the persuasiveness and effectiveness of its decisions, in addition to the esteem in which it is held). If the Justices are simply engaged in another form of politics, why should the body politic not simply accept the policy results produced in Congress and the White House—branches of the federal government ostensibly devoted to making political decisions?

41. *See* Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to* Stare Decisis *In Abortion Cases*, 10 CONST. COMMENT. 67, 82–84 (1993) (noting the importance of the nomination and confirmation processes to securing judges who share the citizenry's commitments to fundamental rights and suggesting that "the Constitution permits pro-choice Americans to voice their concerns in the elections of presidents and senators and in the confirmation process").

42. Chief Justice John Marshall provides perhaps the best example of this phenomenon. *See* William H. Rehnquist, *The Supreme Court:* 'The First Hundred Years Were the Hardest', Address Before the University of Miami School of Law, *in* 42 U. MIAMI L. REV. 475, 480–82 (1988); *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 965–71 (Kermit L. Hall et al. eds., 1992) (providing the length of service of several very long-serving Justices, including Chief Justice Marshall's thirty-four year term on the bench).

43. BICKEL, *supra* note 40, at 16–17 (arguing that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it, [an action that one could view as] undemocratic"); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–9, 41, 44–72 (1980) (describing the dangers associated with a federal judiciary bent on imposing its own policy preferences on the community in the absence of a principled basis for doing so).

44. *But cf.* Tushnet, *supra* note 18, at 124–25 (suggesting that the majority correctly decided the equal protection issue in *Bush v. Gore* and noting that "[w]e can, and should, take the case as another in

least plausible in a system in which judges take precedent seriously.[45] A novel question comes before the Supreme Court; the Justices vote; the question now has an answer. The Court's answer is not supposed to be a reflection of partisan intrigue or individualized policy preferences among the Justices, but rather an intellectually defensible resolution of a debatable question of law.[46] The Justices may rely on text, history, and precedent in fashioning their answer. The resolution may not please all interested constituencies and may prove to be very unpopular. Once given, however, the Justices should not abandon it lightly.[47]

If judicial policymaking follows these general outlines, the countermajoritarian difficulty remains. But it can be met with the response that constitutional law, including judicial review of legislative and executive actions for consistency with the Constitution, enjoys popular legitimacy because the citizenry maintains an ongoing commitment to observe the Constitution's mandates, as explicated over time by the Court.[48] As the great civil rights judge Frank M.

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a long line of decisions by political actors—a category that includes judges—expanding and protecting the expansion of the franchise").

45. *See* COX, *supra* note 26, at 26 (arguing that judicial legitimacy ultimately rests on "the fragile faith that 'law' has a separate existence not merely because it applies to all men equally but because it binds the judges as well as the judged, not just today but yesterday and tomorrow"). Richard Fallon has also argued "that a good legal system requires reasonable stability; that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest." *See* Fallon, *supra* note 30, at 585. Fallon goes on to say that "judicial legitimacy does not turn on consent to be governed by the written Constitution (and it alone), as is often thought, but on contemporary acceptance and the reasonable justice of the prevailing regime of law." *Id.* at 596.

46. *See* Wechsler, *supra* note 25, at 15–20; *see also* Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455, 1465–66 (1995) ("[I]t is part of our tradition that when courts issue judicial opinions . . . those opinions will provide professional readers with explanations for the results reached. That a judicial opinion fails in this regard is a serious charge.").

47. *See* COX, *supra* note 26, at 68, 258–59, 375–76 (warning that failure to afford prior precedents respect will lead citizenry to view federal judges as intrinsically political actors pursuing their own policy agendas without any meaningful restraints on their discretion).

48. Perhaps ironically, stare decisis seems to be stronger in cases involving statutory interpretation rather than constitutional interpretation. *See* Nelson, *supra* note 39, at 73 n.236; *see also* Payne v. Tennessee, 501 U.S. 808, 826–28 (1991) (overruling previous decision regarding Eighth Amendment, noting that "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules"). Congress—or a state legislature—remains free to correct erroneous interpretations of statutory text. Accordingly, if a court changes its mind about the correct meaning of a statutory or regulatory text, the legislative branch may reinstate the prior interpretation at its next session. At least at the federal level, the Supreme Court's interpretations of the Constitution cannot be corrected by the political branches absent invocation of the amending process. Chief Justice Rehnquist argues that this militates in favor of reversing decisions involving constitutional text more readily than decisions involving statutory text. *See Payne*, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' . . . This is particularly true in constitutional cases because in such cases 'correction through legislative action is practically impossible.'") (citations omitted). Yet, this seems exactly backwards. Legislatures can correct improper interpretations of statutes at will and legislators face regular democratic accountability. The federal judiciary's power to impose its will without any democratic accountability is, accordingly, quite limited in this circumstance. Democratic accountability, in the form of legislative correction, is immediately available. When federal judges

Johnson, Jr. once observed, "it is one thing for a judge to adopt a theory of political morality *because it is his own*; it is another for him to exercise his judgment about what the political morality implied by the Constitution is."[49]

To avoid the crisis of legitimacy potentially presented by the countermajoritarian difficulty, individual Justices have an obligation to acquiesce in decisions that they do not necessarily like or support.[50] Once the Supreme Court has spoken, a Justice has an obligation to hold herself bound by the result unless circumstances change and the Court, as an institution, finds it essential to revisit the question and its prior resolution. The idea that a precedent could be, quite literally, here today and gone tomorrow should be anathema. Moreover, it will not do to honor precedents in name only; to invoke a precedent but misrepresent its holding to reach a desired result would constitute a transgression of appropriate institutional rules of behavior.

Suppose, however, that judges do not wish to hold themselves bound by prior precedents they dislike. Suppose further that if they cannot muster the five votes necessary to abandon an earlier precedent, they simply recast—or recreate—the decision to suit their preferences. As this sort of behavior manifests and repeats itself, the Supreme Court looks less like a judicial body and more like a mini-legislature, a kind of "junior varsity" Congress.[51]

However, it is one thing for members of Congress to flip-flop. They are quite free to vote one way today and another way tomorrow. They have no obligation to act consistently, even on the same piece of legislation. They need not provide their constituents with detailed explanations of departures from prior positions and are, indeed, free to claim falsely that a new position represents a long-standing commitment.[52] And this makes sense because they are elected to

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routinely change their mind regarding constitutional text, no easy source of correction exists. Moreover, the judges' vicissitudes belie any serious claim that the text of the Constitution—as opposed to the personal moral preferences of the judges—actually commands a particular result. In consequence, citizens lose more faith in the judiciary when it alters the meaning of constitutional text than when it tinkers with statutory text. Because the legitimacy of judicial review rests on the notion that the Constitution imposes certain values, routine changes in basic understandings of constitutional text erodes the persuasive force of the federal judiciary's interpretive efforts. *See* COX, *supra* note 26, at 69–71, 258–59, 362–66, 375–78.

49. Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 909 (1979).

50. *See* COX, *supra* note 26, at 362–64, 375–77; *see also* Gerhardt, *supra* note 24, at 76–78, 83–90, 143–47.

51. *Cf.* Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) ("I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior varsity Congress.").

52. Vice President Gore's positions on tobacco farming and the right to abortion illustrate the malleability of history when political convenience requires a shift to appease key interest groups within a party. Editorial, *Al Gore's Abortion Lie*, N.Y. POST, Feb. 1, 2000, at 38 (reporting on Al Gore's pro-life votes while in the House of Representatives); Jeffrey H. Birnbaum, *What Does Al Gore Believe?*, FORTUNE, July 10, 2000, at 68 ("In the 1980s he spoke glowingly of tobacco farming and took cigarette industry donations, but now he is a vigorous opponent of smoking and the tobacco industry. On abortion . . . he says that while he voted against government-funded abortions, he was not pro-life."); John Aloysius Farrell, *Bradley Targets Gore's Tennessee Tobacco Roots, and Record/Gore Issues Reply,*

reflect and implement the will of the people.[53] A changing consensus regarding a policy issue should lead at least some elected officials to alter their positions to accord with the wishes of their constituencies. That is, "[p]oliticians recognize this fact of life and are obliged to trim and shape their speech and votes accordingly, unless perchance they are prepared to step aside; and the example that John Quincy Adams set somehow is rarely followed."[54]

On one hand, if federal judges are simply another set of partisan actors, it is difficult to see why their decisions should not be popularly accountable. The idea would not be difficult to implement. One approach would be simply to allow, through a petition process, a referendum on any given decision of the Supreme Court. If the electorate dislikes a decision, it could simply strike it down by a majority (or a supermajority) vote. Referendum and initiative devices in the states effectively facilitate such votes on state supreme court decisions.[55] Thus, subject to limitations imposed by the federal Constitu-

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Says He 'Led Fight' Against Smoking, BOSTON GLOBE, Jan. 13, 2000, at A25 ("[W]hile Gore has helped lead the Clinton administration's efforts to reduce teen-age smoking in recent years, congressional and legal records have shown that as a member of Congress he regularly interceded on behalf of tobacco interests."). Similarly, in 1980, George Herbert Walker Bush abandoned pro-choice positions on abortion after joining Governor Ronald Reagan's ticket. *See* Anthony Lewis, *Who Is George Bush?*, N.Y. TIMES, Nov. 6, 1988, § 4, at 25 ("What changed Mr. Bush's view [on abortion rights]? Politics did."); Judy Mann, *Bush's Chameleon Ways*, WASH. POST, Nov. 16, 1988, at B3 (noting that in context of abortion rights, "[m]ore than any other prominent politician or public figure, he cuts his conscience to fit this year's fashion—in 1980, 1984, and 1988"); Steven V. Roberts, *Nominee of Bush's Is Said to Oppose Banning Abortion*, N.Y. TIMES, Jan. 24, 1989, at A1 (describing Bush's evolving and politically expedient shifts on the question of abortion rights). Thus, neither party has a monopoly on instrumental changes regarding supposedly core values.

53. *See* Wechsler, *supra* note 25, at 14 (observing that "principles are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time"); *see also* Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 871–72 (2001) (observing that "candidates, officials, and media will try to focus or can be made to focus on what interests their constituents and customers, or can be made to interest them . . . . The politician's primary incentive is simply to direct conversation that will garner more votes at the next election than it will repel").

54. Wechsler, *supra* note 25, at 14–15. President John Quincy Adams detested politics and electioneering, often giving the appearance of "one who cared little for popular government or public opinion." LYNN HUDSON PARSONS, JOHN QUINCY ADAMS 181 (1998). Even as his chances for reelection to the U.S. Presidency dimmed, Adams did very little "to promote his own ideas, to protect himself from his enemies, and to reward through his appointive power those who believed in him." *Id.* at 183. During the Presidential election campaign of 1828, President Adams stubbornly refused to engage in partisan political activities, instead pursuing his intellectual interests while his political stock was in a virtual free-fall. *Id.* at 184–85, 196–98. Although highly principled, John Quincy Adams was a remarkably inept politician—the point that Wechsler makes somewhat obliquely.

55. For example, the citizens of Hawaii voted to amend their state constitution in response to an unpopular state supreme court decision recognizing gay and lesbian rights. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (reversing lower court ruling to hold that the state marriage law forbidding same-sex marriage violates the equal protection clause of the Hawaii Constitution); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (mem.) (remanding the case so that the state could overcome strict scrutiny and show that a state statute forbidding same-sex marriage is not violative of the state constitution), *reconsidered in part*, 875 P.2d 225 (Haw. 1993). For additional commentary on gay and lesbian rights in the context of Hawaii state politics, *see* Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 107–12 (1999); E. Gary Spitko, *A Biologic Argument for*

tion,[56] unpopular decisions of the state courts may be reversed by popular vote. An amendment to the federal Constitution could permit such action at the federal level as well.

Another idea would be to subject federal judges, like many of their state counterparts, to regular retention elections. If a given Justice seems too troublesome to a sufficient number of persons, they may organize a campaign to defeat her the next time she seeks reappointment. Former Chief Justice Rose Bird of the California Supreme Court certainly learned the consequences of opposing the popular will regarding the death penalty.[57]

Both of these devices, if deployed at the federal level, would force judges to consider carefully how their decisions would play with the general electorate.[58]

Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process, 18 U. HAW. L. REV. 571, 571–72 (1996); Mark Strasser, *The Future of Same-Sex Marriage*, 22 U. HAW. L. REV. 119, 119–23 (2000); Elaine Herscher, *Same-Sex Marriage Suffers Setback*, S.F. CHRON., Nov. 5, 1998, at A2; Deb Price, *Gays Readjust Strategy After Hawaii Loss*, DETROIT NEWS, Nov. 16, 1998, at A9. Similarly, efforts to amend the Vermont state constitution to disallow recognition of civil unions by same-sex couples presently are underway. See Kristen, *supra*, at 112–13; *Vermont House Approves Bill to Replace Civil Unions Law*, WASH. POST, May 24, 2001, at A21; Pamela Ferdinand, *Vt. House Votes to Outlaw Gay Marriage*, WASH. POST, Mar. 17, 2001, at A3; *cf.* Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (interpreting the Vermont state constitution to require formal recognition of same-sex unions).

56. *See* Romer v. Evans, 517 U.S. 620, 631–36 (1996) (striking down as impermissible under Equal Protection Clause a Colorado constitutional amendment adopted by statewide referendum which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships.").

57. *See generally* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 SO. CAL. L. REV. 2007 (1988) (discussing defeat of Chief Justice Rose Bird and two colleagues in retention election, based in large part on perceived liberal bias of these jurists, particularly on death penalty issues). In 1977, California Governor Jerry Brown appointed Rose Elizabeth Bird to the position of Chief Justice of the California Supreme Court. *Id.* at 2020. From this position, Chief Justice Bird led a reliably liberal bench and handed down an ever-increasing number of highly unpopular progressive—or more pejoratively, activist—decisions, particularly in the area of criminal defendants' rights. *Id.* at 2027. Her opposition to the death penalty ultimately proved to be her undoing. *Id.* at 2056. Her death penalty rulings sparked the creation of an organized campaign to remove her and several of her colleagues from the bench. *Id.* Her opponents' efforts proved successful in 1986 when the state's voters ousted her and two of her colleagues from office. *Id.* at 2032; *see also* Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 23 (discussing link between defeat of Chief Justice Rose Bird and her position on the death penalty); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 14, 14 nn. 73–74 (1995) (discussing risks to judicial independence associated with accountability measures such as retention elections). For additional background and perspective on California Supreme Court Chief Justice Rose Bird's defeat and the causal relationship between the defeat and her overall jurisprudential outlook, see JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, *in* JUDICIAL POLITICS: READINGS FROM JUDICATURE 71–80 (Elliot Slotnick ed., 2d. ed. 1999); Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1.

58. Evidently, some Alabama judges already engage in such behavior on a regular basis. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J. L. & POL. 645, 683–86 (1999).

If one believes that judges enforce "the law," and that "the law" represents some category of rules and principles independent of politics, it would be wrong to punish a judge for doing her duty. On the other hand, if judges represent simply another set of partisan actors, it would be quite reasonable to ensure that judges exercise their political authority in a fashion acceptable to the body politic.

But judges are different from popularly elected politicians. By way of contrast, a federal judge—at least in theory—has no constituency but the law itself. Text, precedent, and history, rather than the latest Gallup poll, should inform the judicial task. "The decisions of the federal courts, particularly those of constitutional dimension, have the ability to command the public's loyalty and obedience precisely because the decisions are usually thought to be above politics; the Supreme Court speaks to enduring constitutional values, not the latest polling data."[59]

The electorate may reward or punish an instrumental change of heart on the part of an elected official at the next regularly scheduled election. If the official cannot seek reelection, the voters may nevertheless reward or punish the incumbent's party by electing or defeating her successor. In short, elections hold both politicians and parties accountable for their votes. No similar mechanism binds federal judges. Accordingly, "Article III judges cannot *legitimately* exercise either executive or legislative power without answering to the people; yet, judges' ability to engage in their Article III duties would inevitably suffer if they were made to answer to the people."[60]

The legitimacy of the federal judiciary, at least as presently constituted, hangs on the truth of the proposition that judges do something other than, and distinct from, politics:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this [C]ourt is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our [C]onstitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.[61]

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59. Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 478–79 (1997).

