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STARE DECISIS AND THE OVERRULING OF CONSTITUTIONAL DECISIONS IN THE WARREN YEARS

JON D. NOLAND*

INTRODUCTION

The retirement of Chief Justice Warren coupled with the resignation of Justice Fortas may signal the end of the most recent "activist" era in the Supreme Court's history.¹ For example, it appears that there may be some change in emphasis in the Court's decisions as well as greater hesitancy to develop new doctrine and extend present doctrine. Any further changes in the Court's personnel could lead to what Justice Douglas has termed a "substantial unsettlement" in constitutional law pending the determination by the new judges of their positions on constitutional issues.² The question of whether there will be wholesale reversals of recent Supreme Court decisions has been much mooted in the popular press.³ The President, as well as others, is reported to have some hope in this regard.⁴ These accounts, however, have cautioned those entertaining such expectations that the Court is not unrestrained by its prior decisions. Fred P. Graham has written in the *New York Times* :

If the Warren Court's reforms were paraded back before them the erstwhile dissenters might feel bound by the doctrine of *stare decisis* (stand by settled cases) and would not be willing to discard them so soon.

In fact, the "strict constructionists" that Mr. Nixon admires are the least likely agents of constitutional upheaval. Justice Harlan, who dissented against most of the landmark liberal cases, believes so strongly in *stare decisis* that he has recently written a few liberal decisions himself—and has been chided by Justice Hugo Black for hobbling law enforcement.⁵

It is not the purpose of this article to predict the future course of decisions or to weigh the probabilities that specific decisions of the

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1. "Activism" is used both in the sense of a willingness to accept cases as proper for adjudication and a willingness to decide cases according to personal notions of what is desirable. See generally Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 988 (1967).

2. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

3. N.Y. Times, May 25, 1969, § 4, at 2, col. 5; TIME, July 4, 1969, at 62.

4. N.Y. Times, May 25, 1969, § 4, at 2, col. 6.

5. *Id.* at col. 7.

Warren Court will or will not be reversed. However, it does seem appropriate at this time to reassess the role of stare decisis in constitutional adjudication and the process of reversal in the evolution and growth of constitutional law, especially with reference to the Warren years.⁶ It is to this task that we now turn.

HISTORY OF THE DOCTRINE OF STARE DECISIS

The Doctrine at Common Law

The doctrine of stare decisis arose from a desire for certainty and continuity in the law. As early as Bracton and the Year Books of the fourteenth century,⁷ stare decisis has been termed "at least the everyday working rule of our law"⁸ which must generally be adhered to "if litigants are to have faith in the even-handed administration of justice in the courts."⁹ With one exception,¹⁰ the doctrine has never called for complete adherence to prior decisions. Blackstone's proposition was that "precedents and rules must be followed, unless flatly absurd or unjust."¹¹ Thus, in this statement, which is an overly restrictive definition of even the English practice,¹² both a static and a dynamic component are recognized. The American common law doctrine has been well stated as follows:

The general American doctrine behind stare decisis, then, is that a court is not inexorably bound by its own precedents, but, in the interests of uniformity of treatment to litigants, and of stability and certainty in the law, a court will follow the rule of law which it has established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer

6. This is a subject that has been treated periodically in the law reviews. See generally Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948); Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151 (1958); Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U.L.Q. REV. 589 (1931); Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125 (1889); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Reed, *Stare Decisis and Constitutional Law*, PA. BAR ASSOC. Q., April, 1938, at 131; Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962); Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 361, 593, 795 (1933).

7. von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924).

8. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20, 34 (1960).

9. *Id.* at 34.

10. The House of Lords from 1861 to 1966 denied that it had authority to overrule its prior decisions. Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967).

11. BLACKSTONE'S COMMENTARIES ON THE LAW 42 (Gavit ed. 1892).

12. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 349 (5th ed. 1956).

sound because of changed conditions and that more good than harm would come by departing from precedent.¹³

This formulation emphasizes that stare decisis, if it can be considered a rule at all, is at most a rule of *policy* that requires the balancing of a variety of factors in the process of deciding whether a particular precedent or line of precedents should be followed or rejected.¹⁴ The dynamic element of the doctrine is an acknowledgment of the fact that the law must grow and conform to the norms, institutions and sense of justice of the times if it is to command obedience and respect. The static element reminds us that stability and certainty, rather than growth and change, are often higher values and, in any event, that judge-made growth and change must be incremental,¹⁵ interstitial and in harmony with the continuum which is our history. Thus, Holmes did not offend the common-law doctrine of stare decisis when he wrote that "imitation of the past, until we have a clear reason for change, no more needs justification than appetite."¹⁶ He further stated that

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. . . . [Especially] if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁷

THE DOCTRINE IN CONSTITUTIONAL LAW

Rigid Stare Decisis

On occasion it has been stated that certainty and stability are as important in constitutional law as in other kinds of law and that, therefore, the doctrine of stare decisis should apply with equal weight in constitutional cases.¹⁸ This has resulted in an excessive emphasis on the

13. Moore & Oglebay, *The Supreme Court, Stare Decisis and the Law of the Case*, 21 TEX. L. REV. 514, 539-40 (1943). See generally Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941). Cardozo apparently believed that even this formulation was at times too restrictive. CARDOZO, *supra* note 8, at 150.

14. It was Hamilton's view that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ." THE FEDERALIST No. 78, at 471 (Mentor ed. 1961) (A. Hamilton). The fact is that it is for judges to say when they will be bound by precedents, but it does not follow that they exercise an unbridled discretion. *But see* Hertz v. Woodman, 218 U.S. 205, 212 (1910).

15. For a discussion of the incremental nature of judicial decision making see SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 73-91 (1968).

16. HOLMES, *COLLECTED LEGAL PAPERS* 285, 290 (1920).

17. Holmes, *The Path of the Law*, 10 HARV. L. REV. 461, 469 (1897).

18. COOLEY, *CONSTITUTIONAL LIMITATIONS* 79-89 (7th ed. 1903); Chamberlain, *The Doctrine of Stare Decisis As Applied to Decisions of Constitutional Questions*, 3

static element of the doctrine. The view of Mr. Justice Field in *Pollock v. Farmer's Loan & Trust Co.*¹⁹ was as follows:

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 court 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 Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of people.²⁰

Justice Field's statement, which appears to be derived in part from Hamilton's pronouncement,²¹ focuses on the static component of stare decisis in an effort to confine judicial discretion within strict limits and seemingly rejects any departure from the "settled" conclusions of prior cases.²²

This theory, which cannot be attributed solely to Justice Field, allows little or no room for accommodation of the Constitution with the changing *mores* and institutions of American life. It overlooks the fundamental truth that the Constitution contains "not rules for the passing hour, but principles for an expanding future."²³ Although it has been argued otherwise,²⁴ the Constitution cannot be "interpreted as though it were a private contract or a statute enacted for a peculiar, temporary purpose."²⁵ Particular constitutional principles or certain ap-

HARV. L. REV. 125 (1889). Even the proponents of rigid stare decisis are outdone by those holding the view that decisions of the Court become part of the Constitution itself and may be changed only by formal amendment. Cf. *United States v. Moreland*, 258 U.S. 433, 438 (1922).

19. 157 U.S. 429 (1895).

20. *Id.* at 652. Two years earlier in a non-constitutional case Field wrote that "it is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Barden v. Northern Pacific R.R.*, 154 U.S. 288, 322 (1893).

21. See note 14 *supra*.

22. It has been argued that the doctrine of stare decisis is misapplied to constitutional law because of the flexibility embodied in its dual nature. Long, *The Doctrine of Stare Decisis: Misapplied to Constitutional Law*, 45 A.B.A.J. 921 (1959).

23. CARDOZO, *supra* note 8, at 83.

24. Brown, *Construing the Constitution: A Trial Lawyer's Plea for Stare Decisis*, 44 A.B.A.J. 742 (1958).

25. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 257 (1967). The idea that constitutional decisions could be reached in this manner was persuasively rejected by James Bradley Thayer in his significant essay on judicial review. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

plications thereof may be correct for one period of our development and yet incorrect for a future era. It is true that certain clauses of the Constitution may have a fixed, technical meaning that is susceptible of only one correct interpretation.²⁶ However, most of the significant clauses speak only in generalities whose substance and importance vary with the course of history. Hence, their construction and application require more than an ascertainment of the framers' intent. This is demonstrated by the first case in which a prior decision of the Court was expressly overruled. In *Thomas Jefferson*²⁷ the Court had held that the jurisdiction of the admiralty courts of the United States was limited, as was the jurisdiction of the English admiralty courts, to the ebb and flow of the tide. At the time there was little commerce on the rivers and lakes of the west. If such commerce had not developed, the English rule would have accomplished the purposes for which the jurisdiction was granted. However, the development did occur, and the inadequacy of the rule became apparent. Thus, in *Propeller Genessee Chief v. Fitzhugh*²⁸ the Court extended the admiralty jurisdiction to lakes and other navigable waters. Rigid stare decisis, because it fails to allow for such necessary changes and growth, cannot function as a workable precept in constitutional adjudication.

