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Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis

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I. INTRODUCTION

A. *Overview*

Consider the plight of Joe Sinking.[1] Mr. Sinking is a CEO who was recently involved in a major corporate decision regarding the construction of a new nuclear power plant.[2] At the time the decision was announced, construction was expected to take four years at a cost of about $70 million. Before public hearings were held on the proposed project, the initial plan was scrapped in favor of a new plan, with projected costs of over $250 million. By the time the construction permit was granted, more than $80 million had been spent on preparations and obtaining approval for the plant. Now, after seven years and a series of mishaps, protests by environmental groups, regulatory changes and costs totalling over $2.5 billion, Mr. Sinking must decide whether to continue the project or scrap it altogether. Should he continue the project? What role, if any, should the money and effort already spent play in his decision? Should it matter to Mr. Sinking that the plant is 70% complete? 90% complete?

Now suppose that our protagonist, Mr. Joe Sinking, has been appointed to the highest court of his jurisdiction and that Justice Sinking has to resolve a dispute concerning the interpretation of a 60-year-old statute. The petitioner argues that the present dispute is controlled by a case decided in that court about 20 years after the statute was enacted. The respondent argues that because circumstances have changed since the court decided the controlling precedent—and certainly since the statute was enacted—Justice Sinking should feel free to disregard the prior case and decide the dispute in the respondent's favor. Should Justice Sinking follow the 40-year old precedent? What role, if any, should the prior decision play in his decision?

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1. Joe Sinking is a fictional character. The significance of his name will become obvious in the next few pages.

2. The following hypothetical is based on Jerry Ross & Barry M. Staw, *Organizational Escalation and Exit: Lessons from the Shoreham Nuclear Power Plant*, 36 ACAD. MGMT. J. 701 (1993) (examining the Long Island Lighting Company's decision to build and operate the Shoreham Nuclear Power Plant) [hereinafter Ross & Staw, *Lessons from Shoreham*].

This Article argues that, although occurring in two very different contexts, the two situations involving Mr. Sinking regard essentially the same decision-making phenomenon. Mr. Sinking's choices possess the characteristics of what has been referred to in the academic literature as the escalation of commitment problem.[3] Escalation of commitment refers to the tendency of individuals to consider "sunk" costs in their calculations.[4] A common yet telling example involves the decision by a car owner to pay additional money to fix her car simply because she has invested so much already in prior repairs.

This Article explores the concept of *stare decisis* from the escalation of commitment perspective. I argue that the theory of escalation of commitment provides a powerful tool that can be used in our understanding of the application of *stare decisis*. The literature on the use of precedent is extensive;[5] however, this Article develops a new way of looking at case law development and *stare decisis*. In particular, the Article contemplates *stare decisis* as a decision-making process and then considers the academic literature in order that we may gain some insight into that process.

The thesis begins to develop in the first part of the Article, wherein Parts II through IV argue that the process of case law development, with reliance on *stare decisis*, can be described as an escalation of commitment situation. First, Part II introduces the escalation of commitment literature. Then, Part III discusses the application of *stare decisis*. Finally, Part IV analyzes the process of case law development and the application of *stare decisis* from the escalation of commitment perspective. In summary, these sections demonstrate that there is much in common between *stare decisis* and the prototypical escalation situation.

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3. *See* Joel Brockner, *The Escalation of Commitment to a Failing Course of Action: Toward Theoretical Progress*, 17 ACAD. MGMT. REV. 39, 39-42 (1992) (describing the defining features of escalating commitment situations); Donald E. Conlon & Howard Garland, *The Role of Project Completion Information in Resource Allocation Decisions*, 36 ACAD. MGMT. J. 402 (1993) (analyzing the various determinants of escalation situations); Jerry Ross & Barry M. Staw, *Expo 86: An Escalation Prototype*, 31 ADMIN. SCI. Q. 274, 275-79 (1986) [hereinafter Ross & Staw, *Expo 86*] (discussing four general classes of determinants of escalation); Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 29 (1976) (describing U.S. involvement in Indochina during the Vietnam conflict from the perspective of the theory of escalation of commitment); Barry M. Staw & Jerry Ross, *Knowing When to Pull the Plug*, 1987 HARV. BUS. REV. 68, 68-71 [hereinafter Staw & Ross, *Knowing*] (describing the escalation of commitment process).

4. *See* discussion *infra* Part II.A.