60. *Id.* at 477–78 (emphasis added).

61. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting); *see also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1947) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve."); Smith v. Allwright, 321 U.S. 649, 669 (1942) (Roberts, J., dissenting) (arguing that failure to observe principles of stare decisis "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only").

If, in reality, judicial decisionmaking is really just another form of partisan activity, devices to ensure greater accountability should be instituted as quickly as possible.

The Justices of the U.S. Supreme Court appear to be cognizant of the importance of at least appearing to be engaged in principled decisionmaking:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[62]

Moreover, the weight of scholarly commentary supports respect for stare decisis, even in cases involving constitutional questions.[63]

The federal Constitution guarantees rights to individual citizens that, as often as not, are popular only in the abstract.[64] When neo-Nazis march in Skokie, Illinois,[65] or a handful of students oppose a prayer at a middle school graduation ceremony in Providence, Rhode Island,[66] the Constitution—at least as interpreted to date—mandates results at odds with the will of the community. The willingness of the community to accept these countermajoritarian results hinges on the plausibility of the proposition that the judges are not pursuing simply their own subjective policy preferences. Accordingly, federal judges would do well to avoid making decisions that seem difficult to justify in light of Wechsler's legal process concerns.[67]

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62. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865–66 (1992) (joint opinion).

63. *See, e.g.*, ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN COURT ERA OF THE SUPREME COURT 75–76 (1971); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1144–45, 1155–57 (1994); Gerhardt, *supra* note 24, at 76–87; Hellman, *supra* note 40, at 1123–42; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368–72 (1988); Maltz, *supra* note 24, at 478–79, 492–93; Monaghan, *supra* note 24, at 744–48; Schauer, *supra* note 26, at 595–602; Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1345 (1990). *But cf.* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) (arguing that constitutional text must always have primacy in constitutional interpretation, even if this requires frequent overruling of existing judicial precedents).

64. *Cf.* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (arguing that, over time, the Supreme Court generally has not adopted radically countermajoritarian interpretations of the Constitution on matters of general importance to the community).

65. *See* Smith v. Collin, 439 U.S. 916, 916–19 (1978) (Blackmun, J., dissenting from denial of certiorari) (providing the history of the Skokie, Illinois case, which involved a Nazi march through a predominantly Jewish community which included many Holocaust survivors); Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 617–19 (1982).

66. *See* Lee v. Weisman, 505 U.S. 577, 597–99 (1992) (prohibiting, on Establishment Clause grounds, a graduation prayer at a public middle school in Providence, Rhode Island); Engel v. Vitale, 370 U.S. 421, 430–35 (1962) (holding that organized school prayer, as part of standard public school curriculum, violates the Establishment Clause).

67. For example, the availability of the town square for speech activity should not be a function of whether the judges (or town council) support or oppose the would-be speaker's message. *Compare* Hill

The viability of the federal judiciary—at least as presently constituted—rests, then, on the willingness of the citizenry to accept the proposition that federal judges are not merely political actors. The willingness of citizens to do this is, in turn, contingent on the conduct of federal judges in going about the judicial task. The United States Supreme Court can either approach its institutional duties and responsibilities in a manner that generates and sustains popular legitimacy (and acceptance) of the process of judicial decisionmaking, or it can choose to do the opposite by engaging in behaviors that seem more appropriate to politicos than jurists.

B. STARE DECISIS AND JUDICIAL LEGITIMACY

The Supreme Court has insisted consistently that (absent compelling reasons) it must adhere to its prior precedents: "[A]ny departure from the doctrine of *stare decisis* demands special justification."[68] A careful observer "will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'"[69] The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."[70]

Professor Deborah Hellman has provided a useful glossary of the conditions that the Supreme Court itself has set forth for overruling a prior precedent:

> In deciding whether to overrule what is believed to be an erroneous earlier decision, the judge ought to consider whether there has been substantial

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v. Colorado, 530 U.S. 703, 719–30 (2000) (upholding against free speech challenge restrictions on anti-abortion protestors seeking to distribute pamphlet on a public sidewalk), *with* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 906–15, 932–34 (1982) (prohibiting, on free speech grounds, application of Mississippi antiboycott law even though protest included both economic boycott and threats of violence). One should note that although I broadly endorse Wechsler's call for federal judges to engage in principled decisionmaking, I emphatically reject the idea that any given rule of law is "neutral" in any meaningful sense of the word. *See* Krotoszynski, *supra* note 26, at 1000–02 (noting the metaphysical impossibility of truly "neutral" legal rules, but arguing that the process associated with judging should be principled). Wechsler's call for principled decisionmaking relates to critically important legitimacy values and has merit independent of his hopes for "neutral" substantive rules. Principled decisionmaking can exist in a world of value-laden substantive rules. *See id.* at 1002, 1013–27.

68. Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (declining to overrule *Bullington v. Missouri*, 451 U.S. 430 (1981)); *see also* THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that federal judges must hold themselves bound by "strict rules and precedents" to avoid the exercise of "arbitrary discretion").

69. Vasquez v. Hillery, 474 U.S. 254, 266 (1986) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)) (upholding equal protection challenge to race discrimination in grand jury selection).

70. *Id.* at 265–66. *But see* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 6, 41 (1949) (arguing strongly for principled exercise of judicial power, but cautioning that "[a] change of mind from time to time is inevitable when there is a written constitution").

> reliance on the old rule, whether the old rule has proved unworkable, whether intervening decisions or congressional enactments have rendered the old rule an anachronism, and whether circumstances have so changed as to eviscerate the justification for the old rule. Generally mere erroneousness of the old rule is not enough. At least one of the above additional factors is also required.[71]

Although the Supreme Court has identified these considerations as limiting its discretion to overrule a prior precedent, it has hardly held itself bound by them. The Court has stated explicitly in recent years that stare decisis has less force in cases involving questions of constitutional law.[72]

Even so, a new Supreme Court majority may legitimately overrule an otherwise governing constitutional precedent only if the prior precedent has proven to be "unsound in principle and unworkable in practice."[73] The Justices, at least ostensibly, should apply this test conjunctively—an existing precedent must be *both* "unsound in principle" and "unworkable in practice" to be a proper candidate for overruling.

Stare decisis bears an important relationship to judicial legitimacy. As Professor Archibald Cox has explained, "[t]o command an uncoerced allegiance while lacking the sanction of majoritarianism, law must not only apply to all people equally; it must apply not just today but yesterday and tomorrow; and, above all, it must bind the judges as well as the judged."[74] Nevertheless, some Justices have exhibited scant regard for the doctrine of stare decisis when they dislike a particular precedent.[75] Should the Supreme Court fail to respect the mandate of

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71. Hellman, *supra* note 40, at 1112–13 (internal citations omitted).

72. Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) ("*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes."); *see also* United States v. Scott, 437 U.S. 82, 101 (1978) ("We recognize the force of the doctrine of *stare decisis*, but we are conscious as well of the admonition of Mr. Justice Brandeis: '[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1952) (Brandeis, J. dissenting))).

73. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (rejecting as unworkable "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular [state] governmental function is 'integral' or 'traditional'"); *see also* United States v. IBM Corp., 517 U.S. 843, 856 (1996) (describing circumstances in which it is appropriate for the Supreme Court to overrule a prior precedent, but declining to do so in the case at bar because parties failed to argue theory that might have justified overruling a longstanding precedent); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–78 (1938) (providing rationale for overruling *Swift v. Tyson*, a prior precedent that authorized federal courts to disregard state common law in favor of a federal common law, citing "injustice" and "confusion" caused by *Swift*, and declaring that "[t]here is no federal general common law").

74. COX, *supra* note 26, at 375; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–22 (1978) (describing the relationship of principled decisionmaking to judicial legitimacy and identifying procedures through which a judge may engage in principled decisionmaking, notably including careful respect for stare decisis and reasoned explanations for any departure from prior precedent).

75. *See, e.g.*, Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669, 672 (1994) (noting that "where [Chief Justice] Rehnquist has

stare decisis routinely, it will put at risk the willingness of the general public to accept its decisions as legitimate.[76]

C. THE DECLINE OF STARE DECISIS AND PRINCIPLED DECISIONMAKING

Stare decisis has been in broad decline for the past three decades, especially within the pages of United States Reports.[77] As one particularly cynical observer has suggested, "The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals."[78] This observation overstates the case against stare decisis. That is, the Supreme Court, as a historical matter, has always proclaimed a general willingness to adhere to its prior precedents.[79] Of course, the Justices have, from time to time, reversed prior decisions, sometimes in relatively short order. *West Virginia State Board of Education v. Barnette*[80] provides a good example of this phenomenon.

In *Barnette*, the Supreme Court struck down a West Virginia statute that required all students enrolled in the state's public schools to participate in a compulsory daily flag salute. Writing for the majority, Justice Robert Jackson eloquently explained that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[81] However, contrast this with a case from a mere three years prior. In *Minersville School District v. Gobitis*,[82] the Supreme Court appeared to permit mandatory flag salute ceremonies in the public schools. Justice Frankfurter explained that "[w]e are dealing with an interest inferior to none in the hierarchy of legal values. National unity

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sufficient support on the Court to reject precedents with which he disagrees, he has shown little reluctance to disregard the doctrine of stare decisis").

76. COX, *supra* note 26, at 377 ("The future of judicial review probably depends in good measure on whether the view that law is only policy made by courts carries the day in the legal profession, or whether room is left for the older belief that judges are truly bound by law both as a confining force and as an ideal search for reasoned justice detached so far as humanly possible from the interests and predilections of the individual judge.").

77. The Supreme Court has overruled many more constitutional precedents in the last fifty years than in the preceding 150 years. *See* Maltz, *supra* note 75, at 675. Professor Maltz explains that:

> The magnitude of the paradigm shift was reflected in the number of cases that were actually overruled. Between 1960 and 1972, the Court explicitly abandoned the doctrines of prior decisions on no less than twenty-nine occasions. To put this number in perspective, Justice Brandeis's famous opinion in *Burnet v. Coronado Oil & Gas Co.* listed only twenty-eight instances in which the Court had overruled itself on constitutional issues during the entire period from 1789 to 1932.

Id.; see also Maltz, *supra* note 24, at 494–95 (listing cases in which the U.S. Supreme Court reversed itself from 1960 to 1979).

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

79. *See supra* text and accompanying notes 67–75.

80. 319 U.S. 624 (1943).

81. *Id.* at 642.

82. 310 U.S. 586, 599–600 (1940).

is the basis of national security."[83] Because of the importance of the government's interest:

> To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence.[84]

Eight Justices joined Justice Frankfurter's opinion. Only Justice Stone dissented.[85]

The *Barnette* majority did not mind this. Although acknowledging that it was abandoning a relatively fresh precedent,[86] the Court bravely plowed ahead: "The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled."[87]

Brown v. Board of Education[88] provides a stark methodological contrast to the process of overruling prior precedents that *Barnette* reflects. Although the *Barnette* majority's reversal of a three-year-old precedent represents a departure from the Supreme Court's contemporary practice prior to and during the 20th century,[89] the Justices' agonizing over whether—and how—to overrule the "separate but equal" doctrine of *Plessy v. Ferguson*[90] is far more representative of the Supreme Court's traditional respect for stare decisis. *Brown*, which squarely rejected the doctrine of separate but equal in the public schools, represented the culmination of a series of cases that chipped away at *Plessy* incrementally over a period of years.[91] The Supreme Court began its attack on

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83. *Id.* at 595.

84. *Id.* at 597–98.

85. *Id.* at 605 (Stone, J., dissenting) ("I cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection.").

86. *See Barnette*, 319 U.S. at 630 n.10.

87. *Id.* at 642.

88. 347 U.S. 483 (1954).

89. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 708–29 (1999) (describing general rule, from the Framers to the middle twentieth century, that Supreme Court should adhere to prior constitutional precedents absent exceptional circumstances).

90. 163 U.S. 537 (1896).

91. *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637, 640–42 (1950) (holding that racially segregated seating arrangements at University of Oklahoma Graduate School violated Equal Protection Clause); Sweatt v. Painter, 339 U.S. 629, 633–36 (1950) (requiring University of Texas Law School to admit black applicant); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 346–52 (1938) (requiring University of Missouri School of Law to admit black applicant); McCabe v. Atchison, Topeka & Santa

Plessy by demanding over time that "separate but equal" be increasingly "equal." *Brown* completed this evolutionary process, declaring separate as intrinsically unequal.

Chief Justice Earl Warren's memoirs make clear that several of the Justices worried about abandoning *Plessy* without a sufficiently compelling predicate for doing so.[92] These Justices did not view segregated public schools favorably as a social phenomenon, but did worry about the adverse effects that overturning the fifty-eight-year-old *Plessy* precedent might have on stare decisis. They believed that prior decisions of the Court were not to be lightly brushed aside; only the most compelling circumstances justified overturning a prior precedent of the Court. Needless to say, times have changed.

With increasing frequency, the Warren Court—and later the Burger Court—overruled prior precedents of relatively recent vintage. In this new regime, precedents received short shrift, and in addition, those Justices on the losing side of controversial cases increasingly refused to acquiesce in decisions with which they disagreed. The Justices' flip-flop on the constitutional status of the death penalty provides a good example of the increasingly limited relevance of stare decisis, at least in cases involving interpretations of the Constitution's text. In *Furman v. Georgia*,[93] a divided 5-4 Court deemed the death penalty unconstitutional as it then existed. Only Justices William Brennan and Thurgood Marshall held the death penalty unconstitutional per se.[94] Yet, four years later, in *Gregg v. Georgia*,[95] a majority of the Supreme Court held Georgia's revised death penalty statute to be constitutional.[96] Immediately thereafter, Justices Brennan and Marshall began a practice of perpetual dissent in cases involving the application of the death penalty.[97] They concluded that "they should not be

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Fe Ry. Co., 235 U.S. 151, 160–62 (1914) ("If [an individual] is denied by a common carrier, acting in the matter under the authority of a state, a facility or convenience in the course of his journey which, under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege [of equal protection] has been invaded.").

92. *See* EARL WARREN, THE MEMOIRS OF EARL WARREN 281–86 (1977) ("To return to our method of handling the school desegregation cases, we were all impressed with their importance and the desirability of achieving unanimity if possible."); *see also* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 88–95 (1983) (discussing Chief Justice Warren's recognition and regret that "precedents would have to be overturned" in correcting the erroneous doctrine of "separate but equal").

93. 408 U.S. 238 (1972).

94. *Id.* at 305 (Brennan, J., concurring) ("The punishment of death is therefore 'cruel and unusual'; and the States may no longer inflict it as a punishment for crimes."); *id.* at 359–60 (Marshall, J., concurring) ("There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment. In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.") (footnote omitted).

95. 428 U.S. 153 (1976).

96. *Id.* at 186–87.