The Denial of Stare Decisis

To be contrasted with the position of Justice Field as expressed in the *Pollock* case is the opinion of Chief Justice Taney that a constitutional decision "is always open to discussion when it is supposed to have been founded in error"²⁹ and that the judicial authority of the Court should "depend altogether on the force of the reasoning by which it is supported."³⁰ Another proponent of this view was Charles Warren who denied that stare decisis can ever properly be applied in constitutional cases since "the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes."³¹ This proposition rests on the thesis that the Court must continually justify its decisions by reference to the language of the Constitution itself and that the Court's own precedents are not evidence of the meaning of that language. Its logic leads one to the conclusion that stability, certainty and continuity fail to play a meaningful role in constitutional adjudication since adherence to precedents depends entirely on their intrinsic "correctness." Therefore, con-

26. For Justice Frankfurter's views see notes 109-112 *infra* and accompanying text.

27. 23 U.S. (10 Wheat.) 358 (1825).

28. 53 U.S. (12 How.) 1058 (1851).

29. Passenger Cases, 48 U.S. (7 How.) 702, 781 (1849).

30. *Id.* at 781.

31. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 748-49 (1926).

stitutional doctrines that are determined to be "erroneous" should automatically be rejected.

As Boudin has pointed out, only such a complete rejection of stare decisis is compatible with our constitutional theory that declares "the absolute lack of power of any department of government to act outside the constitutional limits."³² Indeed, this appears to have been the position taken in *Erie R. R. v. Tompkins*,³³ where Justice Brandeis wrote for the Court:

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout a century. But the unconstitutionality of the course pursued has now been made clear and *compels* us to do so.³⁴

The implication of this language is that there is no occasion for the consideration of competing policies or of the political consequences of an overruling decision where the question is one of constitutionality. Inherent in such a concept is the assumption that there is only one "correct" interpretation of the Constitution that, when "discovered," must be declared and applied with evangelistic vigor while the "erroneous" views of predecessors are dismissed with no little measure of intolerance.³⁵ Obviously, competing considerations are completely submerged in the face of such moral certainty. Therefore, in one sense, the theory underlying the rejection of stare decisis is also overly rigid.

In addition, the denial of any effect of stare decisis in constitutional cases only enhances the public image of the Court as a council of nine wise men who rule solely by *ipse dixit*. If the Justices were in fact infallible, this might be tolerable but, as Justice Jackson so tellingly proclaimed: "We are not final because we are infallible, but we are infallible only because we are final."³⁶ Ultimately the Court's power rests solely on its moral sanction which in turn rests on the belief and fact that its decisions do not reflect merely the individual, arbitrary preferences of

32. Boudin, *The Problem of Stare Decisis in Our Constitutional Theory*, 8 N.Y.U. L.Q. REV. 589, 594 (1931).

33. 304 U.S. 64 (1938).

34. *Id.* at 77-78 (emphasis added). Brandeis, of course, recognized in other cases that stare decisis does have some place in the decision of constitutional questions. *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (dissenting opinion).

35. See the dissenting opinion of Justice Roberts in *Smith v. Allright*, 321 U.S. 649, 666 (1944).

36. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion).

its members. This can be partially insured by requiring that the Court pay some heed to the decisions of its predecessors. As Professor Cox has written :

[T]he Court is to decide not by what is good, or just, or wise, but according to law, according to a continuity of principle found in the words of the Constitution, judicial precedents, traditional understanding and like sources of law.³⁷

Therefore, the judge is usually confronted with the dilemma of deciding constitutional cases through application of traditional judicial tools and methods of reasoning while never losing sight of the political consequences and results of his decisions. If it is properly understood and applied, the doctrine of stare decisis can assist in the accomplishment of both of these tasks.

The Intermediate Premise of Stare Decisis

As a matter of practice as Boudin recognized,³⁸ the doctrine of stare decisis historically has been applied in constitutional cases, albeit less rigorously. One reason for the less rigorous application of the doctrine is that the interest in promoting stability and certainty is frequently not so urgent where great public interests are involved.³⁹ Of course, it is true that property rights are sometimes founded upon a particular constitutional principle, and in such a case, even though the Constitution is involved, it may be "more important that a rule of law be settled, than that it be settled right."⁴⁰ This policy may prevail, for example, where private parties have engaged in a multitude of transactions in reliance upon the rule that they are constitutionally immune from taxation.⁴¹ Reliance may also be placed upon decisions affirming governmental powers, as in questions affecting the taxing powers of the states.⁴² In such instances, the Court must determine that more harm will be done in rejecting than in retaining the questioned rule. That judgment must be based "on very practical and in part upon policy considerations."⁴³ However, the rejection of previously accepted constitutional doctrines will generally not result in the frustration or denial of reasonable expectations arising from

37. COX, *THE WARREN COURT* 21 (1967).

38. Boudin, *supra* note 32, at 619.

39. *Contra*, Chamberlain, *supra* note 18, at 130-31.

40. *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927); *accord* *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 579 (1944) (Stone, J., dissenting).

41. *Cf. Helvering v. Griffiths*, 318 U.S. 371 (1943).

42. *Union Tank Line Co. v. Wright*, 249 U.S. 275, 293-94 (1919) (dissenting opinion). *Cf. United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

43. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 594 (1944) (opinion of Jackson, J.).

transactions based thereon.⁴⁴ To the extent that this is true, the primary justification for adherence to precedents is inapplicable.

Moreover, in addition to the usual consideration, factors peculiar to constitutional cases may be placed in the balance. The reasons which dictate that less consideration be given to the static element of *stare decisis* were well summarized by Mr. Justice (then Solicitor General) Reed as follows:

In the constitutional field the rule should be most liberally applied, because the court must test its conclusions by the organic document, rather than precedent; because constitutional doubts must be personal and present doubts, not those of others; because legislation is often powerless to overcome questionable constitutional decisions; and finally because of the extreme difficulty in rectifying judicial error by amendment.⁴⁵

To this list, of course, should be added Marshall's admonition that "it is a constitution we are expounding."⁴⁶

All would substantially agree with the validity of Justice Reed's statement. Constitutional decisions must plainly be explicable in terms of the language of the Constitution. Concededly, it is difficult to change the Constitution through the process of formal amendment.⁴⁷ On the other hand, it is perplexing to consider constitutional doubts more personal than doubts concerning non-constitutional doctrines. One of the earliest proponents of this theory was Mr. Justice Daniel, who in the *License Cases*⁴⁸ declared:

[I]n matters involving the meaning and integrity of the Constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum*. I, too, have been sworn to observe and maintain the Constitution. I possess no sovereign prerogative by which I can put my

44. The Court so found, for example, in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 1058 (1851). *But see* *Marshall v. The Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 953 (1853): "There are no cases, where an adherence to the maxim of '*stare decisis*' is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts." *Id.* at 958. The disruptive effects of the retroactive application of overruling decisions have been eliminated, particularly in the criminal area, by denying any retroactive effect to such decisions.

45. Reed, *Stare Decisis and Constitutional Law*, PA. BAR ASSOC. Q., April, 1938, at 134.

46. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 579, 602 (1819).

47. This point is made in WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 52 (1910).

48. 46 U.S. (5 How.) 272 (1847).

conscience into commission. I must interpret exclusively as that conscience shall dictate.⁴⁹

The logic of this theory ultimately leads, as did Taney's, to a complete rejection of stare decisis. It rests on the assumption that each Justice is a "solitary philosopher"⁵⁰ who need not show tolerance for what his brethren before him decided and who has no responsibility for convincing the other Justices of the validity of his position or for the actions of the Court as a durable institution. As a matter of practice, however, Justices have been willing, at least in part, to put aside their personal views once it is clear that a majority of their colleagues have found them unpersuasive. Frequently, this results in separate concurrences solely on the ground of stare decisis.⁵¹ If matters of conscience can yield to the honestly held opinions of others and to the demands of stare decisis in this situation, it would seem that there should be equal room for compromise as the Court proceeds to reach its collective judgment in the first instance. Furthermore, the decision making process must involve more than a confrontation among the facts at issue, the Constitution and the Justices' unburdened conscience. The full panoply of political, economic and social considerations must be present in his mind.⁵²

There are a series of objective factors against which the judge can and should measure the dictates of his conscience. These are not directly related to the substantive validity of the doctrine in question, but rather to the process underlying the decision and the age and nature thereof. Nevertheless, they are relevant to the precedential value of a decision. For example, the age of a decision may foretell not only the degree of reliance that has been placed upon it, but also the effect of an overruling on the institution of the Court itself.⁵³ These considerations often work in opposite directions. The prime example, of course, is the *Legal Tender Cases*⁵⁴ in which *Hepburn v. Griswold*,⁵⁵ decided just one year before,

49. *Id.* at 305.