5. *See infra* notes 74-76 and accompanying text.

The thesis continues to develop in the second part of the Article, wherein Parts V through VII turn to the analysis of the normative implications of the escalation of commitment theory. Academic literature has traditionally described escalation of commitment as a "flaw," or a decision-making "quirk."[6] Can the same be said of escalation of commitment in the context of judicial decision-making? Part V discusses the normative implications of viewing *stare decisis* as an escalation of commitment problem. I contend that most of the rationales advanced in favor of *stare decisis* are consistent with the argument that judicial decision-making and *stare decisis* involve escalation of commitment. However, I argue that there is at least one aspect of the judicial decision making process—the unique role that judges play in legitimizing the judical process—which is not accounted for in the escalation literature. Thus, I conclude, this idiosyncratic role played by judges as decision makers provides a strong reason for a continued use of the doctrine of *stare decisis*, albeit in a modified form. The question then becomes: What is the appropriate use of precedent?

Before answering this question, I turn one more time to the decision-making literature to explore possible solutions to the escalation problem. In Part VI, I discuss the process of "de-escalation" of commitment, and its application to the judicial decision-making process. I use this discussion to establish a benchmark against which we can judge the approach currently followed by the Supreme Court regarding *stare decisis.*

In Part VII I focus on the doctrinal application of the escalation framework. Two major doctrinal issues are analyzed. First, I elaborate on the implications of the escalation framework for the distinction courts have traditionally made concerning the doctrine of *stare decisis.* In particular I argue that the escalation framework suggests that the distinction between constitutional and statutory *stare decisis* is unwarranted and that, instead, a weaker form of precedent should be applied to all types of cases. Second, Part VII uses the escalation framework as a benchmark against which I evaluate the recent model of *stare decisis* developed over the last decade by the Rehnquist Court, and a more recent model of *stare decisis* advanced by Professor William Eskridge. Part VIII concludes the paper.

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6. *See* Chandra Kanodia et al., *Escalation Errors and the Sunk Cost Effect: An Explanation Based on Reputation and Information Assymmetries*, 27 J. ACCT. RES. 59, 60 (1989) (arguing that "escalation behavior can be explained as part of a larger phenomenon of hiding private information on human capital").

B. Caveats and Limitations

A couple of general explanatory notes are in order. First, any discussion about *stare decisis* faces an initial problem: while *stare decisis* has been described as central to our system of law,[7] it has also faced an extraordinary amount of skepticism. This criticism is somewhat well deserved as judges have, at times, conveniently used the doctrine in an unprincipled manner.[8] In this Article, I operate from the assumption that the doctrine matters and that the problematic issue is not whether to follow precedent at all but when to do so. Accordingly, I try to develop a framework to help us understand the proper role of precedent in the judicial decision-making process.

Second, I discuss the doctrine of *stare decisis* at a fairly abstract level; that is, I consider the doctrine as applicable to judicial decision-making in general. Obviously, due to the hierarchical nature of the judicial system in the United States, lower courts experience *stare decisis* differently than higher courts. Where appropriate, I have made such a distinction.

Finally, I focus this Article on horizontal *stare decisis* (the following of precedents over time) as opposed to vertical *stare decisis* (dealing with the hierarchical relationship between lower and higher courts). While the two forms of *stare decisis* share some features, and indeed some of the arguments made in this Article can be applied indistinguishably, there are various important idiosyncracies. Where appropriate, I make reference to those distinctions.

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7. *See infra* notes 77-79 and accompanying text.

8. Compare Justice Scalia's statement in *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment), *superseded by* 18 U.S.C. § 1001 (Supp. II 1996) "Who ignores [the doctrine of *stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)"—with his statement in *Payne v. Tennessee*, 501 U.S. 808, 834-35 (1991) (Scalia, J., concurring)—"[The doctrine of *stare decisis*], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." While the two statements are not necessarily contradictory, they convey a different tone with regard to the manner in which the courts should apply *stare decisis*. *See* Amy L. Padden, Note, *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, 1706 (1994) (criticizing Justice Scalia for attacking the doctrine of *stare decisis* only "when it dictates a different result from that which he would have reached himself"); *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988) ("[S]tare decisis has always been a doctrine of convenience, to both conservatives and liberals.").