97. *See* Sorola v. Texas, 493 U.S. 1005, 1011 (1989) (Brennan, J., dissenting) ("Even if I did not conclude that the Double Jeopardy Clause prevents the imposition of the death penalty on resentencing, my belief that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . would compel me to vacate the judgment below and remand

bound by the doctrine of stare decisis when it conflicted with their personal views of the constitutionality of the death penalty."[98]

When Justice Brennan retired from the Supreme Court in 1990 and Justice Marshall followed suit in 1991, that ended, albeit briefly, the phenomenon of perpetual dissent over the constitutionality of the death penalty. But in 1994, Justice Harry Blackmun picked up where they left off, adopting their practice of nonacquiescence to *Gregg* and voting to grant relief in all cases involving the imposition of the death penalty.[99] Although one can understand the deep conviction shared by Justices Brennan, Marshall, and Blackmun that the death penalty, however imposed and in whatever circumstances, transgresses the Eighth Amendment's prohibition against cruel and unusual punishments, a policy of openly refusing to accept prior precedents of the Supreme Court as binding was incredibly imprudent.[100]

The potentially adverse consequences of embracing a weak form of stare decisis became clear in a series of cases beginning with *South Carolina v. Gathers*,[101] an Eighth Amendment case involving the admissibility of a prosecutor's comments regarding the victim's character (prosecutorial victim impact statements) during capital sentencing proceedings. It was a 5-4 decision, with Justices Marshall and Brennan providing critical votes. Relying on *Booth v.*

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for resentencing on the condition that the state be precluded from imposing the death sentence.") (internal citation omitted); *see also* Grubbs v. Missouri, 482 U.S. 931 (1987) (Brennan & Marshall, JJ., dissenting from denial of certiorari) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence.") (internal citations omitted); Richard H. Fallon, *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 110–11 & 111 n.324 (1997); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 248–58; Maltz, *supra* note 75, at 676; Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent as a Punishment*, 22 FLA. ST. U. L. REV. 591, 593–96 (1995).

98. Maltz, *supra* note 75, at 676.

99. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting that "[f]rom this day forward, I will no longer tinker with the machinery of death . . . [because] the death penalty experiment has failed").

100. Justice Brennan explained his practice of perpetual dissent in death penalty cases as reflecting "the unique interpretive role of the Supreme Court with respect to the Constitution." William J. Brennan, Jr., *In Defense of Dissent*, 37 HASTINGS L.J. 427, 437 (1986). Thus, "when a [J]ustice perceives an interpretation of the text to have departed so far from its essential meaning, that [J]ustice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path." *Id.* Ironically, Justice Brennan's statement of the rule of stare decisis closely approximates Justice Scalia's approach to the subject. *See* Payne v. Tennessee, 501 U.S. 808, 833–35 (1991) (Scalia, J., concurring) ("[W]hat would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with a plainly inadequate rationale supporting it *must* be left in place for the sole reason that it once attracted five votes."); *see also* Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1705–07 (1994) (describing and critiquing Justice Scalia's approach to stare decisis as failing to constrain a judge's discretion in any meaningful fashion).

101. 490 U.S. 805 (1989).

Maryland,[102] the Supreme Court held South Carolina's introduction of victim impact statements concerning the personal and religious characteristics of the victim during sentencing were wholly unrelated to the moral culpability of the defendant.[103] The Court thus held that the statements were inadmissible, affirmed the South Carolina Supreme Court's judgment reversing Gathers's death sentence, and remanded for a new sentencing proceeding.[104]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, dissented.[105] O'Connor stated that she "remain[ed] persuaded that *Booth* was wrong when decided and [stood] ready to overrule it if the Court would do so."[106] However, O'Connor believed it was possible to overturn the South Carolina Supreme Court's decision in *Gathers* without expressly overruling *Booth*.[107] Toward this end, she employed a narrow reading of *Booth*, arguing that *Booth* only precluded a jury from hearing information pertaining to a victim's family and not regarding the victim.[108]

In 1990, the year after the Supreme Court decided *Gathers*, President George H. W. Bush appointed and the Senate confirmed then-Circuit Judge David H. Souter to fill Justice Brennan's seat on the Supreme Court. During Justice Souter's first term as an Associate Justice, the Supreme Court overruled both *Booth* and *Gathers* in *Payne v. Tennessee*.[109] In a decision authored by Chief Justice Rehnquist, the *Payne* Court stated that *Booth* held as inadmissible per se victim impact statements during the sentencing phase of trial and that *Gathers* expanded this rule to include a prosecutor's statements regarding personal qualities of victims.[110] In overruling these cases, the *Payne* Court stated: "[The] States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs," and "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question."[111] The majority justified its decisions to overrule *Booth* and *Gathers* by explaining that "*stare decisis* is not an inexorable command," particularly in constitutional cases, in which reliance interests are limited (as compared with property and contract decisions) and in which less opportunity for legislative correction exists.[112] Moreover, the Court noted that both *Booth* and *Gathers* were decided "by the narrowest of margins" and

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102. 482 U.S. 496, 501–02 (1987) (5-4 decision) (holding that the Eighth Amendment prohibits a jury from considering victim impact statements during capital sentencing proceedings).

103. *Gathers*, 490 U.S. at 811–12.

104. *Id.*

105. *Id.* at 812 (O'Connor, J., dissenting). Justice Scalia also dissented, but filed a separate opinion. *See id.* at 823 (Scalia, J., dissenting).

106. *Id.* at 813–14 (O'Connor, J., dissenting).

107. *Id.* at 814.

108. *Id.*

109. 501 U.S. 808 (1991).

110. *Id.* at 817–18.

111. *Id.* at 824–25.

112. *Id.* at 828.

"over spirited dissents."[113] Justice Marshall, now in dissent, came to realize too late the strategic folly of failing to respect a strong form of stare decisis.[114] Despite the majority's efforts to muster a persuasive justification for its decision, *Payne* presents the spectacle of a conservative majority simply declining to afford any precedential value to decisions that it disliked.[115] The Justices' failure to afford much, if any, future effect to constitutional precedents fatally undermines the plausibility of the Justices' claim to speak to enduring constitutional values.[116]

Experience teaches that perpetual dissent is a vice that knows no ideological boundaries. Chief Justice Rehnquist has never quite been able to accommodate himself to *Roe v. Wade*,[117] and Justice Scalia repeatedly has argued, usually in dissent, for a substantially reduced vision for the Establishment Clause.[118] It

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113. *Id.* at 828–29.

114. *See id.* at 844–45, 848–51 (Marshall, J., dissenting) ("The overruling of one of this Court's precedents ought to be a matter of great moment and consequence.").

115. *See* Gerhardt, *supra* note 24, at 70–71, 112–13; *see also* Gerhardt, *supra* note 41, at 76 (describing Chief Justice Rehnquist's view "that ultimately the standard is error, and, once that is shown, then overruling is in order"). For a comprehensive and thoughtful critique of the *Payne* majority's treatment of stare decisis, *see* Padden, *supra* note 100, at 1689, 1694–1708.

116. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865–66 (1992) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.").

117. *See id.* at 944 (1992) (Rehnquist, C.J., dissenting) (disclosing belief that *Roe* should be overruled); *see also* Hodgson v. Minnesota, 497 U.S. 417, 480–501 (1990) (Kennedy, J., dissenting, with whom Rehnquist, C.J., and White and Scalia, JJ., join) (criticizing majority for deeming unconstitutional a state parental notification requirement applicable to minors seeking abortions); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 785–88 (1986) (White, J., dissenting, with whom Rehnquist, J., joins) (announcing continued dissent regarding Court's post-*Roe* abortion jurisprudence); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452–59 (1983) (O'Connor, J., dissenting, with whom White and Rehnquist, JJ., join) (criticizing the *Roe* trimester framework as an unworkable approach to abortion jurisprudence); Roe v. Wade, 410 U.S. 113, 171–78 (1973) (Rehnquist, J., dissenting) ("I find myself . . . in fundamental disagreement with those parts of [the *Roe*] opinion that invalidate the Texas [abortion] statute."). *But cf.* Maltz, *supra* note 75, at 670 ("It would be too simplistic to say that Chief Justice Rehnquist has no regard for precedent."). Like Chief Justice Rehnquist, Justice Scalia has been a perpetual dissenter in cases involving abortion rights. *See* Casey, 505 U.S. at 979–81 (Scalia, J., dissenting) ("The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520–21 (1990) (Scalia, J., concurring) ("I continue to believe . . . that the Constitution contains no right to abortion."); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (disclosing belief that *Roe* should be overruled).

118. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318–20 (2000) (Rehnquist, C.J., dissenting, with whom Scalia and Thomas, JJ., join) (criticizing majority's application of Establishment Clause to prohibit school district from allowing student delivery of religious messages); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 397–401 (1993) (Scalia, J., concurring) (criticizing the Court's past Establishment Clause jurisprudence, but noting agreement "with the Court that allowing [a religious institution] to use [public] school facilities [after hours] poses 'no realistic danger' of a violation of the Establishment Clause"); Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting) (criticizing majority's application of Establishment Clause to prohibit invocations and benedictions at public school graduation ceremonies); County of Allegheny v. ACLU, 492 U.S. 573, 655–63, 670 (1989) (Kennedy, J., concurring in part and dissenting in part with whom

would be grossly unfair to accuse liberal Justices of unprincipled behavior without also noting that very conservative judges routinely engage in identical behavior as well—albeit regarding a different set of disliked precedents.

The past ten years have seen further deterioration. In cases involving the scope of Congress's Commerce Clause powers, a regular group of four Justices have dissented repeatedly. Justices Stevens, Souter, Breyer, and Ginsburg have all announced, in thinly veiled language, their intention to undo the conservative majority's "new federalism" jurisprudence as soon as they can muster the requisite five votes.[119]

And in cases involving reproductive freedom, Chief Justice Rehnquist and Justices Scalia and Thomas make no secret of their desire to overrule the Court's decisions at the first available opportunity. Professor Michael Gerhardt has observed that "[a]bandoning *Roe* (or any precedent for no better reason than that a majority can show that it could have been better reasoned) violates traditional notions of neutrality, equality, consistency, stability, and efficiency in constitutional decisionmaking."[120] Judicial activism in the service of a conservative judicial agenda is still judicial activism.

The contemporary Justices' lack of regard for precedent goes well beyond a straightforward refusal to honor precedents with which individual Justices

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Rehnquist, C.J., and White and Scalia, JJ., join) (criticizing majority's application of Establishment Clause to prohibit City of Pittsburgh from displaying creche in county courthouse); Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting) ("Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.").

119. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting, with whom Stevens, Ginsburg, and Breyer, JJ., join) ("As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that 'the first call of a theory of law is that it should fit the facts.'" (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 167 (Howe ed., 1963))); *see also Morrison*, 529 U.S. at 663–64 (Breyer, J., dissenting, with whom Stevens, J., joins) ("But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach—in which the case law may evolve toward a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue."); Printz v. United States, 521 U.S. 898, 976 (1997) (Souter, J., dissenting) ("If, therefore, my views were prevailing in these cases, I would remand for development and consideration of petitioners' points, that they have no budget provision for work required under the Act and are liable for unauthorized expenditures."); *see also Printz*, 521 U.S. at 978 (Breyer, J., dissenting) ("Thus, there is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem."); United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting) ("In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began.").

120. Gerhardt, *supra* note 41, at 85; *see also* Maltz, *supra* note 75, at 626–27 (arguing that, in current circumstances, "an appeal to precedent in essence presents . . . a one-sided bargain" because any Justice holding himself bound by precedents he disliked would likely find his colleagues giving decisions with which he agreed "little constraining force").

disagree. With increasing frequency, the so-called "moderate" members of the Court purport to hold themselves bound by prior precedents, while effectively rewriting the law. *Planned Parenthood of Southeastern Pennsylvania v. Casey*[121] provides perhaps the best example of this phenomenon. Although the joint opinion by Justices O'Connor, Kennedy, and Souter purports to respect the "essential holding"[122] or "central holding" of *Roe*,[123] the joint opinion utterly disregards the trimester framework[124] and compelling state interest test set forth in *Roe*—and followed in subsequent cases applying *Roe*.[125] Although the authors opened their opinion by noting that "[l]iberty finds no refuge in a jurisprudence of doubt,"[126] the text of their decision largely shreds the Supreme Court's prior abortion precedents.[127]

At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982.[128] The statute imposed informed consent requirements on women seeking an abortion, including mandatory information about the fetus and a twenty-four-hour waiting period; required parental consent before a minor could

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121. 505 U.S. 833 (1992).

122. *Id.* at 846.

123. *Id.* at 860.

124. *See id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

125. *Compare id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."), *with* Roe v. Wade, 410 U.S. 113, 155, 162–66 (1973) (requiring state regulations of abortion in the first trimester and, except for purposes of maternal health, in the second trimester, to be narrowly tailored and designed to advance a compelling state interest). Of course, Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services, Inc.* was equally fast and loose with *Roe*'s holding. *See* 492 U.S. 490 (1989). Although noting that "[t]his case therefore affords us no occasion to revisit the holding of *Roe*," *id.* at 521, Chief Justice Rehnquist applied a rationality test after determining that Missouri's laws sought to protect the potential life reflected by the fetus. *See id.* at 519–20 ("But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life . . . . The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality."). Chief Justice Rehnquist, while decrying any intent to overrule *Roe*, recharacterized the right to reproductive freedom as a plain "liberty interest," as opposed to a fundamental liberty interest, and held the state to a rationality standard (i.e., Missouri had to show a rational relationship to a legitimate state interest in order to save the regulations). *Id.* In this sense, then, Chief Justice Rehnquist attempted to accomplish precisely what the joint opinion ultimately succeeded in doing: rewriting *Roe* without formally overruling the decision. Chief Justice Rehnquist thus lacks any credibility to criticize the "cite and switch" maneuver in the context of abortion rights jurisprudence.

126. *Casey*, 505 U.S. at 844.

127. *See id.* at 979, 994, 997–98 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Gerhardt, *supra* note 41, at 76–79 (criticizing the joint opinion for departing from *Roe*'s trimester framework and prior holdings regarding mandatory disclosure requirements without sufficient explanation or justification, thereby "preserv[ing] only marginal certainty with regard to the constitutional law of abortion"); Padden, *supra* note 100, at 1722 ("The joint opinion articulated a new test for determining when a state can restrict the right to abortion, yet it did not explain why a change in the prior test would not create uncertainty or why the previous standard had not induced reliance . . . . As an exercise ostensibly following stare decisis, *Casey* resulted in a weakening of its traditional tests.").

128. *Casey*, 505 U.S. at 844.

obtain an abortion (with a provision for a judicial bypass); required a married woman to inform her husband of her intention to obtain an abortion; and imposed regulations and reporting requirements on clinics providing abortion services.[129] With the exception of the provision requiring minors to obtain parental consent, the Supreme Court, in previous decisions, had rejected nearly identical statutory provisions.[130]

From *Roe v. Wade* forward, the Supreme Court reliably applied strict scrutiny to regulations burdening a woman's decision to terminate a pregnancy.[131] In practice, this meant that a state seeking to regulate abortion services had to proffer a compelling interest and demonstrate that the abortion regulation was narrowly tailored to achieve this interest. The state's interest in the potential life represented by the fetus becomes compelling only in the last trimester of a pregnancy; the state's interest in maternal health becomes compelling only in the second trimester of a pregnancy. Thus, under *Roe*, states possessed little authority to regulate first trimester abortions at all. *Roe*'s central mandate consisted of two basic points: (1) the requirement of strict scrutiny for abortion regulations, and (2) the use of the trimester scheme to identify the points at which the state's interest in maternal and fetal health becomes "compelling."[132]

The *Casey* joint opinion, although proclaiming an intention to retain the "central" or "core" holding of *Roe*, rejects both the standard of review *Roe* established and the trimester framework for enforcing this standard of review.

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129. *Id.*; *see also id.* at 902–11 (setting forth relevant provisions of the Pennsylvania statute as an appendix).