50. *Cf.* Chafee, Book Review, 62 HARV. L. REV. 891, 901 (1949).

51. *Murphy v. Sardell*, 269 U.S. 530 (1925) (Holmes, J., concurring); *Door v. United States*, 195 U.S. 138, 153-54 (1904) (Peckham, J., concurring). Justices have sometimes not felt so constrained where later cases purport to reexamine and reaffirm the grounds of the prior decision. *St. Joseph Co. v. United States*, 298 U.S. 38, 93-94 (Stone & Cardozo, J.J., concurring). Compare the concurring opinion of Justice Harlan in *Orozco v. Texas*, 394 U.S. 324 (1969) with the dissent of Justice Stewart in the same case.

52. Professor Jaffe has written: "[A] judge who listens only to the still, small voice of his own conscience should get himself to a monastery." Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 998 (1967).

53. *Contra*, Chamberlain, *supra* note 18, at 129.

54. 79 U.S. (12 Wall.) 287 (1871).

55. 75 U.S. (8 Wall.) 513 (1870).

was overruled.⁵⁶ With respect to the propriety of this action, it was the opinion of Mr. Justice Bradley that :

Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision.⁵⁷

By the same token, such reversals, when made by a bare majority of the Court, "do no service to the idea of law as something distinct from politics and the arbitrary preferences of individuals."⁵⁸

In addition to the age of the decision, it is pertinent to consider whether the precedent was set by a sharply divided Court or by a unanimous Court and whether the question at issue was elaborately argued and fully considered. A doctrine that has consistently provoked a series of dissents may be more readily overruled than one that has historically enjoyed the full assent of the Court.⁵⁹ This is illustrated by the extreme cases in which affirmance by an equally divided court "is without force as precedent."⁶⁰ Similarly, decisions by a minority of the Court are not entitled to precedential effect.⁶¹ In the same vein, a single decision has never been regarded as binding as a series of decisions. Likewise, a proposition enunciated without full argument and careful deliberation may be entitled to less consideration than one developed through the normal adversary procedure.⁶²

To the above factors, which obviously require the Court to use a complex thematic approach to the problem of stare decisis, Justice Brandeis added a new element. In his famous dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*,⁶³ the Justice wrote :

The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly

56. See generally Sachs, *Stare Decisis and the Legal Tender Cases*, 20 VA. L. REV. 856 (1934).

57. *Legal Tender Cases*, 79 U.S. (12 Wall.) 287 (1871).

58. Cox, *supra* note 37, at 21; cf. *Smith v. Allwright*, 321 U.S. 649, 666 (1944) (Roberts, J., dissenting).

59. *Washington University v. Rouse*, 75 U.S. (8 Wall.) 499, 500 (1869) (dissenting opinion).

60. *Eaton v. Price*, 364 U.S. 263, 264 (1960).

61. *Wesberry v. Sanders*, 376 U.S. 1, 47 (1964) (Harlan, J., dissenting). See generally Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956).

62. Cf. *Seibert v. United States*, 129 U.S. 192 (1889); *Legal Tender Cases*, 79 U.S. (12 Wall.) 339 (1871) (Field, J., dissenting).

63. 285 U.S. 393 (1932).

strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. In the cases which now come before us there is seldom any dispute as to the interpretation of any provision. The controversy is usually over the application to existing conditions of some well-recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute; and of cases under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of the jury.⁶⁴

The distinction between interpretation and application, although not entirely free from difficulty, is based on the hypothesis that application is dependent upon the ascertainment of facts, existing conditions and prevailing views regarding economic and social policy, all of which may vary in a later decision or become subject to fresh and independent considerations. Indeed, these were among the arguments marshalled by Chief Justice Hughes in his opinion for the Court in *West Coast Hotel Co. v. Parrish*,⁶⁵ which upheld the constitutionality of the Washington minimum wage law, overruled *Adkins v. Children's Hospital*⁶⁶ and marked the beginning of the so-called "revolution" of 1937, in which the Court, in a series of reversals, virtually eliminated itself from any control over economic policies promulgated by the political branches. The Chief Justice also found that the *Adkins* case itself departed from the earlier decisions of the Court. Speaking for the four dissenters, Justice Sutherland, in language reminiscent of Justice Daniels, emphasized that constitutional doubts are individual doubts and disputed the proposition that the Constitution can assume a meaning contrary to that intended by the framers. It is against this background and at this crucial time in the nation's and the Court's history that the first of the Justices to serve during the Warren years was appointed.⁶⁷

64. *Id.* at 410; accord, Pound, *What of Stare Decisis?*, 10 *FORDHAM L. REV.* 1, 11 (1941). The distinction was accepted by the Court in *Smith v. Allwright*, 321 U.S. 649, 665-66 (1944).

65. 300 U.S. 379 (1937).

66. 261 U.S. 525 (1923).

67. Justice Black was nominated for the Court on August 12, 1937, and he took his seat on October 4, 1937.

The Doctrine During the Warren Years

The historic divisions among the members of the Court with respect to the proper role of stare decisis in constitutional cases continued throughout the Warren years. In essence, this controversy was a part of the larger disagreement on the proper role of the judiciary that made the Warren Court the most divided Court in our history.⁶⁸ An analysis of the views of each Justice during this period would be neither useful nor possible since it would result in pure conjecture as to those Justices who did not, or have not, articulated their positions on this issue with any degree of completeness. It does seem apparent, however, that there were no proponents of rigid stare decisis on the Warren Court. Within this broad area of agreement three different philosophies, represented by Justices Douglas, Black and Frankfurter, are discernible. The ensuing analysis, therefore, is concentrated on the views of these Justices.

Justice Douglas

Justice Douglas recognizes that stare decisis plays an important role in private law, where "uniformity and continuity in law are necessary to many activities."⁶⁹ He finds little or no place, however, for application of the doctrine in constitutional law. For the Justice, "happily, all constitutional questions are always open."⁷⁰ This condition is the result of three factors which dictate a different treatment for constitutional cases. In the first place, the Constitution states principles that "are designed not for one era only but for the vicissitudes of time."⁷¹ This requires that stare decisis "give way before the dynamic component of history."⁷² Secondly, a judge is sworn to support and defend the Constitution, not the interpretation that his predecessors have given to it, and those interpretations that appear "false" to him must be rejected.⁷³ Finally, the "reexamination of precedent in constitutional law is a personal matter for each judge who comes along,"⁷⁴ or, in Justice Daniel's terminology, it is a matter of "conscience."

Although Justice Douglas does not forthrightly reject any role for stare decisis in constitutional adjudication, one is struck by the absence from his extrajudicial writings of any discussion of those factors which a

68. Kurland, *Earl Warren, The "Warren Court" and The Warren Myths*, 67 MICH. L. REV. 353, 355 (1968).

69. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); cf. *Screws v. United States*, 325 U.S. 91, 112 (1945).

70. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (concurring opinion).

71. DOUGLAS, *WE THE JUDGES* 429 (1956).

72. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

73. *Id.* at 736.

74. *Id.*

judge should consider in his personal reexamination of precedents. The following passage from the Justice's dissenting opinion in *Glidden Co. v. Zdanok*⁷⁵ indicates that he is willing to invoke the traditional arguments on appropriate occasions:

I mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and Hughes Courts were wrong on the technical, but vitally important, question now presented.⁷⁶

Nevertheless, there is no independent reliance on stare decisis in this language, but merely an appeal to the precedents to lend support to a conclusion otherwise reached. The Justice would undoubtedly disagree with the proposition that a judge, because of the presence of the factors which he enumerates, should follow a constitutional precedent when he regards the rule announced therein as erroneous. Rather, it is reasonable to infer from his writings that, in such a case, the judge should and must follow his private judgment. Thus, at the most, past decisions of the Court can give the judge only a "sense of the continuity of a society . . . and of the origins of principles" and "a feel for the durability of a doctrine."⁷⁷ As a practical matter, therefore, it appears that Justice Douglas denies that stare decisis has any independent significance in constitutional cases.⁷⁸

Justice Black

Justice Black accepts the proposition that stare decisis is not an inexorable command in constitutional cases⁷⁹ since "the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents . . ."⁸⁰ The Justice appears to acknowledge, however, that where justified expectations

75. 370 U.S. 530 (1962). In this case, three members of the Court rejected the decisions in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) and *Williams v. United States*, 289 U.S. 553 (1933), pertaining to the Article III status of the Court of Customs and Patent Appeals and Court of Claims.

76. *Williams v. United States*, 289 U.S. 553, 592 (1933). Justice Douglas dissented in only one other overruling case, *Warden v. Hayden*, 387 U.S. 294 (1967), during the Warren years.

77. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949).

78. See Armstrong, *Mr. Justice Douglas on Stare Decisis: A Condensation of the Eighth Cardozo Lecture*, 35 A.B.A.J. 541 (1949).

79. *James v. United States*, 366 U.S. 213, 233 (1961).

80. *Green v. United States*, 356 U.S. 165, 195 (1958) (dissenting opinion).

would be destroyed or where there has been a heavy investment in reliance on earlier cases the doctrine may call for an adherence to precedents.⁸¹ The application of these generalities is deeply influenced by the Justice's philosophy that "the problem of adapting the Constitution to meet new needs [should be left] to constitutional amendments approved by the people under constitutional procedures."⁸² While recognizing that "it is a constitution we are expounding,"⁸³ his interpretation is based primarily on language and history.⁸⁴ It seems paradoxical that he would agree with the viewpoint of Justice Sutherland who, dissenting in *West Coast Hotel Co. v. Parrish*,⁸⁵ wrote:

We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.⁸⁶

Pursuant to these views, Justice Black does not hesitate to call for the overruling of precedents that he finds to be contrary to his reading of history and the language of the Constitution. This was made clear by his dissenting opinion in *Connecticut Gen. Life Ins. Co. v. Johnson*,⁸⁷ where he urged the Court to overrule previous decisions that interpreted the Fourteenth Amendment to include corporations.⁸⁸ In his dissent the Justice gave no consideration to the age of this doctrine, to its role in the economic life of the nation or to the possible consequences of such a reversal. It was enough that "a constitutional interpretation that is

81. *Id.* at 197.

82. BLACK, A CONSTITUTIONAL FAITH xvi (1968).

83. *Id.* at 8.

84. *Id.*

85. 300 U.S. 379 (1937).

86. *Id.* at 402-03. Professor Jaffee has also found a certain kinship between Justices Black and Sutherland. Jaffee, *supra* note 52, at 996.

87. 303 U.S. 77 (1938).

88. Justice Douglas, joined by Justice Black, dissented on similar grounds in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) where the Court held that a foreign corporation was protected from a discriminatory tax under the equal protection clause, Justice Black dissented without opinion.

wrong should not stand.”⁸⁹

On the other hand, Justice Black is a strong supporter of precedents that in his view are correct, particularly when he believes the Court is changing the Constitution by overturning them. Thus, he dissented in *Harper v. Virginia State Bd. of Elections*,⁹⁰ which condemned the Virginia poll tax, because the Court went beyond its power to interpret the original meaning of the equal protection clause. Similarly, in *Katz v. United States*⁹¹ he was unable to construe the language of the Fourth Amendment to apply to eavesdropping.

While many other judges have sought guidance and restraint in the doctrine of stare decisis, Justice Black finds his guidance and restraint in the history and language of the Constitution. The factors and policies underlying stare decisis play little role in his intellectual processes. It does not appear to disturb him that the true meaning of the Constitution is often not revealed to other Justices as it is to him.

Justice Frankfurter

Justice Frankfurter, more than any other Justice during the Warren years, was concerned with the problems of judicial self-restraint and the proper role of stare decisis in constitutional adjudication. The Justice fully realized that stare decisis is less compelling in constitutional cases since “the ultimate touchstone of constitutionality is the Constitution itself”⁹² and since the Court “bears the ultimate obligation for the development of the law as institutions develop.”⁹³ Nevertheless, reversals “must be by orderly process of law”⁹⁴ and “should not derive from mere private judgment.”⁹⁵ Thus, the horns of the dilemma are clearly bared, and the Justice attempted to chart his way between them, in part, by relying on his conception of stare decisis.

Justice Frankfurter, of course, perceived that stare decisis is a “principle of policy and not a mechanical formula”⁹⁶ that requires the delicate balancing of a variety of factors. He brought to this task a keen sense of history which reminded him that the Court seldom wrote on a

89. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938).

90. 383 U.S. 663 (1966).

91. 389 U.S. 347 (1967).

92. *Graves v. New York*, 306 U.S. 466, 491 (1939) (concurring opinion).

93. *Monroe v. Pape*, 365 U.S. 167, 202 (1961) (dissenting opinion).

94. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (concurring opinion).

95. *Graves v. New York*, 306 U.S. 466, 487 (1939).

96. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

clean slate,⁹⁷ although he recognized that a single decision⁹⁸ or a few sporadic decisions⁹⁹ could not check the Court's power to examine an issue from a fresh viewpoint and with an eye on the present. Where, however, a uniform course of decisions held that the *ex post facto* clause had no application to deportation, he was unwilling to disregard precedent, although as a first impression he might have decided the question otherwise.¹⁰⁰

In measuring the intrinsic authority of precedents, Justice Frankfurter was often less concerned with the substantive rules announced therein than with the process by which the decisions were reached and with the Justices who reached them. Thus, he was more reluctant to question or overrule a case that had been comprehensively briefed and argued and thoroughly debated by the Court.¹⁰¹ On the other hand, where he believed an important question had not been adequately considered, he wrote :

[T]he relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration.¹⁰²

The Justice's concern for the decision-making process is exemplified by his unusual action in *Reid v. Covert*¹⁰³ and *Kinsella v. Krueger*,¹⁰⁴ in which he refused to vote or render an opinion on the grounds that the questions had not been adequately considered and that the Court's decision should have been deferred until the following term.

With respect to issues concerning human rights, Justice Frankfurter often refused to question decisions by those judges who he regarded as having been "most zealous in protecting civil liberties under the Constitution."¹⁰⁵ Thus, in *Gore v. United States*,¹⁰⁶ which upheld the

97. *Galvan v. Press*, 347 U.S. 522, 531 (1954); *accord*, *Abbate v. United States*, 359 U.S. 187, 190 (1959) (Brennan, J.), *Marchetti v. United States*, 390 U.S. 39, 76 (1968) (Stewart, J., concurring).

98. *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (concurring opinion).

99. *Toucey v. New York*, 314 U.S. 118, 140 (1941).

100. *Galvan v. Press*, 347 U.S. 522, 531 (1954); *cf.* *United States v. Barnett*, 376 U.S. 681 (1964); *Irvine v. California*, 347 U.S. 128, 138-39 (1954) (Clark, J., concurring).

101. *Adamson v. California*, 332 U.S. 46, 59 (1947) (concurring opinion).

102. *Monroe v. Pape*, 365 U.S. 167, 220-21 (1961) (dissenting opinion).

103. 351 U.S. 487 (1956).

104. 351 U.S. 470 (1956).

105. *Galvan v. Press*, 347 U.S. 522, 532 (1952).

106. 357 U.S. 386 (1958).

legality of multiple consecutive sentences for separate sales of narcotics, he wrote for the Court :

What is more to the point about the *Blockburger* decision is that the unanimous Court that rendered it then included three Justices conspicuous for their alertness in safeguarding the interests of defendants in criminal cases and in their insistence on the compassionate regard for such interests.¹⁰⁷

The Justice considered Holmes and Brandeis as "the originators and formulators of the body of our present constitutional law pertaining to civil liberties,"¹⁰⁸ and, therefore, was always reluctant to overturn one of their decisions. Of necessity, this philosophy reflected extremely personal views held by the Justice and did not command any significant respect from his colleagues. Indeed, one suspects that Holmes and Brandeis themselves would have preferred that the protections they were able to achieve for personal liberties in a hostile period, the formulation of which were undoubtedly weakened as the result of necessary compromises and accommodations, be expanded in accordance with new conditions and beliefs.

Justice Frankfurter, as did Brandeis before him, emphasized the nature of the constitutional rule involved in determining what effect should be given to stare decisis.¹⁰⁹ Frankfurter's distinction, however, was not between interpretation and application, but rather between clauses with a fixed, historical meaning and those designed to expand or contract with the vicissitudes of time. Thus, for the Justice the privilege against self-incrimination was not "one of the vague, undefinable, admonitory provisions of the Constitution whose scope is inevitably addressed to changing circumstances," but "a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic'."¹¹⁰ Similarly, the limits of the defense of double jeopardy are fixed by history and are not subject to change in the manner of the due process clause.¹¹¹ It can not be denied that certain clauses of the Constitution have a more ascertainable and definite historical meaning than others. Nevertheless, one may question whether the Court should regard its role as finished once the historical materials have been fully exposed and some consensus

107. *Id.* at 388-89.