130. *See id.* at 934–40 (Blackmun, J., concurring in part and dissenting in part) (describing prior precedents invalidating restrictions on abortion access and criticizing majority for disregarding at least three prior rulings directly on point); *Casey*, 505 U.S. at 917–19 (Stevens, J., concurring in part and dissenting in part) (arguing that twenty-four-hour waiting period and certain aspects of the forced disclosure regulations are unconstitutional).

131. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759, 771–72 (1986) (describing right to abortion as "fundamental" and requiring compelling state interest to justify abridgment of right); Akron v. Akron Ctr. for Reprod. Health, Inc. 426 U.S. 416, 426–27 (1983) (holding that "restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest"); Carey v. Population Servs., Int'l, 431 U.S. 678, 687–89 (1977) ("The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy . . . . Both types of regulation may be justified only by a compelling state interest . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake.") (internal quotation marks and citations omitted); Roe v. Wade, 410 U.S. 113, 155–56 (1973) (noting that "where certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest'"). *But cf.* Webster v. Reprod. Health Servs., 492 U.S. 490, 518–20 (1989) (plurality opinion) (applying rational basis test to Missouri abortion regulations designed to protect potential life represented by the fetus); *Id.* at 529–31 (opinion of O'Connor, J., concurring in part and concurring in judgment) (applying "undue burden" test to Missouri abortion restrictions and finding them to be unconstitutional); *Id.* at 537, 537–41, 546–49, 554–56 (Blackmun, J., concurring in part and dissenting in part) (applying the compelling state interest test, chiding the plurality for deploying rationality review rather than the compelling state interest test, and concluding that the Missouri regulations at issue violated the substantive due process right to an abortion).

132. *Roe*, 410 U.S. at 155–56, 163–64.

The irony is particularly rich, for the authors of the joint opinion mount a sustained defense of stare decisis as a bedrock principle of constitutional interpretation. A reasonable person may wonder why, if stare decisis is so important to maintaining institutional legitimacy, the joint opinion so cavalierly abandons the legal tests expounded in *Roe* and applied in *Thornburgh v. American College of Obstetricians & Gynecologists*,[133] *Akron v. Akron Center for Reproductive Health, Inc.*,[134] and *Planned Parenthood of Central Missouri v. Danforth*[135] to disallow regulations identical to those Pennsylvania adopted.

More recently still, there is *Troxel v. Granville*.[136] In this case, Justice O'Connor's plurality opinion purports to apply *Meyer v. Nebraska*[137] and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.[138] Both *Meyer* and *Pierce*, as the Supreme Court has interpreted and applied them in the post-*Griswold* line of cases, impose a compelling state interest test on state laws that burden a parent's ability to direct the raising of her child,[139] yet Justice O'Connor never uses the words "compelling state interest."

In *Troxel*, a Washington state superior court entered a visitation order that provided Gary and Jenifer Troxel extensive visitation opportunities with their grandchildren, Isabelle and Natalie Granville.[140] Tommie Granville, the mother of Isabelle and Natalie, agreed that the Troxels should have some contact with the children, but opposed the particulars of the Troxels' visitation request.[141] Washington state law provided that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."[142] The statute authorized the trial court to order visitation rights, even over the objection of a custodial parent, "when visitation may serve the best interest of the child."[143] Significantly, the statute did not require the superior court to give any weight to the custodial parent's feelings or preferences

133. 476 U.S. 747, 760, 767–68 (1986) (invalidating informed consent and reporting requirements).

134. 462 U.S. 416, 436 (1983) (invalidating twenty-four-hour waiting period, informed consent, and parental consent provisions).

135. 428 U.S. 52, 71, 74, 81 (1976) (invalidating spousal consent and parental consent; upholding reporting requirement).

136. 530 U.S. 57 (2000).

137. *Id.* at 65 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

138. *Id.* (citing Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925)).

139. *See Meyer*, 262 U.S. at 400 (state legislation must not be "arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce*, 268 U.S. at 534–35 (applying *Meyer* standard); *see also* Roe v. Wade, 410 U.S. 113, 152–54, 155 (1973) (citing *Meyer* and *Pierce* and requiring state to show a compelling interest to justify the abridgement of a fundamental right); Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) (citing with approval and applying *Meyer* and *Pierce*); *id.* at 495–98 (Goldberg, J., concurring) (citing *Meyer* and *Pierce* and articulating the compelling state interest test for state laws that abridge fundamental rights).

140. *Troxel*, 530 U.S. at 61.

141. *Id.*

142. WASH. REV. CODE § 26.10.160(3) (2000).

143. *Id.*

regarding the wisdom of court-ordered visitation rights for a third party.[144]

Thus, the Washington state statute, as applied, substantially divested Tommie Granville of control over the persons who would enjoy temporary physical custody of her children. The Washington Supreme Court, applying *Meyer* and *Pierce*, held that the statute unduly interfered with Ms. Granville's parental rights.[145] Thus, in *Troxel*, the U.S. Supreme Court had to decide how far a state could go in ordering visitation over the objections of a custodial biological parent. Under the Court's prior precedents, any significant restriction on parental autonomy over the raising of children would be subject to strict scrutiny and thus would be constitutional only if necessary to advance a compelling state interest and narrowly tailored to achieve that interest. Justice O'Connor begins her opinion by citing *Meyer* and *Pierce* and explaining that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[146] She further reports that "subsequent cases . . . have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[147] Without invoking the standard of review routinely applied in these cases—strict scrutiny—Justice O'Connor concludes that "[s]ection 26.10.160(3), as applied to . . . this case, unconstitutionally infringes on that fundamental parental right."[148] The critical reader is left to guess precisely why this is so; normally, the Supreme Court must provide an applicable standard of review that governs its disposition of the case. Here, the Court simply observes that "the [C]ourt must accord at least some special weight to the parent's own determination,"[149] and concludes that "the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."[150] Justice O'Connor invokes the precedents only to disregard their substantive legal import. At a minimum, she had a duty to explain why application of strict scrutiny was no longer appropriate for facts similar to those in earlier cases involving parental rights.

Justice Thomas concurred in the judgment, but refused to join Justice O'Connor's plurality opinion. He noted that "neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."[151] Under the existing precedents, Justice Thomas noted that substantive due process doctrine protects

144. *Troxel*, 530 U.S. at 67.
145. *See* In re Custody of Smith, 969 P.2d 21, 27–28 (Wash. 1998).
146. *Troxel*, 530 U.S. at 65.
147. *Id.* at 66.
148. *Id.* at 67.
149. *Id.* at 70.
150. *Id.* at 72.
151. *Id.* at 80 (Thomas, J., concurring).

a parent's right to make basic decisions regarding the raising of her children: "[P]arents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them."[152] Thus, unlike the other Justices voting to strike down the Washington child visitation statute, Justice Thomas actually cited and applied the governing standard of judicial review—strict scrutiny.[153] Because Washington had not proffered a compelling state interest in support of its visitation law, the appropriate course of action was to strike down the state statute.[154] Although Justice Thomas has expressed skepticism regarding the legitimacy of substantive due process jurisprudence in other contexts,[155] he "express[ed] no view on the merits of this matter" and understood "the plurality as well to leave the resolution of that issue for another day."[156]

Practicing lawyers and legal scholars will have to develop a new nomenclature to describe the Supreme Court's growing practice of invoking a precedent and then largely abandoning it.[157] Although far from ideal when not justified by special circumstances, the direct overruling of a prior precedent at least offers the benefit of providing clear guidance to lawyers and lower court judges. Purporting to respect a precedent—while gutting it in the application—hardly promotes the principle of stare decisis.[158]

D. THE RESULTS: *BUSH V. GORE* AND THE JURISPRUDENCE OF *OPRAH!* TRIUMPHANT

The erosion of stare decisis through devices such as perpetual dissent and "cite-and-switch" has left the Supreme Court's members in a position to create an increasingly ad hoc, highly subjective jurisprudence that reflects little more

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152. *Id.* (Thomas, J., concurring).

153. *See id.* (Thomas, J., concurring) ("I would apply strict scrutiny to infringements of fundamental rights.").

154. *See id.* (Thomas, J., concurring) ("Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties.").

155. *See* Stenberg v. Carhart, 530 U.S. 914, 980–83 (2000) (Thomas, J., dissenting) (criticizing Court's abortion jurisprudence).

156. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

157. Perhaps the practice should be dubbed "cite and switch," given its obvious consanguinity with the time-honored practice of "bait and switch" promotions at unscrupulous used car dealerships.

158. Professor Cass Sunstein has lauded Justice O'Connor for her ostensible "judicial minimalism." *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 8–36, 46–54 (1999); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7–8 (1996) (describing with approval the Supreme Court's emerging trend of "decisional minimalism"). If judicial minimalism means creatively reporting past precedents on an ongoing basis, it hardly seems something to be welcomed. If Justice O'Connor—and four of her colleagues—no longer believe that government-imposed burdens on fundamental rights trigger strict scrutiny, then they should say so forthrightly. To invoke cases finding particular interests to be fundamental, but then to abandon the standard of review set forth in such cases, hardly constitutes fealty to precedent. Moreover, an ad hoc jurisprudence that creates a new rule for every case hardly does much to advance the rule of law. For a wide-ranging and thoughtful critique of Professor Sunstein's proposed "minimalist" approach to constitutional jurisprudence, *see* Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. Rev. 1971 (1999).

than the ability of a contemporary group of five Justices to find sufficient common ground to join a result.[159] Over time, the individual Justices have effectively operated under a substantially reduced obligation to pursue a consistent vision of the law or even to vote in a consistent fashion on related issues. *Bush v. Gore* represents the logical culmination of this ongoing process of politicization.

The 2000 U.S. Presidential election was remarkably close, with respect to both the popular and Electoral College votes. As the ballots were counted and recounted across the nation, it became increasingly clear that the outcome of the election would turn on Florida's electoral votes. And, to make matters even more complicated, the popular vote in Florida mirrored the national popular vote; only a few hundred votes, out of several million cast, separated Governor Bush and Vice President Gore. Moreover, sufficient irregularities associated with the conduct of the election and the subsequent counting of the ballots existed to make the outcome of the final Florida tally quite uncertain. From mid-November to December 12, 2000, in a series of highly controversial and badly splintered rulings, the Florida Supreme Court and the U.S. Supreme Court sought to bring the Florida Presidential election to a firm conclusion.

The U.S. Supreme Court had the last word in *Bush v. Gore*[160] and the case makes for interesting reading. By a 5-4 vote, a majority of the Justices reversed the Florida Supreme Court's decision requiring a statewide manual recount of undervotes in the Presidential election using the statutory "intent of the voter" standard.[161] In an unsigned per curiam opinion, five Justices held that the Equal Protection Clause of the Fourteenth Amendment required a more definite procedure for ascertaining the intent of the voter when recounting undervotes by hand.[162]

The Supreme Court's involvement in the Presidential election began after the Florida Supreme Court ordered a hand recount in selected Florida counties.[163] In a unanimous opinion, the Justices vacated the Florida Supreme Court's decision and remanded the case for further proceedings.[164] On remand, the Florida Supreme Court held that Florida law required a hand recount whenever a sufficient number of uncounted votes might affect the outcome of an election.[165] In addition to ordering a hand recount in Dade County, Florida, the Florida Supreme Court also authorized a statewide recount of all undervotes.[166]

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159. *See, e.g.*, Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (featuring a terribly splintered Supreme Court offering a series of opinions regarding the constitutionality of certain content-based restrictions on public, educational, and governmental cable channels and leased access cable channels).

160. 531 U.S. 98 (2000) (per curiam).

161. *Id.* at 111.

162. *See id.* at 104–111.

163. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76–78 (2000) (per curiam).

164. *See id.*

165. *See* Gore v. Harris, 772 So. 2d. 1243, 1260–61 (Fla. 2000) (per curiam).

166. *Id.* at 1262.

All of these recounts were to be governed by a statutory "intent of the voter" standard.[167]

Following the issuance of this decision, then-Governor George W. Bush argued to the U.S. Supreme Court that the Florida Supreme Court's decision vested too much discretion in the local canvassing boards to divine the intent of the voter.[168] He claimed that this essentially unfettered discretion would lead to the application of inconsistent standards both among and within various Florida counties.[169] Bush further asserted that this differential treatment of ballots violated the Equal Protection Clause of the Fourteenth Amendment.[170]

Seven of nine Justices voted to sustain Bush's equal protection argument.[171] However, only five of these seven felt it necessary to order a stop of the recount at the stroke of midnight on December 12, 2000.[172] To reach this conclusion, the five Justices had to render a binding interpretation of Florida law—an interpretation not directly reached by the Florida Supreme Court itself:

> Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice Breyer's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. § 102.168(8) (2001).[173]

As it happens, the Florida Supreme Court had (more or less) indicated that the legislature wished to avail itself of the safe harbor provision of 3 U.S.C. § 5.[174] The Florida Supreme Court's statements referred to a wish on the part of

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167. "[A] legal vote is one in which there is a 'clear indication of the intent of the voter.'" *Id.* at 1257 (quoting FLA. STAT. § 101.5614(5) (2000) (amended 2002)) (providing that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board").

168. *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam).

169. *See id.* at 106–08.

170. *See id.* at 103.

171. *Id.* at 110–11; *see also id.* at 133 (Souter, J., dissenting); *Id.* at 145–46 (Breyer, J., dissenting).

172. *See id.* at 110–11.

173. *Id.* at 111; *see also* Chemerinsky, *supra* note 3, at 1109–12 (faulting the majority for imposing a binding interpretation of Florida statutory law on the Florida Supreme Court).

174. 3 U.S.C. § 5 provides that:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. § 5 (1994). This provision provides a safe harbor for slates of electors certified at least six days prior to the meeting of the Electoral College. *See* Bush v. Gore, 531 U.S. 98, 110–11 (2000) (per

the state legislature to "participat[e] fully in the federal electoral process," with a glancing reference to 3 U.S.C. §§ 1–10.[175]

In an earlier unanimous decision, the U.S. Supreme Court instructed the Florida Supreme Court to respect the state legislature's authority under Article II, Section 1, Clause 2 of the U.S. Constitution to direct the manner in which Florida's Presidential electors would be selected.[176] The Florida Supreme Court's initial decision seemed to place an equal emphasis on the Florida Code and the Florida state constitution.[177] Under Article II of the federal Constitution, in a Presidential election, the Florida Supreme Court was bound to apply state statutory law rather than the state constitution.[178]

On remand from the U.S. Supreme Court, the Florida Supreme Court squarely grounded its ruling on Florida statutory law. It explained that the state legislature wished to avail itself of the safe harbor provision and also wanted all votes reflecting the ascertainable intent of the voter to be counted.[179] The Florida Supreme Court's opinion demonstrated a marked desire to have its cake and eat it too. On the one hand, the Justices indicated a desire to promote the values of finality by ensuring that the state's electoral procedures complied with 3 U.S.C. § 5. On the other hand, the Justices proclaimed that all votes should be counted by a canvassing board manually ascertaining the voter's intent. Try as one might, a careful and conscientious reader cannot divine what Florida law would require in the event of an unavoidable conflict between these two values—finality and enfranchisement.

The U.S. Supreme Court's per curiam opinion assists the Florida Supreme Court by ruling in favor of finality over enfranchisement. Effectively, the per curiam opinion makes a binding interpretation of Florida law and then imposes

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curiam); Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 77–78 (2000) (per curiam); DERSHOWITZ, *supra* note 20, at 18–19, 37–38.

175. Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1220, 1237, 1237 n.55 (Fla. 2000) (per curiam).

176. *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76–78 (2000) (per curiam); *see also* U.S. CONST. art. II, § 1, cl. 2 ("Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

177. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d at 1230, 1237–40 (Fla. 2000) (per curiam) (citing and invoking FLA. CONST. art. I, § 1, which states that "[a]ll political power is inherent in the people").

178. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 75–77 (2000) (per curiam); *see also* McPherson v. Blacker, 146 U.S. 1, 24–29, 34–36 (1892) (noting that during the early years of the Republic "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the [C]onstitution," and citing and quoting with approval an 1874 Senate Report that stated "[t]his power is conferred upon legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States," and holding that the clause "has conceded plenary power to the state legislatures in the matter of the appointment of electors").

179. Gore v. Harris, 772 So. 2d 1243, 1256–62 (Fla. 2000).

it on the Florida Supreme Court.[180]

Chief Justice Rehnquist's concurring opinion goes even further than the per curiam opinion in dispensing binding constructions of the Florida election statutes.[181] He may not have found the legal reasoning of the Florida Supreme Court persuasive, but rendering a binding construction of Florida's election laws constituted a blatant usurpation of the state court's role. Chief Justice Rehnquist's effort was not even particularly subtle, as such things go. He repeatedly cited the *dissenting* opinion of Florida Supreme Court Chief Justice Wells—a rather odd place to look for the correct interpretation of Florida law—in support of his interpretation of Florida's election laws.[182]

Chief Justice Rehnquist attempted to justify his foray into the Florida election code by claiming a need to safeguard the Florida state legislature's discretion under Article II, Section 1 to direct the manner through which Florida would select its Presidential electors. But this rationale, upon careful consideration, does not really justify his actions. Even if the state legislature retained authority to name a slate of electors or to modify the rules governing the selection of Presidential electors, it does not mean that Article II, Section 1 gives the U.S. Supreme Court the power to undertake this task as a joint participant with the state legislature.

If Florida's state legislature believed that the state supreme court misread the statutes, the legislature could have attempted to assert its Article II, Section 1 prerogatives by naming directly a new slate of Presidential electors. Although the Republican leadership of both houses of the Florida state legislature was contemplating such action, it had not yet acted.[183] Accordingly, Chief Justice Rehnquist's effort to decide questions of state law was, at best, unnecessary and, at worst, a regrettable form of judicial activism.[184]

To be sure, *Bush v. Gore* did present a credible claim of an equal protection violation. This is precisely why Justices Souter and Breyer voted to sustain the

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180. Bush v. Gore, 531 U.S. 98, 110–11 (2000) (per curiam); *see* Chemerinsky, *supra* note 3, at 1111 (criticizing the majority for "impermissibly usurp[ing] the Florida Supreme Court's authority to decide Florida law in this extraordinary case").

181. *See* Bush v. Gore, 531 U.S. at 112–21 (Rehnquist, C.J., concurring).

182. *See id.* at 120 ("We will not parse that analysis here, except to note that the principal provision of the Election Code on which it relied, § 101.5614(5), was, as Chief Justice Wells pointed out in his dissent in *Gore v. Harris* . . . entirely irrelevant."). As a general matter, federal courts do not look to dissenting opinions to discern the meaning of state statutes. Chief Justice Rehnquist's lust for a desired outcome led him to abandon even the pretense of observing the usual rules of judicial practice when state law provides a relevant decisional principle in a federal case. *Cf. id.* at 136–43 (Ginsburg, J., dissenting) (explaining, in some detail, the usual deference afforded state supreme court interpretations of state law—including statutory law).

183. *See* Jo Becker, *Legislature Defers Decision on Special Session*, WASH. POST, Dec. 5, 2000, at A1.

184. *See* Chemerinsky, *supra* note 3, at 1109–11 (arguing that the federal Supreme Court had no business rendering a binding interpretation of Florida law); *cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–80 (1938) (holding that "[t]here is no federal general common law" and requiring federal courts in diversity cases to apply the law of the local state, including opinions of the highest state court in the jurisdiction).

equal protection claim.[185] Black letter administrative law principles prohibit agencies from arbitrarily administering their duties.[186] Accordingly, were a local canvassing board to deploy a Ouija board to discern the intent of the voter, such action would violate basic notions of either due process or equal protection. To the extent that persons at different counting tables in the same county employed inconsistent standards for analyzing undervotes, a nontrivial equal protection—or due process—objection existed.[187]

But, as Justice Breyer properly noted, it was entirely possible to redress the equal protection/due process concern without ordering the recount to be stopped: "[T]here is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely."[188] Justice Breyer correctly

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185. *See* Bush v. Gore, 531 U.S. at 134 (Souter, J., dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."); Bush v. Gore, 531 U.S. at 145 (Breyer, J., dissenting) (stating that "basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem").

186. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 230–32 (1974) ("No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis by the dispenser of the funds."); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 303 (1979) ("For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'" (citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969))); Sec. of Agric. v. Cent. Roig Ref. Co., 338 U.S. 604, 613–14 (1950) ("[The Secretary] is not free to be capricious, to act without reason, that is, in relation to the attainment of the objects declared by [Congress]."); Allison v. Block, 723 F.2d 631, 635 (8th Cir. 1983) ("Against this backdrop of statutory and legislative history, we cannot accept the Secretary's assertion that Congress left the implementation of section 1981a a matter of unfettered administrative discretion."); Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968) (explaining that arbitrary agency action "cannot be reconciled with the fundamental principle that ours is a government of laws"); Louisville & Jefferson County Metro. Sewer Dist. v. Seagram & Sons, 211 S.W.2d 122, 125 (Ky. 1948) ("Everybody agrees upon our cherished principles of denying arbitrary power and recognizing equality in public and governmental functions."); State v. Control Comm'rs, 45 A.2d 430, 432–33 (Vt. 1946) ("[D]iscretion as to the granting of licenses may lawfully be delegated to public officials without prescribing definite rules of action, but not, however, to be exercised arbitrarily, for that would not be discretion."); McDonough v. Goodcell, 91 P.2d 1035, 1039 (Cal. 1939) ("[D]iscretion must be exercised within legal bounds. Those bounds are generally that the discretion of the administrative officer or board may not be exercised arbitrarily, capriciously, fraudulently, or without factual basis sufficient to justify the refusal.").

187. *But cf.* Tribe, *supra* note 3, at 221–47 (rejecting, as without substantial merit, objections to the standardless recount ordered by the Florida Supreme Court whether premised on equal protection, substantive due process, or procedural due process grounds). Notwithstanding Professor Tribe's blithe assurance that nothing was amiss, the problems with the standardless recount went even deeper, of course. Not only were different standards deployed within a given county, but different counties using the same voting equipment used different standards to discern the "intent of the voter." Even if some margin of discretion would be inherent in discerning the intent of the voter on a ballot-by-ballot basis, Florida would be hard-pressed to explain why a dimple reflects the intent of the voter in Volusia County but not in Palm Beach County, particularly when both counties use identical voting machines. To put the matter in some context, it would be as if the Department of Education used one set of criteria to establish financial need at the University of Florida (in Gainesville, Florida) when distributing Pell Grants and a completely different set of criteria for the same program at Florida State University (in Tallahassee, Florida).

188. Bush v. Gore, 531 U.S. at 146 (Breyer, J., dissenting); *see also* Balkin, *supra* note 3, at 1429–31; Chemerinsky, *supra* note 3, at 1110–11.

supposed that "halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, . . . [constituted] a remedy out of proportion to the asserted harm."[189]

If the recount could not be completed before December 18, 2000 (the deadline for certification of electors) and Florida submitted an amended slate of electors prior to January 6, 2001 (the date Congress counted the electors' ballots), then Congress could decide the matter. "[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes."[190] We will never know, of course, precisely how matters might have come to rest had the federal Supreme Court given the Florida Supreme Court a third bite at the apple. As a matter of settled constitutional precedent, however, it surely deserved a chance to take the third strike.[191]

When all was said and done, only two of the nine Justices took positions that appear consistent with their prior voting patterns on the Supreme Court. Justices Souter and Breyer voted with the conservative majority to grant relief on the equal protection claim. This approach to the Equal Protection Clause is generally consistent with their prior analysis of equal protection issues. By way of contrast, Justices Stevens and Ginsburg rejected the equal protection claim at issue in *Bush v. Gore*, even though they both historically have been sympathetic to a broad reading of the Equal Protection Clause's mandate.[192]

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189. Bush v. Gore, 531 U.S. at 147 (Breyer, J., dissenting).

190. *Id.* at 153.

191. Professor Leedes's apology for the majority decision and Rehnquist's concurrence is more than a little puzzling on this point. He asserts that "[i]f Congress, rather than the Court, had decided whether Florida's system of counting undervotes was lawful, the resultant partisan wrangling would not have been based on the rule of law." Leedes, *supra* note 3, at 249. This is so because "[t]here are feisty members in Congress who would have used any means necessary to obtain the [P]residency for their party's candidate." *Id.* Yet, inexplicably, Congress becomes the savior of principled decisionmaking, in the event that a post-December 12, 2000 recount resulted in Florida submitting a new slate of Democratic electors: "If Gore had won the recount after December 12, on January 6, Congress had the authority, if not the duty, to find that the Florida Supreme Court impermissibly required the canvassing board to count votes that were not legal." *Id.* at 293. If the Twelfth Amendment should be disregarded because Congress contains nothing but unprincipled partisan scoundrels, it seems, at best, odd to expect legally principled action from that body. In my own view, the Twelfth Amendment textually commits the counting of the ballots to the House and Senate; accordingly, the federal courts simply have no role to play in deciding how to resolve a dispute between multiple sets of electoral ballots from the same state. *See* Nixon v. United States, 506 U.S. 224, 228–33 (1993) (holding that Senate power to try impeachments is not subject to judicial review, nor may the judicial branch impose a definition of "trial" on the Senate when it sits as a court of impeachment). The political question doctrine presupposes that some questions belong to another coordinate branch of the federal government. *See id.*; *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (describing the political question doctrine and its potential applicability to various types of cases); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169–71 (1803) (holding that "[q]uestions, in their nature political, or which are, by the [C]onstitution and laws, submitted to the executive, can never be made in this [C]ourt"). The power to decide a particular question necessarily implies the power to decide it badly (or wrongly), at least as viewed from the perspective of another coordinate branch of the federal government.

192. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531–37, 556–58 (1996) (vindicating gender-based equal protection claim by women wishing to attend the all-male Virginia Military Institute); McCleskey v. Kemp, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting) (voting to allow an equal

As for Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, the newfound enthusiasm for equal protection principles that they exhibited also appears more than a little anomalous when contrasted with their prior voting patterns in equal protection cases.[193] Thus, even though their equal protection analysis happens to be reasonably persuasive, one could fault these Justices for engaging in instrumental reasoning (and voting).

E. INCONSISTENCY AND EQUAL PROTECTION: *MCCLESKEY* CONTRASTED

McCleskey v. Kemp[194] provides a particularly chilling contrast to *Bush v. Gore*. *McCleskey* involved equal protection and Eighth Amendment challenges to the enforcement of the death penalty in Georgia. Warren McCleskey claimed that race played an impermissible role in administering the Georgia death penalty and also that the disparate treatment of capital defendants in Georgia violated the Eighth Amendment's prohibition against the arbitrary imposition of the death penalty.[195] In support of both claims, McCleskey pointed to a detailed statistical analysis of the death penalty prepared by David Baldus, a professor who found that Georgia prosecutors disproportionately sought, and that Georgia juries disproportionately convicted, minority defendants who killed nonminority victims of capital murder.[196]

In a 5-4 decision, the Supreme Court refused to credit the findings of the Baldus study. Because McCleskey could not prove that these statistical differences reflected intentional discrimination against minority defendants, the Supreme Court declined to find an equal protection violation:

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protection claim based on a statistical study showing that Georgia attempts to execute minorities more often than nonminorities); *see generally* Saenz v. Roe, 526 U.S. 489, 498–504 (1999) (holding, in a majority opinion by Justice Stevens, that the Fourteenth Amendment protects right to travel from state to state, including right to equal public benefits, and applying strict scrutiny to California law limiting public assistance for newcomers).

193. United States v. Virginia, 518 U.S. 515, 565 (1996) (Scalia, J., dissenting) (voting to deny equal protection challenge to male-only admissions policy at Virginia Military Institute); McCleskey v. Kemp, 481 U.S. 279, 291–99 (1987) (Justices Rehnquist, O'Connor, and Scalia joined Justice Powell's majority opinion rejecting an equal protection claim involving the racially-based application of the death penalty); *see also* Tushnet, *supra* note 18, at 118–20, 125 (noting that "[t]he Justices in the *Bush v. Gore* majority are not averse to legal innovation, but they have ordinarily been quite suspicious of innovations in what appears to be a direction compatible with Warren Court inclinations" and arguing that the majority's equal protection analysis, although persuasive, represents a marked departure in approach to such questions for general members of the *Bush v. Gore* majority).

194. 481 U.S. 279 (1987).

195. *Id.* at 286.

196. *Id.* ("He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims."); *id.* at 287 ("Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.").

> Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.[197]

The majority also rejected McCleskey's argument that Georgia created and maintained the death penalty statute with knowledge of its disparate racial impact[198]—knowledge that would support an inference of unlawful discriminatory intent.[199] "There was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose."[200] Finally, the Court rejected McCleskey's claim that the legislature maintained the death penalty because of, and not despite, its disparate racial impact: "Nor has McCleskey demonstrated that the legislature maintains the capital punishment statute because of the racially disproportionate impact suggested by the Baldus study."[201] The Justices accordingly concluded that the Baldus study was clearly insufficient to support an inference that the decisionmakers in McCleskey's case acted with discriminatory purpose.[202]

To be sure, ascertaining voter intent from an improperly executed punch card ballot presents an infinitely easier task than determining whether a particular criminal defendant is so far beyond rehabilitation that the only reasonable course of conduct for a just society is to kill the convicted offender. The considerations relevant to imposing a death sentence plainly traverse much more ground than do standards for counting punch card ballots. Yet, one should not lose sight of the relevant legal interests involved: enfranchisement in a particular race in a single election versus death. A reasonable person may suppose that the implications of a death sentence would require more than minimal rationality on the part of the system designed to charge, convict, and administer this punishment.[203]

Yet, the fact remains that the criminal justice system arbitrarily imposes the

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197. *Id.* at 294.

198. *Id.* at 298–99.

199. *See* Rogers v. Lodge, 458 U.S. 613, 617–22 (1982) (holding that use of at-large voting districts in Burke County, Georgia was not discriminatory in its inception but nevertheless violates the Equal Protection Clause because the county maintains at-large county supervisor districts because of, and not despite, discriminatory effects of the at-large districting system).

200. *McCleskey*, 481 U.S. at 298.

201. *Id.*; *cf. Rogers*, 458 U.S. at 621–22, 626–27 (finding that an at-large districting system maintained to dilute minority voter strength violated the Equal Protection Clause even though Georgia did not enact system to achieve this result).

202. *McCleskey*, 481 U.S. at 297.

203. *See generally* Mary K. Newcomer, Note, *Arbitrariness and the Death Penalty in an International Context*, 45 DUKE L.J. 611, 611–15, 648–49 (1996) (arguing that nonarbitrary application of the death penalty should be an absolute prerequisite to its continued existence in the contemporary United States).

death penalty.[204] In *Bush v. Gore* terms, wild disparities in the application of the death penalty exist among the states,[205] within the states,[206] and even among and within local jurisdictions within particular states.[207] Application of the death penalty suffers from myriad dysfunctions, running the gamut from drunk, stoned, senile, or unconscious defense counsel[208] to both conscious and unconscious forms of racism.[209] Beyond troubling disparities based on race and class,[210] the death penalty—at least as presently administered—"does not spare the mentally ill, the mentally retarded, or children."[211]

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204. Bright, *supra* note 57, at 16.

205. *Id.* at 9–11.

206. *Id.* at 15–16.