108. *Elkins v. United States*, 364 U.S. 206, 233 (1960) (dissenting opinion).

109. *See also Lee v. Florida*, 392 U.S. 378, 389 (1968) (Harlan, J., dissenting).

110. *Ullmann v. United States*, 350 U.S. 422, 438 (1956); *cf. Marchetti v. United States*, 390 U.S. 39, 76-77 (1968) (Stewart, J., concurring).

111. *Green v. United States*, 355 U.S. 184, 215 (1957) (dissenting opinion).

reached as to the central meaning revealed therein.¹¹²

The above discussion outlines only the broad details of Justice Frankfurter's conception of the role of stare decisis in constitutional cases. He found no rules to guide his judgment in applying the doctrine, but by weighing those factors that he considered relevant he was able to suppress reading his own preferences into the Constitution. The clash of this philosophy with the Douglas-Black approach is reflected in many of the overruling cases of the Warren years.

OVERRULINGS IN THE WARREN YEARS

The Statistics

It is undoubtedly true that many, if not most, significant changes in constitutional law occur through the process of qualifying, distinguishing or expanding precedents without express or implied¹¹³ overrulings of decisions.¹¹⁴ Nevertheless, overruling cases "do represent the most unambiguous manifestations of change."¹¹⁵ In addition to providing some objective measure of the respect accorded to the doctrine of stare decisis during a particular period, an analysis of overruling and overruled cases may indicate those substantive areas in which change has been concentrated.

The process of identifying "overruling" and "overruled" cases is not an easy one. It is impossible to rely on case headnotes or on Shepard's since these sources indicate only those cases which are expressly overruled by the Court. Accordingly, the cases and statistics set forth herein are derived from an examination of the official reports and an attempt has been made to list not only express overrulings, but also overrulings by implication. Decisions that have sought to distinguish a precedent on any tenable ground have not been reported as overruling cases. For example, the Court in *Baker v. Carr*¹¹⁶ distinguished *Colegrove v. Green*¹¹⁷ on the ground that the question of justiciability relied on by three Justices therein was not applicable to the apportionment of state

112. This in itself may be a difficult task. Frederick Bernays Wiener has written with some justification that "in the field of history . . . a judicial opinion has neither finality nor infallibility." WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 187 (1967).

113. A prior decision of the Supreme Court may be overruled by implication. *Commissioner v. Church*, 335 U.S. 632, 745 (1948).

114. See generally Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 361, 593, 795 (1933). Statistics show that "the greater number of instances in which the case is distinguished the less likely the case will be overruled." Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. LAW 414, 430 (1959).

115. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. OF TORONTO L.J. 194, 196 (1962).

116. 369 U.S. 186 (1962).

117. 328 U.S. 549 (1946).

legislatures, although it previously had been so applied.¹¹⁸ The *Colegrove* doctrine, therefore, retained some vitality until *Wesberry v. Sanders*,¹¹⁹ where it was given a complete burial. Thus, *Wesberry v. Sanders* is listed as an overruling case, but *Baker v. Carr* is not.¹²⁰

During the sixteen Terms encompassed by the Warren years,¹²¹ thirty decisions can be identified as overruling thirty-six previous cases on constitutional grounds.¹²² These decisions are distributed by Term as follows:

1954 — 1	1960 — 2	1964 — 3
1956 — 3	1961 — 1	1965 — 2
1957 — 1	1962 — 1	1966 — 4
1959 — 1	1963 — 4	1967 — 3
		1968 — 4

It is significant that twenty (over 55 percent) of the overruling decisions were handed down in the last six Terms and that eleven (30 percent) were handed down in the last three Terms. A comparison of these figures with those derived in previous studies shows that the Warren years were *active* ones, if such overturnings can be used as one measure of *activism*. For example, Justice Douglas found that eight constitutional decisions were overruled between 1860 and 1890 and that twenty-one such decisions were overruled between 1937 and March, 1949.¹²³ Other commentators have found sixty overruling cases in the constitutional law area between 1810 and 1956¹²⁴ and thirty-five reversals in constitutional cases between 1844 and 1946.¹²⁵ Thus, it appears that before the 1953 Term the Court rendered an overruling opinion in a constitutional case approximately every two and one-half years. The Warren Court, on the other hand, averaged almost two overruling decisions per Term.¹²⁶

The average age of the overruled cases is twenty-six years. Nine of

118. *Kidd v. McCannless*, 352 U.S. 920 (1956).

119. 376 U.S. 1 (1964).

120. Technically, since Justice Frankfurter did not speak for a majority of the Court in *Colegrove*, his opinion was not entitled to precedential effect.

121. Chief Justice Warren served under a recess appointment from October 5, 1953, until March 2, 1954. His nomination was sent to the Senate on January 11, 1954, and the nomination was confirmed on March 1, 1954.

122. The New York Times has reported that the Warren Court, as of May 25, 1969, had made 45 reversals, but this figure is not limited to constitutional cases. N.Y. Times, May 25, 1969, § 4, at 2. col. 7.

123. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739, 743 (1949).

124. Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151, 167 (1958).

125. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55, 56-59 (1948).

126. It should be noted that the number of *overruled* cases during the Warren years is not disproportionate to that reported by Justice Douglas for the period of 1937-1949.

the cases overruled (25 percent), however, were decided after Chief Justice Warren assumed his duties.

The impact of the overrulings during the Warren years was felt mainly by the states. Fully seventeen of these cases (47 percent) involved some aspect of the Fourteenth Amendment as it applies to the states. Of the thirty-six overruling decisions, eighteen pertained to criminal procedure and the protection of the rights of an accused, six cases involved the Fourth Amendment, eight dealt with the Fifth Amendment and four with the Sixth Amendment. These statistics demonstrate, as Professor Cox has written, that "the Warren Court has been extraordinarily 'activist' in the field of criminal procedure."¹²⁷ Furthermore, if the cases applying the provisions of the Bill of Rights to the states can be classified as involving interpretation rather than application in the Brandeis dichotomy, at least eight overruling cases have involved the interpretation of the Constitution.

As every casual observer of the Court's work knows, the reversals of the Warren years were far from unanimous. The following table shows the distribution of votes in the thirty overruling decisions:

<u>Vote</u>	<u>Number of Cases</u>
9-0	5
8-0	1
8-1	1
7-1	2
7-2	2
6-2	5
6-3	4
5-2	1
5-4	9

There were sixty-seven dissenting votes in the overruling cases, an average of 2.2 per case. The total number of dissenting votes in the overruled cases is eighty-four or an average of 2.3 per case. In eight of the overruled cases (22 percent) and six (20 percent) of the overruling cases there were no dissents. Only two of the overruled cases were reversed by a unanimous court, whereas two were overturned by 6-3 votes, two by 5-2 votes, one by a 5-4 vote and one by an 8-1 vote. The number of overruling cases in which each Justice dissented is shown by the following table:

<u>Justice</u>	<u>Number of Dissents</u>
Harlan	17

127. COX, *THE WARREN COURT* 87-88 (1967).

Stewart	12
Clark	11
White	8
Black	5
Frankfurter	4
Burton	3
Whittaker	2
Douglas	2
Warren	1

Justice Frankfurter leads the list of the Justices who wrote overruling opinions with four. He is followed by Justices Clark and Minton with three each and by Justices Peckham, Roberts, Reed and Harlan with two each.

The Process of Overruling

To a large extent, *Mapp v. Ohio*¹²⁸ marks the beginning of the federalization of state criminal procedure through the process of selective incorporation of the Bill of Rights into the Fourteenth Amendment. *Mapp*, of course, overruled *Wolf v. Colorado*¹²⁹ and held that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state courts. Although most observers would agree that the *Wolf* rule was a dismal failure, there is much to be regretted in the method and occasion the Court chose to announce its demise. The appellant in *Mapp* urged only that an Ohio statute making criminal the mere knowing possession or control of obscene material, was unconstitutional.¹³⁰ Counsel for Mrs. Mapp did not argue either in his brief or oral argument that *Wolf* should be overruled. In fact, *Wolf* was not even cited in his brief and he disclaimed any intent of urging its reversal during oral argument. The brief of the American and Ohio Civil Liberties Unions, as amici, did request that *Wolf* be re-examined and overruled. This was also urged in oral argument. The brief, however, dealt with this issue in ninety-one words without argumentation of any kind. Justice Clark, writing for the Court, did not discuss the propriety of the Court's reversal of *Wolf* in this posture of the case. Justice Douglas, concurring, relied on the facts that the issue was raised, that argument in cases before the Court is often concentrated on issues other than those which the Court regards as decisive, that the arguments for overruling *Wolf* had often been presented to the Court and that the facts of the case made it

128. 367 U.S. 643 (1961).

129. 338 U.S. 25 (1949).

130. This question was finally decided in *Stanley v. Georgia*, 394 U.S. 557 (1969).

especially appropriate for overruling *Wolf*.¹³¹ All of these arguments miss the mark. While the issue was raised, it was raised in the most tangential and abbreviated way. Although the arguments for overruling *Wolf* had been made before, the Court had always rejected them. Justice Harlan's statement that five members of the Court "simply 'reached out' to overrule *Wolf*"¹³² is completely accurate. His further argument, as follows, is unanswerable:

I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions.¹³³

As previously discussed,¹³⁴ the precedential value of a decision may partially rest on the thoroughness with which the question was considered. All constitutional questions should be thoroughly argued and considered. This is particularly true when the continued validity of an accepted constitutional doctrine that involves delicate problems of federalism is being decided. The conclusion is unavoidable that in *Mapp* the Court acted, not like nine, but like five wise men.

The action of the Court in *Mapp* is to be contrasted with the

131. 367 U.S. 643, 671 (1961).

132. *Id.* at 674.

133. *Id.* at 667. The same arguments were made by Justice Butler in his dissenting opinion in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

134. See notes 128-33 *supra* and accompanying text.

restraint shown by Justice Brennan in *Carnley v. Cochran*,¹³⁵ where, if he had joined Chief Justice Warren and Justices Black and Douglas, *Betts v. Brady*¹³⁶ could have been overruled by at least a vote of 4-3.¹³⁷ One year earlier, in *McNeal v. Culver*,¹³⁸ Justice Brennan had joined in the concurring opinion of Justice Douglas in which the latter wrote that *Betts* was "so at war with our concept of equal justice under law that it should be overruled."¹³⁹ The opinion expressly rejected the notion that *Betts* should not be overruled until an indigent was able to show that the absence of counsel prejudiced him. Justice Brennan, however, declined to adhere to this position in *Carnley*. As Anthony Lewis has written :

Perhaps he felt it inappropriate to overrule a constitutional decision with less than a full bench present, when the result might be said to depend on the accident of vacant seats. Or perhaps he or others thought the grave step of overruling should be taken more deliberately, with counsel in some future case being explicitly directed to focus on the question of the *Betts* doctrine's continuing validity.¹⁴⁰

It seems unfortunate that the same restraint shown in overruling *Betts* was not exercised by Justices Harlan, Brennan and Stewart in *Glidden Co. v. Zdanok*.¹⁴¹ The question in that case was whether the Court of Customs and Patent Appeals and Court of Claims were Article III or Article I courts.¹⁴² In *Ex parte Bakelite Corp.*¹⁴³ and *Williams v. United States*¹⁴⁴ unanimous Courts held that both had been created under Article I. Subsequently, Congress provided that "such court is hereby declared to be a court established under Article III of the Constitution of the United States."¹⁴⁵ Justices Clark and Warren said that Congress, by this legislation, successfully converted the tribunals into Article III courts. Justices Harlan, Brennan and Stewart, however, reading the statutes as a declaration of the original congressional intent, took the occasion to

135. 369 U.S. 506 (1962).

136. 316 U.S. 455 (1942). In *Carnley*, four Justices, including Justice Brennan, found, without overruling *Betts*, that counsel was required by the particular facts of the case.

137. Justice Whittaker had resigned and Justice Frankfurter was in the hospital.

138. 365 U.S. 109 (1961).

139. *Id.* at 119.

140. LEWIS, GIDEON'S TRUMPET 116-17 (1964).

141. 370 U.S. 530 (1962).

142. See generally Greenebaum & Wirtz, *Separation of Powers: The Phenomenon of Legislative Courts*, 42 IND. L.J. 153 (1967).

143. 279 U.S. 438 (1929).

144. 289 U.S. 553 (1933).

145. Court of Claims Act, 28 U.S.C. § 171 (1964); Court of Customs and Patent Appeals Act, 28 U.S.C. § 211 (1964).

disapprove the unanimous decisions in *Bakelite* and *Williams*. Justice Harlan, writing for the three, declared:

Furthermore, apart from this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in non-constitutional cases. . . . there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of *stare decisis*—protection of generated expectations—actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.¹⁴⁶

Contrary to the implication of this language, the expectations involved were equally protected by the rationale of Justice Clark's opinion. Furthermore, even if one accepts Justice Harlan's analysis of the congressional understanding,¹⁴⁷ the reconsideration and disapproval of *Bakelite* and *Williams* was avoidable. Nevertheless, it was possible for the Justice to limit his opinion to the dates of the enactments. Just as decisions of constitutional questions should be avoided if possible, so should unnecessary overrulings and disapprovals of earlier decisions. This is particularly true when undertaken by only three Justices. As Justice Fortas reportedly said, speaking of his role as counsel for Gideon, if an important constitutional case is to be overruled, it is "right for the institution of the Supreme Court, and for the law, to have as much unanimity as possible."¹⁴⁸

If *Mapp* and *Zdanok* are examples of a lack of judicial restraint in overruling and disapproving cases, *Carroll v. Lanza*¹⁴⁹ is an illustration of the opposite tendency. Dissenters have frequently complained that rejection of precedents should be accomplished clearly and forthrightly.¹⁵⁰ The *Carroll* decision is peculiarly subject to this criticism. The story begins with *Bradford Elec. Light Co. v. Clapper*,¹⁵¹ which involved a wrongful death action brought in a New Hampshire federal court by the personal representative of a deceased employee. The employee died of an injury received in New Hampshire, but the employment contract was

146. 370 U.S. at 543.

147. There appear to be some problems in this reasoning. For example, is the declaration of a later Congress as to the intent and understanding of an earlier Congress always binding on the Court?

148. LEWIS, GIDEON'S TRUMPET 119 (1964).

149. 349 U.S. 408 (1955).

150. See *Flemming v. Nestor*, 363 U.S. 603 (1960) (Black, J., dissenting); *Jencks v. United States*, 353 U.S. 657 (1957) (Clark, J., dissenting).

151. 286 U.S. 145 (1932).

made in Vermont. Both the employer and employee were domiciled in Vermont. The Vermont Workmen's Compensation Act provided that the injury or death of an employee subject to the Act, wherever suffered, would be compensated for only as the Act provided, without recourse to actions based on tort. Finding "no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire,"¹⁵² the Court held that New Hampshire was required by the full faith and credit clause to uphold the defense of the Vermont act. Justice Brandeis, for a unanimous Court, further wrote :

A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.¹⁵³

The case of *Alaska Packers Ass'n v. Industrial of California*¹⁵⁴ marks a departure from the *Clapper* philosophy.¹⁵⁵ The Court, weighing the governmental interests involved, upheld application of the California act where the injury occurred in Alaska, even though the contract of employment, which was entered into in California, stipulated that the Alaska Workmen's Compensation Law would apply. The Court relied upon the declaration of the Supreme Court of California that it would be contrary to the policy of California to give effect to the provisions of the Alaska statute.¹⁵⁶

The application of California law was also upheld in *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*,¹⁵⁷ where the Court found that the exclusive nature of the Massachusetts act was "obnoxious" to the policy of California. Justice Stone, speaking for a unanimous Court, wrote :

The *Clapper* case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in

152. *Id.* at 161.

153. *Id.* at 160.

154. 294 U.S. 532 (1935).

155. *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 40 (1965).

156. 294 U.S. 532, 549 (1935).

157. 306 U.S. 493 (1939).

the latter when not obnoxious to its policy.¹⁵⁸

This is the background leading to the *Carroll* decision. The facts therein were similar to *Clapper*, except that the employee had received payments under the Missouri Compensation Act, the state of residence and the situs of the contract, and thereafter, a common law action was brought in Arkansas, the place of injury. There was no evidence that the Missouri act was obnoxious to the policy of Arkansas. In an opinion by Justice Douglas, the Court held that Arkansas was free either to adopt Missouri's policy or to "supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned."¹⁵⁹ It is abundantly clear that this result is directly contrary to the *Clapper* holding, yet the Court did not expressly overrule that case or declare that it would no longer be regarded as controlling.¹⁶⁰ There is no answer to Justice Frankfurter's criticism that *Clapper* should have been explicitly overruled and that it should have been done "with reasons making manifest why Mr. Justice Brandeis' long-matured, weighty opinion in that case was ill-founded."¹⁶¹

Other overruling cases during the Warren years may be criticized on substantive grounds,¹⁶² but this is beyond the scope of this article. The purpose of the foregoing discussion has been to demonstrate that the Court frequently has given inadequate consideration to the process of overruling itself. Occasionally, this has resulted in overrulings on inappropriate occasions, in unnecessary overruling and in failures to expressly overrule decisions that can no longer have validity or effect. The result of such decisions is that the integrity and image of the Court as a durable institution has needlessly suffered.