207. *Id.* at 12–15; *see also* Brooke A. Masters, *Death Penalty, Location Are Linked in Va. Study*, WASH. POST, Dec. 11, 2001, at A1. Masters quoted a Virginia General Assembly study that found "[w]hether a defendant charged with a capital-eligible crime actually faces the death penalty is more related to the type of jurisdiction in which the crime was committed than the actual circumstances of the murder." *Id.* at A13. Masters also noted that "[t]he regional disparities found in Virginia are frequently raised in other states." *See id.*

208. Remarkable though it may seem, "[d]eath sentences have been upheld in cases in which lawyers were drunk, drug impaired, and suffering from Alzheimer's and . . . mental illness." Bright, *supra* note 57, at 19. Bright reports that in a case involving a lawyer who slept through his client's capital trial and sentencing, "[t]he Texas Attorney General's office argued to the appellate court that a sleeping lawyer is no different from a lawyer who is intoxicated, under the influence of drugs, suffering from Alzheimer's disease or mental illness." *Id.* This was not, as it happens, a specious argument. *See* Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000) (holding that defendant was not deprived of his Sixth Amendment rights by virtue of counsel sleeping during capital murder trial), *rev'd en banc*, 262 F.3d 336 (5th Cir. 2001). The sad truth is that the standard of professional competence required to meet the Sixth Amendment's "effective assistance of counsel" guarantee remains woefully inadequate to ensure a reliable outcome in most criminal trials. *See* Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (rejecting defendant's claim that he had ineffective assistance of counsel in violation of Sixth Amendment); *see also* Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (determining that defendant could not overcome Court's strong presumption of effective assistance of counsel).

209. *See* Bright, *supra* note 57, at 12–13 ("Without knowing it, conscientious judges who have had no experience with people of other races may be influenced in their decision making by racial stereotypes and attitudes they have developed over their lives. Without realizing it, a white judge may see a young white man who is before the court for sentencing as a youth with potential in need of help, but see a young black man as a thug who is to be feared."); *see generally* David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (presenting statistical evidence supporting assertion that racial minorities disproportionately face both capital charges and death penalty sentences).

210. *See* Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811 (1998) (noting that most prosecutors responsible for deciding whether to seek capital charges are white, while most persons facing such charges are not). As famed civil rights judge Frank M. Johnson stated the matter, "[r]eliance on the race of the victim means that the sentence is founded in part on a morally and constitutionally repugnant judgment regarding the low value of the lives of black victims." McCleskey v. Kemp, 753 F.2d 877, 908 (11th Cir. 1985) (en banc) (Johnson, J., dissenting), *aff'd*, 481 U.S. 279 (1987).

211. Bright, *supra* note 57, at 5, 22. Only a year ago, the Justices refused to decide at what level of diminished mental capacity it would be unconstitutional to execute a person. *See* Penry v. Johnson, 532 U.S. 782 (2001) (holding that state law must permit jury to consider mitigating evidence, including mental retardation of defendant, at sentencing phase of capital trial). One should note that Chief Justice Rehnquist and Justices Scalia and Thomas dissented in *Penry*, voting to permit a death sentence on

In the matter of life and death, the government should be held to a higher standard of care. For the Constitution's guarantee of equal protection to be meaningful, the federal courts must disallow the arbitrary application of the death penalty. As Justice Blackmun observed, "[t]here is a heightened need for fairness in the administration of death."[212]

In short, empty formalism should not hold greater weight than justice when matters of life and death are at stake.[213] When the weight of empirical evidence demonstrates that factors unrelated to the nature of the crime weigh heavily in the criminal justice system, a meaningful commitment to equal protection requires more than the blithe assertion that criminal defendants have failed to prove intentional discrimination in the operation of the machinery of death.[214]

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facts where it was not at all certain that a jury was able to consider meaningfully the defendant's limited mental abilities. *See id.* at 804–05 (Thomas, J., concurring in part and dissenting in part). In the view of these Justices, a confusing jury instruction that potentially frustrates the ability of a jury to consider a mitigating circumstance should not serve as the basis for undoing a death sentence. *Id.* During the October 2001 Term, the Justices held that the execution of the mentally retarded constitutes "cruel and unusual" punishment for purposes of applying the Eighth and Fourteenth Amendments. *See* Atkins v. Virginia 122 S. Ct. 2242 (2002). Once again, however, Chief Justice Rehnquist and Justices Scalia and Thomas dissented, with Chief Justice Rehnquist derisively characterizing the majority's holding as "a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." *Id.* at 2252 (Rehnquist, C.J., dissenting).

212. Callins v. Collins, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting from denial of certiorari). One of the intractable problems with the death penalty relates to the Supreme Court's competing and inconsistent goals in its administration. On the one hand, every death sentence must reflect an individualized determination of the aggravating and mitigating circumstances surrounding the crime at issue and the defendant; on the other hand, some overall fairness and proportionality must exist to ensure like treatment for like cases. The problem, of course, is that streamlined rules provide for like treatment, but pretermit any individualized considerations for a particular defendant. Open-ended rules that permit careful consideration of each individual's case inexorably lead to widely disparate results—often with racial or class-based implications. *See generally* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

213. *See* Singleton v. Norris, 108 F.3d 872, 874–75 (8th Cir. 1997) (Heaney, J., concurring) ("My thirty years' experience on this court have compelled me to conclude that the imposition of the death penalty is arbitrary and capricious. At every stage, I believe the decision of who shall live and who shall die for his crime turns less on the nature of the offense and incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers.").

214. One would be hard-pressed to argue persuasively that the Constitution itself prohibits the death penalty as a matter of course. *See* U.S. CONST. amend. V (requiring that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury"). It would be odd indeed if the Framers drafted an Eighth Amendment that prohibited a punishment expressly contemplated within the very text of the Fifth Amendment. To say that the death penalty can be constitutional does not mean that, in a given circumstance, it is so. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In particular, "[t]here is no legitimate basis in reason for relying on race in the sentencing process." McCleskey v. Kemp, 753 F.2d 877, 908 (11th Cir. 1985) (en banc) (Johnson, J., dissenting), *aff'd*, 481 U.S. 279 (1987); *see also id.* at 919 ("A statute that intentionally or unintentionally allows for serious racial effects is unconstitutional under the [E]ighth [A]mendment. Because the majority holds otherwise, I dissent.") (Hatchett, J., dissenting).

As Stephen Bright has observed, "[i]t seems out of character for a society as generally conservative as ours, which is wary of too much government power and skeptical of the ability of government to do anything well, to trust the courts to decide whether a person lives or dies."[215]

Now, let us return to the equal protection jurisprudence of the *Bush v. Gore* majority and the logical implications of this line of reasoning. If the application of separate and evolving standards by local canvassing boards to ascertain the "intent of the voter" rises to the level of a federal constitutional violation, surely systemic inequities in the operation of the criminal justice system—at least when capital punishment is involved—should similarly require some justification from the state.[216] The United States Supreme Court cannot tenably assert that arbitrary government action in counting votes transgresses baseline expectations of the equal protection principle, while also maintaining that arbitrary government action (when viewed systematically) in charging and executing defendants requires no justification whatsoever in the absence of some nonexistent smoking gun memorandum proving the government's actual knowledge of the disparate impact and embracing that impact.[217]

One may reasonably expect that a Supreme Court Justice broadly committed to equal protection principles in the context of counting ballots would be no less committed to such principles in the context of life and death.[218] Nevertheless, Chief Justice Rehnquist and Justices O'Connor and Scalia do not seem to view all equal protection claims as enjoying equal constitutional importance. One should also be clear about the lack of intentional discrimination in the practices complained about in *Bush v. Gore*—no one seriously suggested that the diverse,

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215. Bright, *supra* note 57, at 1.

216. Interestingly, Justice Stevens voted to grant relief on Warren McCleskey's equal protection claim. *See* McCleskey v. Kemp, 481 U.S. 279, 345–47 (1987) (Blackmun, J., dissenting, in which Marshall and Stevens, JJ., joined) (arguing that Georgia's capital punishment system, at least as operated, violated the Equal Protection Clause); *see also supra* text and accompanying notes 195–201 (discussing *McCleskey v. Kemp* and contrasting it more generally with the majority's equal protection analysis in *Bush v. Gore*). Justice Stevens did not find Bush's equal protection claim to be as compelling. *See* Bush v. Gore, 531 U.S. 98, 125 (2000) (per curiam) (Stevens, J., dissenting) ("And there is no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the 'intent of the voter' standard is any less sufficient—or will lead to results any less uniform—than, for example, the 'beyond a reasonable doubt' standard employed everyday by ordinary citizens in courtrooms across this country.").

217. *But see* Castaneda v. Partida, 430 U.S. 482, 493–94 (1977) (permitting inference of discriminatory intent based on statistical anomalies in jury service, notwithstanding lack of direct proof of discriminatory intent by local officials).

218. Even if one were not entirely persuaded that the factors properly associated with making an individualized sentencing decision in the context of a capital crime may be analogized reasonably to the factors properly associated with counting ballots, there are still issues associated with the death penalty—such as killing minors and persons suffering from mental retardation—that do not implicate complex decisional matrices. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas have not registered any consistent and strong equal protection or Eighth Amendment objections to the execution of minors or mentally retarded persons. So, it does seem fair to question whether their strong commitment to equal protection principles in the context of dimpled and pregnant chads was anything more than instrumental judging in action. Bush v. Gore, 531 U.S. 98, 104–09 (2000) (per curiam).

table-to-table standards were either designed or implemented to favor one candidate over another. Bush neither alleged nor proved active discriminatory intent on the part of local elections officials. Rather, he merely asserted that inconsistent vote-counting practices unduly burdened a fundamental right—the right to vote—without a compelling governmental justification.[219] The Supreme Court sustained this claim, which was predicated on a statistical showing of differential treatment of undervotes in various Florida counties.[220]

To be consistent with their prior voting patterns, the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas should have rejected Governor Bush's equal protection claim. Chief Justice Rehnquist and Justices O'Connor and Scalia are not generally committed to a broad vision of equal protection—at least outside cases involving race-based government programs.[221] So, in the absence of any discriminatory intent and given the generally cabined discretion inherent in the intent-of-the-voter standard, Florida's election procedures, as explicated by the state supreme court, should have been "good enough for government work."[222] At the same time, to be consistent, Justices Stevens and Ginsburg should have credited the equal protection claim. Justices Stevens and Ginsburg usually have articulated a relatively broad vision of the equal protec-

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219. *See* DERSHOWITZ, *supra* note 20, at 30; Tribe, *supra* note 3, at 181–82.

220. *See* Bush v. Gore, 531 U.S. at 109 (per curiam).

221. *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that city's government contracts program, in which at least thirty percent of the dollar value of each contract had to be awarded to minority businesses, was not based on a compelling state interest or narrowly tailored to remedy effects of past discriminatory practices); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (asserting that race-based classifications in government contracts hiring must be analyzed under strict scrutiny standard); *cf.* Romer v. Evans, 517 U.S. 620, 636, 651–53 (1996) (Scalia, J., dissenting, with whom Rehnquist, C.J., and Thomas, J., join) (rejecting equal protection claim brought by gay and lesbian citizens of Colorado against a state constitutional amendment, Amendment 2, that withdrew home rule from local governments insofar as they might seek to adopt local policies of nondiscrimination against sexual minorities).

222. *See generally* Tribe, *supra* note 3, at 221–26 (arguing that Florida's voting procedures did not raise any serious equal protection problems and suggesting an absence of any class of voters suffering disparate treatment, which is "an element usually a prerequisite to an equal protection claim"). Again, it bears noting that, in *McCleskey*, all three of these Justices rejected a compelling showing of statistically significant race-based differences in both indictments and convictions of capital offenses in Georgia. *McCleskey*, 481 U.S at 292. In the context of assessing the fundamental fairness of existing death penalty statutes,

> [j]ustices writing lead opinions frequently have professed uncertainty and indifference about empirical evidence concerning the practical operation of death penalty systems, have adopted principles of adjudication that make social fact propositions subsidiary or irrelevant to governing decisional premises, and have proclaimed incompetence to scrutinize basic facts about capital punishment administration.

James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986–1989*, 27 LAW & SOC'Y REV. 65, 81 (1993) (citations omitted). Evidently, these Justices find the treatment of dimpled chads to be a more compelling equal protection problem, deserving of closer judicial scrutiny and solicitude, than statistical irregularities associated with state-imposed executions.

tion guarantee.[223] And here, the claim really sought nothing more than minimum rationality in the application of the intent-of-the-voter standard.[224]

Thus, fully seven of the nine Justices voting in *Bush v. Gore* engaged in instrumental judging rather than adhering to prior jurisprudential commitments. Consistency gave way to convenience; with the Presidency hanging in the balance, Emerson's canard about "consistency [being] the hobgoblin of little minds"[225] won the day. But, whereas many commentators seem to think that

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223. *See* United States v. Virginia, 518 U.S. 515, 531–34 (1996) (noting that "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature"); Michael M. v. Superior Court, 450 U.S. 464, 502 (1981) (Stevens, J., dissenting) ("A rule that authorizes punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially."); Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one [E]qual [P]rotection [C]lause. It requires every state to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.").

224. A careful reader may question how opposition to the result in *McCleskey* could be squared with a strong commitment to stare decisis in cases involving constitutional adjudication. In my view, there is a fundamental difference between legitimate, principled differences of opinion as to the import of a precedent—or line of precedents—and a willingness to repudiate completely existing case law. Abolishing the right to reproductive freedom by applying only rationality review to abortion regulations or radically expanding or contracting the commerce power represent the repudiation, as opposed to the application, of governing constitutional precedents. Conscientious judges viewing the same facts, and applying the same precedents, may reach differing results—all without instrumental, or unprincipled, judging. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (presenting a difference of opinion as to whether Establishment Clause or Free Speech Clause precedents should govern after-school use of local public school facilities by religiously affiliated student organization). Accordingly, a difference of opinion regarding the outcome in a particular case does not necessarily imply that judges have abdicated their constitutional duties.

Turning more specifically to *McCleskey*, the central premise in the post-*Furman* death penalty cases has been the idea that the administration of the death penalty must not be arbitrary or irrational. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). As the Supreme Court has explained, "[b]eginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Id.* at 111. Given the overwhelming data showing that factors wholly unrelated to the rehabilitative capacity of the defendant—such as race, class, and quality of counsel—drive death penalty decisions, a principled application of the "reasonable consistency" rule could easily require reform in the death penalty system. One easy reform, for example, would be a requirement of centralized decisionmaking within the states and in the federal system regarding indictments on capital charges. Decentralized decisionmaking in the context of charging leads to wildly disparate treatment among prosecutor's offices even within a single state. It also insulates such decisionmaking from meaningful judicial review. Requiring a central commission or agency to approve capital charges after a review of the record would ensure greater consistency in charging behavior and greatly facilitate review of charging behavior for arbitrary or otherwise inappropriate reasons such as race. In my view, *Furman* and its progeny would support such a reform as a matter of Eighth and Fourteenth Amendment jurisprudence. *But see* McCleskey v. Kemp, 481 U.S. 279, 313 n.37 (1987) ("Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case . . . . Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice.") (internal citations omitted).

225. *See* Ralph Waldo Emerson, *Self Reliance*, *in* ESSAYS AND ENGLISH TRAITS 66 (C.W. Eliot ed., 1909) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

Bush v. Gore represents a new departure for the Justices, sadly it does not. The contemporary behavior of the individual Justices belies the notion that stare decisis and the rule of law meaningfully bind judicial discretion (at least in the Supreme Court of the United States).