CONCLUSION

The most superficial study of the Supreme Court and our legal system demonstrates that the Court cannot escape the influence of its own precedents. Even the most *activist* judges are influenced by the interpretations of their predecessors and seek to maintain some appearance of continuity with the past, which, considering the great body of con-

158. *Id.* at 504.

159. 349 U.S. 408, 413-14 (1955).

160. At least one lower court has found that *Clapper* was impliedly overruled by *Carroll*. *Shelby Mut. Ins. Co. v. Girard Steel Supply Co.*, 224 F. Supp. 690, 696 n.7 (D. Minn. 1963).

161. 349 U.S. 408, 421-22 (1955).

162. Perhaps *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) and *Camara v. Municipal Court*, 387 U.S. 523 (1967) are particularly subject to such an attack.

stitutional law, is not an insuperable problem.¹⁶³ The Court occupies center stage in a continual dialogue between past and present through which it is forced "to reexamine in new contexts the validity of the constitutional positions it has previously taken."¹⁶⁴ This reexamination compels the Court to interpret the Constitution in the light of current conditions and fresh, independent considerations in order that the fundamental equilibriums set forth therein be maintained. It is anomalous, but nevertheless true, that our written Constitution, by permitting an appeal back to the document itself, increases the Court's discretion and facilitates the process of change.¹⁶⁵ The Court is thus cast in the role of "the most philosophical of our political departments"¹⁶⁶ which confronts it with formidable problems. Constitutional doctrines necessarily change and precedents are necessarily overruled, yet this must be accomplished with due regard for the necessary demands of continuity and with constant attention to the political and social consequences of each decision. Perhaps more importantly, the process itself must operate within the traditional framework of our democratic institutions and judicial mechanism.

The thesis of this article is that the doctrine of stare decisis, substantially as understood and applied by Justice Frankfurter,¹⁶⁷ can assist the Court in this task. The primary function of stare decisis in constitutional law must be to give the Court some guidance with respect to the propriety or impropriety of overruling a particular precedent. Blaustein and Field have categorized overrulings as "necessary, justified and unwarranted."¹⁶⁸ Although their analysis constitutes a significant contribution, the real problems lie in fitting a particular case into the appropriate category. For example, an overruling is necessary where the precedent results in "great hardship or inconvenience" or where it rests on "obvious error,"¹⁶⁹ but what process should the Court use in making these judgments? Similarly, overrulings are "justified" where a precedent

163. See generally WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 197 (1967); Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD 654 (1918). in *ESSAYS IN CONSTITUTIONAL LAW* 85, 101 (McCloskey ed. 1957). Justice Jackson seriously overstated his case when he wrote that constitutional law precedents "are the most powerful influence in forming and supporting reactionary opinions." JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 295 (1941). The body of precedents is so great that authorities may be readily cited for either *progressive* or *reactionary* purposes.

164. Hart, Book Review, 67 HARV. L. REV. 1456, 1458 (1954).

165. LEVY, AN INTRODUCTION TO LEGAL REASONING 43 (1958).

166. JACKSON, *supra* note 163, at 312-13.

167. It is, of course, possible to subscribe to the Justice's method of analysis without endorsing his position on substantive matters.

168. Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151, 168-77 (1958).

169. *Id.* at 168.

fails to meet the needs of modern conditions or where reconsideration of prior doctrine prompts the Court to change its views.¹⁷⁰ Is the Justice to weigh only modern conditions or the meaning and history of the constitutional provision in question in making this determination? Apparently not, since "unwarranted" overrulings include those where the Court fails to give due consideration and weight to the reasoning and analysis of its predecessors and to the values underlying the static element of stare decisis.¹⁷¹ The crucial question in this formulation, which demands resolution, is what constitutes *due* consideration and weight.

Stare decisis can provide a framework for the analysis of these issues if the Court is willing to recognize that it is a multi-faceted doctrine that requires a sophisticated and conscientious weighing of a variety of factors. Of course, stare decisis is unable to confine the discretion of the Court within any well-defined boundaries. It can, nevertheless, give the Court some assurance that the reversal of a constitutional decision is "rooted in the Constitution itself as an historic document designed for a developing nation"¹⁷² and that it is both necessary and timely. The mode of analysis which the Court should follow can be outlined as follows:

1. The Court should first determine the propriety of a reversal in the circumstances of the case before it. The factors to be considered in this regard are:

- (a) whether the issue has been fully argued and briefed;
- (b) whether at least five Justices are in favor of overruling; and
- (c) whether a reversal is necessary because the precedents are not distinguishable on some valid and meaningful ground, and there are no other grounds, constitutional or otherwise, for the decision.

2. Some judgment must be made of the weight to be accorded to the precedent or precedents involved. The elements that will influence this judgment include:

170. *Id.* at 175-76.

171. *Id.* at 177.

172. *Graves v. New York*, 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring). Aside from stare decisis, of course, the Court must be satisfied that its decisions are "grounded in reason," Hart, *Forward: The Time Chart of the Justice's*, 73 HARV. L. REV. 84, 99 (1959), and "in their generality and their neutrality transcend any immediate result that is involved." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

- (a) the age of the doctrine ;
- (b) the number of cases upholding or applying the doctrine ;
- (c) the degree of support that the doctrine has historically enjoyed; and
- (d) the thoroughness with which the doctrine has been considered in previous cases.

3. The nature of the constitutional question involved has a bearing on the weight to be given to prior interpretations. The Court should analyze the question both with reference to the Brandeis distinction between interpretation and application and the Frankfurter distinction between technical and expanding clauses.

4. The Court must find some substantive basis for reversal. Its attention should be directed, for example, to any :

- (a) new history or learning which casts doubt on the validity of the prior rule ;
- (b) new economic and political conditions which render the rule unfit for continued application ;
- (c) new policies or philosophies which undermine the doctrine's logical foundation ; and
- (d) unfavorable experience with the rule.

5. Finally, the Court must be constantly aware of the consequences of the alternative courses. These include :

- (a) the practical consequences of a failure to overrule ;
- (b) the logical consequences of the new doctrine ; and
- (c) the practical consequences of an overruling.¹⁷³

Obviously, no one factor or group of factors can or should be determinative. One searches in vain for hard and fast rules in this area. Nevertheless, the method of analysis recommended will direct the Court's attention to those considerations that should be uppermost in its mind when a question concerning the validity of a constitutional doctrine comes before it. If this intellectual process is not followed and made evident in the Court's opinions, we have no assurance that a Justice is not merely

173. The Court, as a *maker* of fundamental policy, cannot escape responsibility for the consequences of its decisions. It is, therefore, not only legitimate, but essential, for it "to inquire into the advisability of its end product in terms of the long-range interest of the country." *Miranda v. Arizona*, 384 U.S. 474, 531-32 (1966) (White, J., dissenting). See generally Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924).

reading his own personal preferences into the Constitution. It is impossible, of course, to purge the personal element from judicial decision-making. On the other hand, the notion that the Court is checked only by its "own sense of self-restraint"¹⁷⁴ misses the mark.¹⁷⁵ The appellate process and our adversary tradition subject the judge to a number of restraints. For example, the need to arrive at a collective judgment and to explain the decision in an opinion that will withstand critical analysis.¹⁷⁶ The reversal of a constitutional doctrine must be justified in understandable terms to the parties, the legal profession and the public, especially where the Court is reversing a case that previously upheld congressional or state power.¹⁷⁷

A further reason for respecting *stare decisis* in constitutional adjudication is that the innovations of the Court must be interstitial and incremental in nature. As popular awareness that the Court does not *declare* law grows, this may become increasingly essential to the maintenance of the Court's independence, status and moral sanction.¹⁷⁸ The problem was well stated by Justice Jackson as follows :

Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common-law process would become the most intolerable kind of *ex post facto* judicial law-making. Moderation in change is all that makes judicial participation in the evolution of the law tolerable. Either judges must be fettered to mere application of a legislative code with a minimum of discretion, as in continental systems, or they must formulate and adhere to some voluntary principles that will impart stability and predictability to judicial discretion. To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.¹⁷⁹

174. *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

175. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 402 (1936) (Sutherland, J., dissenting).

176. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 555 (1969). For a criticism of Chief Justice Warren's opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), see McCLOSKEY, *THE AMERICAN SUPREME COURT* 216 (1963).

177. Sachs, *Stare Decisis and the Legal Tender Cases*, 20 VA. L. REV. 856, 884 (1934).

178. *See Carrington, supra* note 176, at 552. Stated differently, the dilemma is that "the Court must face up to the political implications of cases it decides, and, at the same time, keep alive the ideal, the mystery, the magic that it is the law speaking." Mason, *Book Review*, 82 HARV. L. REV. 714, 717 (1969).

179. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944).

If the overrulings of the Warren years are subject to any general criticism, it is that they have seemingly been rendered without an appraisal of all the factors and interests involved. The vision of the Court, perhaps as a result of its failure to recognize the proper role of stare decisis in constitutional cases, has frequently been too narrow. As a consequence, its overrulings are subject to objection for reasons that are unrelated to the substantive changes announced. This unnecessarily weakens the authority of the Court. The need is for a more catholic approach to the problem of overruling that will avoid procedural objections and that will give the Court a greater awareness of the value of its own precedents, the necessity for growth and change and the long-range consequences of its decisions. So long as the Court is exercising the Judicial Power under Article III of the Constitution, it can give, and we can demand, no less.

APPENDIX

Overruling Decision	Date	Vote	Dissenters	Overruled Decision	Date	Vote	Age	Subject Matter
Carroll v. Lanza, 349 U.S. 408	1955	6-3	Frankfurter, Burton and Harlan	Bradford Electric Co. v. Clapper, 286 U.S. 145	1932	8-0	23	Full Faith and Credit Art. IV, Sec. 1
Gayle v. Browder, 352 U.S. 903	1956	9-0		Plessy v. Ferguson, 163 U.S. 537	1896	7-1	60	Equal Protection 14th Amendment
Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (rehearing)	1957	6-2	Clark and Burton	*Reid v. Covert, 351 U.S. 487 *Kinsella v. Krueger, 351 U.S. 470	1956 1956	5-3 5-3	1 1	Court Martial Jurisdiction Art. III, Sec. 2, 5th and 6th Amendments
Green v. United States, 355 U.S. 184	1957	5-4	Frankfurter, Burton, Clark and Harlan	Trono v. United States, 199 U.S. 521	1905	5-4	52	Double Jeopardy 5th Amendment
Elkins v. United States, 364 U.S. 206	1960	5-4	Frankfurter, Clark, Harlan and Whittaker	Weeks v. United States, 232 U.S. 383	1914	9-0	46	Silver Platter Doctrine Supervisory Power (4th Amendment)
Mapp v. Ohio, 367 U.S. 643	1961	6-3	Harlan, Frankfurter and Whittaker	Wolf v. Colorado, 338 U.S. 25	1949	6-3	12	Exclusionary Rule 14th Amendment (4th Amendment)
Glidden Co. v. Zdanok, 370 U.S. 530	1962	5-2	Douglas and Black. Clark and Warren concurred in the result, but dissented from the overrulings.	Ex parte Bakeelite Corp., 279 U.S. 438 Williams v. United States, 289 U.S. 553	1929 1933	9-0 9-0	33 29	Court of Customs and Patent Appeals, Court of Claims, Arts. I and III
Gideon v. Wainwright, 372 U.S. 335	1963	9-0		Betts v. Brady, 316 U.S. 455	1942	6-3	21	Right to Counsel, 14th Amendment (6th Amendment)

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Overruling Decision	Date	Vote	Dissenters	Overruled Decision	Date	Vote	Age	Subject Matter
Wesberry v. Sanders, 376 U.S. 1	1964	7-2	Harlan and Stewart**	Colegrove v. Green, 328 U.S. 549 (Frankfurter opinion)	1946	3-1-3	18	Congressional Apportionment, Art. IV, §4, 14th Amendment
Malloy v. Hogan, 378 U.S. 1	1964	5-4	Harlan, Clark, White and Stewart	Twining v. New Jersey, 211 U.S. 78 Adams v. California, 332 U.S. 46	1908 1947	8-1 5-4	56 17	Privilege Against Self-Incrimination, 14th Amendment (5th Amendment)
Murphy v. Waterfront Commission, 378 U.S. 52	1964	9-0	(Harlan and Stewart would rest the decision on the supervisory power and not overrule <i>Feldman</i>)	Feldman v. United States, 322 U.S. 487	1944	4-3	20	Privilege Against Self-Incrimination, 5th Amendment
Jackson v. Denno, 378 U.S. 368	1964	5-4	Black, Clark, Harlan and Stewart	Stein v. New York, 346 U.S. 156	1953	6-3	11	Due Process 14th Amendment
McLaughlin v. Florida, 379 U.S. 184	1964	9-0		Pace v. Alabama, 106 U.S. 583	1883	9-0	81	Equal Protection 14th Amendment
Pointer v. Texas, 380 U.S. 400	1965	9-0		West v. Louisiana, 194 U.S. 258	1904	8-1	61	Right of Confrontation 14th Amendment (6th Amendment)
United States v. Brown, 381 U.S. 437	1965	5-4	White, Clark, Harlan and Stewart	American Communications Ass'n v. Douds, 339 U.S. 382	1950	5-1	15	Bill of Attainder Art I, Sec. 9
Harper v. Virginia State Bd. of Elections, 383 U.S. 663	1966	6-3	Black, Harlan and Stewart	Breedlove v. Suttles, 302 U.S. 277	1937	9-0	29	Poll Tax—Equal Protection 14th Amendment

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Overruling Decision	Date	Vote	Dissenters	Overruled Decision	Date	Vote	Age	Subject Matter
Miranda v. Arizona, 384 U.S. 474	1966	5-4	Harlan, Stewart, White and Clark (in part)	Crooker v. California, 357 U.S. 433 Gicenia v. La Gay, 357 U.S. 504	1958	5-4	8	Privilege Against Self-In- crimination, 14th Amend- ment (5th Amendment)
Spevack v. Klein, 385 U.S. 511	1967	5-4	Harlan, Clark, Stewart and White	Cohen v. Hurley, 366 U.S. 117	1961	5-4	6	Privilege Against Self-In- crimination, 14th Amend- ment (5th Amendment)
Keyishian v. Board of Re- gents, 385 U.S. 589	1967	5-4	Clark, Harlan, Stewart and White	Adler v. Board of Education, 342 U.S. 485	1952	6-3	15	Free Speech and Association 14th Amendment (1st Amendment)
Afroyim v. Rusk, 387 U.S. 253	1967	5-4	Harlan, Clark, Stewart and White	Perez v. Brownell, 356 U.S. 44	1958	5-4	9	Loss of Citizenship 14th Amendment
Warden v. Hayden, 387 U.S. 294	1967	8-1	Douglas	Gouled v. United States, 255 U.S. 298	1921	9-0	46	Search and Seizure Evidence 14th Amendment (4th Amendment)
Camara v. Municipal Court, 387 U.S. 523	1967	6-3	Clark, Harlan and Stewart	Frank v. Maryland, 359 U.S. 360	1959	5-4	8	Administrative Searches 14th Amendment (4th Amendment)
Katz v. United States, 389 U.S. 347	1967	7-1	Black	Olmstead v. United States, 277 U.S. 438 Goldman v. United States, 316 U.S. 129	1928	5-4	39	Electronic Surveillance 4th Amendment

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Overruling Decision	Date	Vote	Dissenters	Overruled Decision	Date	Vote	Age	Subject Matter
Marchetti v. United States, 390 U.S. 39	1967	7-1	Warren	United States v. Kahriger, 345 U.S. 22 Lewis v. United States, 348 U.S. 419	1953 1955	5-4 6-3	14 12	Privilege Against Self-Incrimination. 5th Amendment
Bruton v. United States, 391 U.S. 123	1968	6-2	White and Harlan	Della Paoli v. United States, 352 U.S. 232	1957	5-4	11	Confrontation Clause 6th Amendment
Moore v. Ogilvie, 394 U.S. 814	1969	7-2	Stewart and Harlan	MacDougall v. Green, 335 U.S. 281	1948	6-3	21	Equal Protection 14th Amendment
Brandenburg v. Ohio, 395 U.S. 444	1969	8-0		Whitney v. California, 274 U.S. 357	1927	9-0	42	Freedom of Speech 14th Amendment (1st Amendment)
Penton v. Maryland, 395 U.S. 784	1969	6-2	Harlan and Stewart	Palko v. Connecticut, 302 U.S. 319	1937	8-1	32	Double Jeopardy Clause 14th Amendment (5th Amendment)
Chimel v. California, 395 U.S. 752	1969	6-2	White and Black	Harris v. United States, 331 U.S. 145 United States v. Rabinowitz, 339 U.S. 56	1947 1950	5-4 5-3	22 19	Search and Seizure 14th Amendment (4th Amendment)

* Opinions "withdrawn."

** Only Harlan dissented from overruling.

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