II. THE *PARAINESIS*

A. CASSANDRA CALLING: THE NEED FOR A RENEWED COMMITMENT TO STARE DECISIS

Federal judges, and particularly U.S. Supreme Court Justices, undoubtedly possess the power to play fast and loose with precedent. Results-oriented judging remains an option for judges of all ideological stripes. Before engaging in this behavior, however, judges should consider carefully the systemic effects of the practice aggregated across the entire judicial system.

Specifically, applying a Rawlsian original position, a self-interested judge should think twice before disregarding precedent to reach a desired result.[226] Surely, Justices Brennan and Marshall lamented the Rehnquist Court's disregard of many 5-4 decisions in which they participated in the majority.[227] Yet, by consistently dissenting in death penalty cases and by refusing to acquiesce in settled decisional law, Justices Brennan and Marshall themselves helped to legitimate perpetual dissent on matters of constitutional law. It should not have surprised them that conservative members of the Court would prove equally stubborn on issues such as reproductive freedom.[228]

Over time, the cumulative results of this practice lead by a rather direct route to *Bush v. Gore*. It is but a small step to go from disregarding stare decisis to voting on a case-by-case basis for desired results. The whole concept of stare

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226. *See* JOHN RAWLS, A THEORY OF JUSTICE 102–23, 134–35, 221–27 (rev. ed. 1999) (arguing that a rational person can analyze the justice or fairness of a legal rule by asking whether, in the absence of any foreknowledge of her place in the society or the potential effect of the rule on her and her loved ones, she would embrace unqualified the proposed rule and suggesting that only rules deemed just when considered from behind the "veil of ignorance" are truly just). At least arguably, a Justice should fear future courts disregarding her precedents as much (or more) than she desires particular results foreclosed by existing precedents. Because a Justice cannot know with certainty the persons who will serve on the Court in the years to come, it makes as much sense to respect stare decisis as to abandon it. Selective respect for the doctrine, arguably the current approach of most members of the Court, makes the least sense because it denies the Justices an entirely free hand to decide cases as they wish today, but does little to constrain the overruling behavior of future courts. A rule of no stare decisis or very strong stare decisis would better promote their judicial philosophies over time.

227. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–35 (1995) (5-4 decision); Payne v. Tennessee, 501 U.S. 808, 826–30 (1991) (same).

228. Then-Justice Rehnquist dissented, with Justice White, in the original *Roe v. Wade* decision and, with the possible exception of *Webster*, has never really looked back. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 950–53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that *Roe* was wrongly decided and should be overruled); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting) (stating, with Chief Justice Rehnquist joining the dissent, that "[i]n my view, the time has come to recognize that *Roe v. Wade* . . . 'departs from a proper understanding' of the Constitution and to overrule it" (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985))).

decisis depends on the willingness of judges to apply rules that they would not necessarily create in the first instance precisely because they are settled rules. Once one jettisons the idea that a judge has a professional obligation to accept a result she dislikes as binding upon her future votes, it seems only natural that judges would begin voting for results independent of their ability to relate particular results to their votes in other cases.[229] In this sense, then, it is not surprising to see the hard-core federalist wing of the U.S. Supreme Court maul the Florida Supreme Court.[230] Nor should one be shocked by Justice Ginsburg writing a paean to "our federalism." If the result is sufficiently important, then any means to the result are legitimate.

The problem, of course, is that the entire system of constitutional adjudication will break down if judges routinely engage in such behavior over a sustained period of time.[231] The only means of avoiding a meltdown is for judges to apply precedents with which they disagree, unless they believe a persuasive case can be made for overturning the precedent.[232] Perpetually dissenting when no prospect exists for altering the legal precedent simply erodes the credibility of the federal judiciary and makes judges look more like politicians than defenders of the rule of law.[233] This does not mean that a judge has an obligation to apply blithely a precedent he or she finds loathsome or unconvincing.[234] It would be perfectly responsible for a judge to vote to apply a precedent while indicating concurrently that she does not particularly like doing so. Provided that the judge votes to apply the precedent, she need not hide the fact that she dislikes doing so.

In several recent high profile cases, Justice Clarence Thomas has done just

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229. *See* Balkin, *supra* note 3, at 1408–09, 1431–41 (arguing that although judges have the power to act in unprincipled ways, they generally should refrain from doing so, especially when their actions appear to be not merely unprincipled, but nakedly partisan).

230. *See* United States v. Morrison, 529 U.S. 598 (2000) (5-4 decision in which Court struck down the Violence Against Women Act on federalism grounds); Printz v. United States, 521 U.S. 898 (1997) (5-4 decision in which Court struck down provisions of the Brady Handgun Violence Prevention Act on federalism grounds); Lopez v. United States, 514 U.S. 549 (1995) (5-4 decision in which Court struck down the Gun-Free School Zones Act on federalism grounds); New York v. United States, 505 U.S. 144 (1992) (striking down the "take title" provision of Low-Level Radioactive Waste Policy Act as inconsistent with federalism); *see generally* Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism,"* 32 IND. L. REV. 1 (1998).

231. *See* Gerhardt, *supra* note 24, at 76–87; Monaghan, *supra* note 24, at 744–48.

232. *See* Schauer, *supra* note 26, at 588.

233. *See generally* Scheppele, *supra* note 3, at 1416–26 (arguing that rule of law principles require incremental, rather than wholesale and abrupt, changes to existing precedents and suggesting that the majority in *Bush v. Gore* disregarded this consideration to reach a desired outcome).

234. As Professor Charles Fried has explained:

> We encounter here an instance of what may seem a general paradox of rationality: a rational person is always in principle open to reason, yet any human pursuit—certainly the pursuit of reason—would be thwarted if those committed to it kept returning to first principles to make sure that the beginning was right.

Fried, *supra* note 63, at 1144. *See generally* Maltz, *supra* note 63, at 371–72 (describing the institutional values advanced by respect for principles of stare decisis).

this.[235] In such cases, he has written a concurring opinion joining the majority's result, but indicated that he is doing so because of a valid prior precedent that controls on the facts presented. Indeed, in *Troxel v. Granville*, Justice Thomas was the only member of the Court to apply the ostensibly controlling standard of review—the compelling state interest test.[236] Justice O'Connor cited the controlling precedents, but failed to apply the standard of review set forth in those precedents, fashioning from whole cloth a new (and mushy) balancing test with an unarticulated standard of review.[237] Accordingly, Justice Thomas has not routinely placed himself in the posture of being a perpetual dissenter. And yet, at the same time, he has not attempted to hide or to disguise his disagreement with certain binding precedents.[238] This method of applying valid precedents fairly until overruled promotes predictability in the law and engenders confidence in the work of the federal judiciary while also serving to register misgivings about a particular precedent. Thus, Justice Thomas's approach serves well both institutional and personal values.[239]

B. LESSONS FOR THE FUTURE

Bush v. Gore does not represent a radical break with recent judicial behavior; rather, it constitutes a logical outgrowth of the increasingly unprincipled voting behavior of the Justices. Self-described "judicial conservatives," like Chief Justice Rehnquist and Justice Scalia, have proven just as unconcerned with precedent and stare decisis as the so-called "liberal" wing of the Court. Over the past twenty years, a general disrespect for precedent, particularly in cases involving constitutional adjudication, has been gathering steam.[240] It is time to call a halt to this self-destructive behavior.

Because of the Justices' failure to address the continuing erosion of stare decisis, we quickly arrive at the jurisprudence of *Oprah!*:[241] a highly personal-

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235. *See, e.g.*, United States v. Hubbell, 530 U.S. 27, 49 (2000) (Thomas, J., concurring) ("I join the opinion of the Court because it properly applies this doctrine, but I write separately to note that this doctrine may be inconsistent with the original meaning of the Fifth Amendment's Self-Incrimination Clause."); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (voting to apply the "substantial effects" test enunciated in *Lopez*, but stating his "view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress's power and with this Court's early Commerce Clause cases").

236. Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

237. *Id.* at 69–72.

238. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (Scalia, J., dissenting, with whom Thomas, J., joins) (voting to overrule the *Miranda* decision, stare decisis notwithstanding, and vowing to engage in perpetual dissent on this point).

239. Justice Harlan, a highly principled jurist, also used concurring opinions to distance himself from precedents he disliked, even as he voted to apply them. *See* Mello, *supra* note 97, at 647–48.

240. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) ("I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.").

241. Oprah Winfrey, a wildly successful daily talk show host, has created a media empire through a program format encouraging candid confessions by celebrities, politicians, and average citizens. Everyone from Bill Clinton to Calista Flockheart parades through, confesses wrongdoings and personal

ized, indeed, almost confessional approach to constitutional adjudication, in which a Justice's subjective feelings[242] count as much—if not more—than text, precedent, or history. Pedestrian concerns, such as stare decisis, give way to a jurisprudence of the self, a kind of ongoing professional narrative in which each Justice creates a jurisprudence built upon little more than the accretion of desired results.[243]

This jurisprudence amply meets the needs of the "I'm ok, you're ok" worldview represented by Oprah Winfrey's infinite series of self-absorbed, vapid guests. As an intellectual exercise, it comports quite nicely with the idea of responsibility espoused by Ms. Winfrey's sidekick, Dr. Phil, sage dispenser of "I'm ok, you're ok" wisdom.[244] To the extent that *Oprah!* serves as a kind of

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shortcomings, and, in return, receives Oprah's absolution and benediction—and a subsequent group hug. Her show often features segments with "Dr. Phil," a therapist who encourages people to admit and accept their pathologies, usually without passing judgment on them. *See* Ellen Edwards, *Oprah Winfrey Admits Drug Use; During Taping, TV Host Confesses She Smoked Cocaine*, WASH. POST, Jan. 13, 1995, at A1 (observing that "Winfrey's show, which has been nationally syndicated since 1986, always has a very personal tone" and noting Ms. Winfrey's various on-air confessions concerning child abuse, rape, chronic weight problems, and drug abuse). Oprah Winfrey's media enterprises now include her daily show, a monthly magazine, a book-of-the-month club, and Harpo Productions, a media production company that produces her show, other television programs, and major motion pictures. *See* Peter Carlson, *O Is for Oprah Oozing Oodles of Optimism*, WASH. POST, April 25, 2000, at C1 ("Oprah Winfrey—the magazine's founder, editorial director, namesake, cover girl and columnist—is an all-powerful force in the writing business."); Margo Jefferson, *Oprah Goes to Press with Ideas on Living Life Well*, N.Y. TIMES, Aug. 7, 2000, at E2 (extolling Ms. Winfrey as "a brilliant businesswoman and media star: mogul plus" and describing her as "a national care-giver, a national therapist . . . and a philanthropist").

242. Dissenting opinions in *Texas v. Johnson*, 491 U.S. 397 (1989), the flag burning case, present some choice examples of the jurisprudence of *Oprah!* in action. Chief Justice Rehnquist's dissent represents, quite literally, a paean to the flag, replete with poetic and musical tributes to its importance as a symbol of national unity. *See id.* at 424–25 (Rehnquist, C.J., dissenting) (citing and quoting at length Emerson's "Concord Hymn," Key's "Star Spangled Banner," and Whittier's "Barbara Frietchie"). Justice Stevens authored a marginally less emotional opinion, in which, heart firmly affixed to sleeve, he plaintively noted that the flag motivated "the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach." *Johnson*, 491 U.S. at 439 (Stevens, J., dissenting). As a veteran of World War II and a U.S. citizen, Justice Stevens is entitled to hold highly reverential, even mystical, beliefs regarding the United States flag. But as a member of the highest judicial authority in the United States, he should at least attempt to judge with his head and not his heart. Aristotle admonishes that "law is reason free from passion." ARISTOTLE, THE POLITICS OF ARISTOTLE 146 (Earnest Baker trans., 1946). The jurisprudence of *Oprah!* substantially departs from this ideal and therefore, should be rejected at every possible turn.

243. For example, Justice Stevens, who possesses a strong and deeply felt attachment to the United States flag, could not bring himself to accept the result in *Texas v. Johnson*:

> Given all these considerations, plus the fact that the Court today is really doing nothing more than reconfirming what it has already decided, it might be appropriate to defer to the judgment of the majority and merely apply the doctrine of *stare decisis* to the cases at hand. That action, however, would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake.

United States v. Eichman, 496 U.S. 310, 323–24 (1990) (Stevens, J., dissenting). Not liking a result because it strongly conflicts with your personal values or preferences hardly justifies a stance of perpetual dissent.

244. "Dr. Phil" is Dr. Phillip C. McGraw, a straight-talking Texan and a licensed clinical psychologist. *See* Libby Copeland, *Our Lady of Perpetual Help; In the Church of Feel-Good Pop Psychology,*

cultural mirror, it is not surprising to see the Justices increasingly less concerned with reasons and process than with naked results.

Nevertheless, a federal judge—and particularly a Justice of the Supreme Court—has an obligation to promote institutional values as much as any particular substantive result through his or her work. Perpetual dissent and the reinvention of precedent badly disserves the institutional interests of the federal judiciary. It makes the Supreme Court appear blatantly political and engenders within the body politic an unhealthy cynicism toward the Court and its decisions.[245]

Once the Supreme Court has reached a decision on a particular question, all of its members should be prepared to apply it. Any plausible system of precedent will require judges to apply rules that they would prefer to amend or abolish.[246] If judges reserve unto themselves an unfettered right to amend or alter rules, the rule of law becomes in reality the rule of five. Regardless of one's ideological commitments, this hardly seems a desirable outcome. In a society as pluralistic as the contemporary United States, a basic respect for the rule of law will prove essential to maintaining domestic harmony. Judges, more than any other government officers, should devote themselves to promoting the values generally associated with the rule of law.[247]

As Professor Richard Fallon has observed recently "[t]o think clearly about stare decisis in constitutional cases, it is necessary to think about issues of judicial legitimacy and about the underlying assumptions of legitimacy arguments."[248] Questions surrounding the proper scope and role of stare decisis in constitutional adjudication will continue to vex judges and commentators for

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Spiritual Rebirth Means Starting at O, WASH. POST, June 26, 2000, at C1 (describing Dr. Phil's regular role on Ms. Winfrey's daily talk show and his plain-talking approach to dispensing advice); *NAPTE Buyer's Guide, King World, Dr. Phil*, BROADCASTING AND CABLE, Jan. 7, 2002, at 32 (reporting that "McGraw has been appearing on Winfrey's show since 1998—off and on for two years and, more recently, as the co-host of each Tuesday episode"—and describing his objectives as bringing "leadership and guidance" to his audience via "truth television").

245. *See* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227, 256–58 (2001) (observing that "[t]he insidious potential of partisanship to color perceptions is the reason why promises to oneself and others that such a conflict of interest will play no part in a decision are little comfort," arguing that federal judges must be extraordinarily careful when cases present facts suggesting a conflict of interest, and criticizing the *Bush v. Gore* majority for damaging the institutional legitimacy of the Supreme Court and jeopardizing the plausibility of its claim to be a nonpartisan entity).

246. *See* Schauer, *supra* note 26, at 598–602; Schauer, *supra* note 28, at 654–56; *see also* Brennan, *supra* note 100, at 437 ("Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades.").

247. Doing so would promote important institutional values, including "the preservation of neutrality, consistency, equality and stability in constitutional decision-making and the legitimation of judicial review through the Court's acceptance of its own decisions as binding rules of law." Gerhardt, *supra* note 41, at 70; *see also* Scheppele, *supra* note 3, at 1362–66, 1416–26 (arguing that the Supreme Court majority departed from several long-settled customary practices that it usually observes when engaged in constitutional adjudication and suggesting that the *Bush v. Gore* decision disserved values generally associated with the rule of law).

248. Fallon, *supra* note 30, at 596.

generations to come. Nevertheless, Professor Fallon undoubtedly is correct to posit "that a good legal system requires reasonable stability; [and] that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest."[249] From a purely practical point of view, "it would overwhelm Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated authority of constitutional text, structure, and original history."[250] Viewed from this perspective, *Bush v. Gore* looks very bad indeed. Even if it merely completes an ongoing descent into politics, it certainly accelerated the process in a very public fashion.[251] To see seven of the nine Justices jettison prior jurisprudential commitments to support Governor Bush or Vice President Gore was profoundly depressing. When judges become politicians, the rule of law dies.

Politicians, of course, can change direction with the wind. Historically, federal judges have decried any similar flexibility. Commitment to text and precedent cabin judicial discretion, binding judges to support results that may not comport with their personal preferences.[252] *Bush v. Gore* forces any thoughtful observer to ask whether contemporary Supreme Court Justices feel any professional obligation to maintain the tradition of the institution that they serve. In moments of honest reflection, the Justices must recognize that they have done an immeasurable harm to the credibility of the federal judiciary.

An appropriate penance would consist of a renewed commitment to precedent: no more perpetual dissent and no more "cite and switch." The Chief Justice should be prepared to apply, fully and fairly, the rule set forth in *Roe v. Wade*.[253] Justices Stevens, Souter, Ginsburg, and Breyer should be prepared to apply, fully and fairly, the new limitations on the federal commerce power set forth in cases like *United States v. Lopez*,[254] *Printz v. United States*,[255] and *United States v. Morrison*.[256] Justices Scalia and Thomas should cease their

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249. *Id.* at 585; *see also* Fried, *supra* note 63, at 1144–48 (arguing for the necessity of continuity in constitutional interpretations).

250. Fallon, *supra* note 30, at 585.

251. *See* Farnsworth, *supra* note 244, at 258 ("[The result in *Bush v. Gore*] was horribly consistent with the hypothesis that the Justices were in the grip of the same partisan-influenced riptide that was dominating public opinion everywhere else.").

252. *See* John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983). *But see* Tushnet, *supra* note 18, at 113–15 (arguing that the majority decision in *Bush v. Gore* was blatantly partisan and that judges are inherently political actors, but that legal scholars committed to legal process values will feel constrained to attempt to rehabilitate the majority's decision through a process of "renormalization").

253. 410 U.S. 113, 164 (1973) (ruling that state criminal abortion laws that outlaw abortion, except in life-saving procedures, on the mother's behalf violate the Due Process Clause of the Fourteenth Amendment, which protects an individual's right to privacy, including a woman's qualified right to terminate her pregnancy).

254. 514 U.S. 549, 562–67 (1995) (recognizing limitations to the federal commerce power).

255. 521 U.S. 898, 933–35 (1997) (prohibiting the federal government from "commandeering" state officials to implement federal programs).

256. 529 U.S. 598, 617–19 (2000) (recognizing limitations to the federal commerce power).

perpetual opposition to *Engel v. Vitale*[257] and its progeny. From all points on the ideological compass, it is high time for a truce.

This does not imply that individual Justices must abandon principle in the face of stare decisis. On the contrary, respect for precedent is not inexorably in tension with duty to conscience. A federal judge should be able to apply a precedent with which she disagrees based on dual commitments to the process of judicial decisionmaking and the rule of law.[258] Even if a particular precedent seems wrong or misguided, a federal judge should—consistent with the rule of law—apply the precedent until a majority of the Court no longer intends to adhere to it *and* the new majority can offer very persuasive reasons in support of a new and different rule that transcend mere disagreement with the old rule.

The ancillary benefits of such an approach would be tremendous. First, a renewed commitment to stare decisis would restore order to the nomination and confirmation process. If judges view settled law as settled, it becomes far less important to examine every line of text that a judicial nominee has authored since the fourth grade. A general deescalation of the judicial confirmation process would be good for the federal judiciary and the country as a whole.[259] Second, more stability in constitutional law would engender greater respect for the federal judiciary. Basic propositions about the meaning of the Constitution should not shift with each retirement and new appointment to the Supreme Court.[260] Article V of the U.S. Constitution provides the means for amending

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257. 370 U.S. 421, 430–35 (1962) (holding that use of official prayer in New York public schools violated Establishment Clause); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303–10 (2000) (holding that Establishment Clause prohibited school district from allowing student delivery of religious messages); Lee v. Weisman, 505 U.S. 577, 595–99 (1992) (holding that use of invocations and benedictions in public school graduation ceremonies violated Establishment Clause).

258. *See* Mello, *supra* note 97, at 646–48 (describing Justice Harlan's strong commitment to stare decisis).

259. *See* STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 85–118, 187–206 (1994); MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 213–33, 280–84, 290–324 (2000).

260. Justice Harry Blackmun's sincere, albeit wholly inappropriate, pleas to the electorate to elect a pro-choice President who would pick a committed pro-choice Justice to replace him illustrate this problem. He repeatedly suggested that the constitutional right to reproductive freedom rested on the vote a of single Justice. Consider the following:

> All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. But now, just when so many expected the darkness to fall, the flame has grown bright . . . . And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 922–23 (1992) (Blackmun, J., concurring in part and dissenting in part) (internal citations omitted).

> I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 943 (1992) (Blackmun, J., concurring in part and dissenting in part); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 557, 560 (1989) (Blackmun, J., dissenting) ("Thus . . . the plurality

the document; new members of the court should have, at most, an interstitial effect on basic questions of constitutional structure.[261]

This is not to say, of course, that every disagreement about the scope or meaning of a constitutional precedent represents illegitimate instrumental judging. Good faith differences of opinion undoubtedly will exist in close cases; judges will disagree about the precise holding of a prior case and its implications. Sometimes, entirely different lines of precedent could, by reasonable analogy, be applied to the case at bar.[262] In such circumstances, one cannot reasonably fault the Court for whatever result it reaches, provided that the Justices offer a persuasive rationale for their votes and their votes reflect a consistent course of conduct (or, if a particular vote represents a departure from past voting practices, features some sort of explanation for the change of heart).

That said, perpetual dissent in the area of abortion rights and the scope of the federal commerce power do not fall within this zone of reasonable disagreement. Moreover, the consequences of a shift in a single vote would change radically the basic meaning of the Constitution on these issues. Abortion rights could be here today and gone tomorrow. Similarly, with the right retirement and the appointment of a new Justice with a broader view of federal commerce powers, laws such as the Brady Act and the Violence Against Women Act could

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discards a landmark case of the last generation, and casts into darkness the hope and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children .... [T]he signs are evident and very ominous, and a chill wind blows.").

Justice Blackmun undoubtedly possessed very strong feelings about the conservative majority's potential repudiation of *Roe v. Wade*. His opinions in *Casey* and *Webster* do an excellent job of explaining the importance of stare decisis and how the conservative majority's active, but unexplained, revisionism regarding *Roe*'s holding ill-served these values. *See Casey*, 505 U.S. at 941–42; *Webster*, 492 U.S. at 558–59. Having properly rejected the shoddy treatment of binding precedent, he would have done well to refrain from a naked appeal to the political process to embrace his preferred outcome. If the Constitution itself ostensibly compels a particular result, it seems rather odd to include in one's argument an earnest plea for the electoral process to embrace a result mandated by constitutional text, history, and precedent.

261. *See* Note, *supra* note 63, at 1355–59; *see also* LEVI, *supra* note 70, at 42 ("The development proceeds in shifts; occasionally there are abrupt changes in direction. Within a period and a subject matter there will be some consistency.").

262. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). *Good News Club* presented the Justices with a difficult choice. On the one hand, the Supreme Court could have decided the case by relying on Establishment Clause precedents prohibiting organized religious exercises in the public schools. *See* Engel v. Vitale, 370 U.S. 421 (1962); *see also* Lee v. Weisman, 505 U.S. 577 (1992); Edwards v. Aguillard, 482 U.S. 578 (1987). At the same time, however, cases prohibiting the government from discriminating against speech because of its particular viewpoint were arguably equally relevant and would compel a different result than the precedents involving religious exercises in the public schools. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Cantwell v. Connecticut, 310 U.S. 296 (1940). The Justices reasonably could have selected either rule to allow, or disallow, the local school board's restrictions on the use of its buildings and facilities. The facts of *Good News Club* implicated two conflicting lines of precedent, leaving the Justices with a hard choice. This sort of problem is fundamentally different from 180-degree changes of course about basic questions of constitutional law or structure (i.e., the existence of a right to reproductive freedom or the scope of the commerce power).

be constitutionally permissible exercises of the commerce power. These kinds of shifts do not reflect disagreement about the scope of application of an existing precedent, but a basic refusal to accept current precedents as binding interpretations of constitutional text.[263]

The Supreme Court's legitimacy does not suffer when hard cases divide the Justices over close questions. Once the Court has decided a matter, however, the situation changes. Prolonged dissent over basic questions gives rise to the appearance that the Constitution is merely a shibboleth invoked by the Justices to support desired outcomes, without any real substance or meaning. Over time, the Court's ability to command respect for its decisions will erode if they reflect little more than the moral intuitions of the incumbent Justices.[264]

"The essence of law is that it binds everyone."[265] Presumably, this should include the Justices of the federal Supreme Court. As Professor (and former Watergate Special Counsel and Solicitor General) Archibald Cox has suggested, "[c]onstitutionalism and judicial review would never have achieved success and could not long survive if Charles Evans Hughes's statement that the Constitution means whatever the judges say it means expressed a general truth."[266] If constitutional law is, in reality, fundamentally indeterminate, then there is no reason to prefer judicial resolution of conflicts in constitutional values over legislative or executive branch resolution of such questions.[267] That the Justices of the Supreme Court want and expect deference when they speak to constitutional values necessarily implies some willingness to treat decisions as binding even on themselves, even when, individually, they may prefer a different outcome than a particular precedent requires.

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263. Professor Archibald Cox has explained that:

> [i]f the legitimacy of judicial decrees depends, as I believe, in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law, then the farther a President goes in proclaiming an intent to predetermine the course of decisions, the more he will undercut the foundations of legitimacy.

Cox, *supra* note 26, at 362.

264. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–37, 943–49 (1973). Professor Cox's views are once again instructive:

> The principal source of legitimacy, I believe, is the all-important but fragile faith that the courts apply to current constitutional controversies a continuing body of "law" finding symbolic expression in, but also derived from, the agreement worked out at the Philadelphia Convention in the summer of 1787 and later approved at State conventions by the people of the United States. By "law" I mean a set of governing principles—call them "values," "policies," or "standards," if you prefer—that have a separate existence and command an allegiance greater than that due any individual merely by virtue of office or personal prestige, however strong or wise.

Cox, *supra* note 26, at 375.

265. Cox, *supra* note 26, at 375.

266. *Id.*

267. This is the point that Professor Mark Tushnet has made rather forcefully. *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 33–53 (1999); Mark Tushnet, *"Shut Up He Explained"*, 95 NW. U. L. REV. 907, 919–20 (2001).

CONCLUSION

Viewed from a legal process perspective, *Bush v. Gore* is a truly awful decision. But it is not so because a bare majority of the Supreme Court effectively anointed George W. Bush, nor because the majority failed to articulate a plausible theory of the Equal Protection Clause. Rather, *Bush v. Gore* is a terrible decision because it represents the logical culmination of the emerging jurisprudence of *Oprah!*. It is a highly subjective jurisprudence in which individual Justices treat obtaining a desired result as far more important than the actual means used to obtain the result; a personalized jurisprudence in which subjective moral commitments—whether for or against abortion, or for or against the death penalty—enjoy absolute priority over efforts toward logic, consistency, or the appearance of principled decisionmaking; and a jurisprudence that pays scant attention to values associated with institutional legitimacy and the rule of law.

The Justices of the contemporary Supreme Court should take a lesson from the example set by the second Justice Harlan, who represents the antithesis of the jurisprudence of *Oprah!*. He placed tremendous importance on the process of constitutional adjudication.[268] He dissented when his colleagues decided a matter, at least in his view, wrongly.[269] Having dissented, however, Justice Harlan often acquiesced in applying the precedent established over his objection.[270] Justice Harlan refrained even from voting in political elections, for fear that the mere act of voting might make him appear to be a political, rather than judicial, agent.[271] Like Harlan, the incumbent Justices must take greater care to ensure that the means used to achieve desired results do not undermine the legitimacy of the Court as the chief guardian of constitutional values. Perpetual dissent, "cite and switch," and similar devices erode the credibility of the High Court's claim to be engaged in a process of interpretation rather than raw creation.

At the risk of appearing naive, I believe that the nation's highest Court could have acquitted itself more honorably, that some sense of history and institutional values might have led the Justices to search for common ground. Imagine the nation's response if *Nixon v. United States*,[272] involving the Watergate special prosecutor's subpoena for President Nixon's Oval Office tapes, had been decided on a 5-4 basis with President Nixon's appointees voting against enforce-

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268. *See* Mello, *supra* note 97, at 644–48.

269. *See id.* at 645–46; *see also* Kelman, *supra* note 97, at 274–75, 282–83 (describing Justice Harlan's willingness to acquiesce in precedents with which he disagreed and noting that "[w]hen he was not prepared to concede the majority the last word on the subject, Harlan's instinct was to subordinate himself to the decision until the Court, disillusioned or altered in membership, agreed to reconsideration").

270. *See* Mello, *supra* note 97, at 646–48.

271. *See* Nathan Lewin, *John Marshall Harlan*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, at 445 (Clare Cushman ed., 2d ed. 1995).

272. 418 U.S. 683 (1974).

ment of the subpoena. There the Justices rose to the occasion and produced a unanimous opinion rejecting President Nixon's claim of an unfettered, and virtually unlimited, executive privilege.[273] *Bush v. Gore* cried out for similar judicial statesmanship, but the contemporary Court proved incapable of emulating its predecessor's behavior.

Bush v. Gore should be a lesson. If the Justices fail to exercise greater self-control in the coming years, proposals to reign in judicial discretion are sure to find increasing favor in the body politic. If the Justices are really just another set of politicians, the people will reasonably ask why unelected politicians should have the final say over legislative and executive officials who are more directly accountable to the electorate. Strong judicial review is hardly an indispensable element of democratic government—something that the Supreme Court should keep in mind for the next time.

Perhaps Pericles could have rendered a more powerful *epitaphios* for legal process values, and particularly stare decisis, as an essential component of judicial legitimacy in constitutional adjudication. I have done my best to explain why *Bush v. Gore* represents not a new departure for the U. S. Supreme Court, but rather a logical result from a growing willingness, on the part of Justices from all points on the ideological compass, to disregard process values in favor of obtaining desired results.

My *epainesis* may not adequately praise the importance of process values and extol their virtue in contributing to the legitimacy and, hence, acceptance of judicial review over time. Even so, I hope that a skeptical reader will agree that *some* attention to such matters is essential over the long term if the Supreme Court is to command popular allegiance to its rulings. My *parainesis* urges a renewed focus on process values and principled constitutional adjudication. Reasonable observers of the process of constitutional adjudication should agree that consistency in constitutional law is no vice and that abrupt departures on the part of Justices from previous positions without persuasive explanations are no virtue (and should be avoided).

In an important sense, however, my *epitaphios* may prove unnecessary. Unlike a fallen Greek war hero, principled constitutional adjudication need not remain forever interred. After all, bad habits can be unlearned. The Justices of the United States Supreme Court have the ability to resurrect stare decisis from the ashes, like a Phoenix, to serve as a predictable and meaningful limitation on judicial discretion in constitutional adjudication. From time to time, this would require the Justices to acquiesce in decisions with which they disagree. At the risk of exhibiting a case of terminal naiveté, I believe that the Justices should be willing to apply precedents simply because they are precedents to promote stability in the law and faith in the determinacy of the Supreme Court's interpretative project.

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273. *Id.* at 703–16.