II. A THEORETICAL FRAMEWORK: ESCALATION OF COMMITMENT THEORY

A. *Escalation of Commitment and Sunk Costs*

Decision-making research has broadly classified decisions as either one-time or sequential.[9] Sequential decisions involve: (1) an initial allocation of resources with the expectation of achieving a given goal;[10] (2) a feedback phase, in which decision-makers receive information signaling either that they are engaged in a failing venture or that they have not yet attained their goals;[11] (3) some level of uncertainty;[12] and (4) a follow-up decision regarding whether to continue or withdraw from the initial course of action.[13] One particularly crucial element of some sequential decisions is that of sunk costs.

Sunk costs refer to costs that have already been incurred and that are beyond recovery at the point when the follow-up decision is made;[14] that is, sunk costs may be conceptualized as a payment that was made in response to an earlier decision. The payment may have been in the form of money, but also may have been in the form of time or effort.[15] Sunk costs occur when, over time, streams of anticipated costs and revenues are involved in multiple decisions or multiple time periods.[16] If the reali-

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9. *See* JOEL BROCKNER & JEFFREY Z. RUBIN, ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS 4 (1985). One-time decisions, by definition, cannot result in escalation of commitment situations, since all the effects of the decision are realized immediately. Without future flows of revenues and costs there are no sunk costs, and thus no possibility for escalation. *See* Gregory B. Northcraft & Gerrit Wolf, *Dollars, Sense, and Sunk Costs: A Life Cycle Model of Resource Allocation Decisions*, 9 ACAD. MGMT. REV. 225, 226 (1984).

10. *See* Brockner, *supra* note 3, at 39-40.

11. *See id.*

12. *See id.*

13. *See id.* In an environment where choice is not possible, escalation would not exist. The possibility of choice is the key to the processes that operate to create escalating behavior. Thus, for example, an individual who continues to put money into a car that continues to break down frequently, but who does not have resources to replace the car, is not engaged in escalation type behavior. *See* BROCKNER & RUBIN, *supra* note 9, at 246-48 (discussing the conflict between the United States and El Salvador in the mid-1980s from the escalation of commitment perspective).

14. *See* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 11-14, 231-32 (Scott D. Stratford & Curt Berkowitz eds., 1991) (discussing the sunk costs effect as a pitfall to rational decision making); Barry M. Staw & Ha Hoang, *Sunk Costs in the NBA: Why Draft Order Affects Playing Time and Survival in Professional Basketball*, 40 ADMIN. SCI. Q. 474, 474-77 (1995) (analyzing the escalation problem within the context of the National Basketball Association draft).

15. *See* Howard Garland & Stephanie Newport, *Effects of Absolute and Relative Sunk Costs on the Decision to Persist with a Course of Action*, 48 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 55, 55 (1991) (showing that relative rather than absolute magnitude sunk costs have a significant impact on subjects' reported likelihood of escalation of commitment).

16. *See* Gregory B. Northcraft & Gerrit Wolf, *Dollars, Sense, and Sunk Costs: A Life Cycle*

zation of costs and revenues occurs at a single decision point, the decision-maker incurs no sunk costs.

With decisions involving sunk costs, decision-makers commonly attempt to recover those costs by persisting in the course of action they previously chose. Escalation of commitment refers to the tendency for decision-makers to increase their commitment to previously chosen behaviors on the expectation of recovering the costs already incurred.[17] Despite receiving feedback indicating the wrongheaded character of their prior choices, decision-makers become locked into losing situations, behaving as if they were "throwing good money after bad."[18]

Escalation situations occur both at the individual and organization levels. Examples of escalation at the individual level include: the decision to wait for a bus for a period of time substantially longer than that which it would have taken to walk to the destination;[19] the decision to put additional money into fixing a broken car;[20] and the decision to change jobs.[21] At the organization level, examples of escalation include decisions regarding whether to end labor strikes and whether to terminate ineffective employees.[22] War efforts can also be characterized as escalation situations. For example, a national government engaged in a war involving a considerable loss of life, money, and reputation, must decide whether to make further economic allocations to the war effort.[23] Thus, escalation is created by the tendency to consider sunk costs, costs that are beyond recovery, in choices about future behavior.[24]

Sequential decisions involving sunk costs, therefore, raise a particularly acute dilemma for decision-makers. What role, if any, should be given to the initial decision? Should the costs incurred in making and implementing the initial decision be considered in deciding whether to con-

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Model of Resource Allocation Decisions, 9 ACAD. MGMT. REV. 225, 225 (1984) (examining the "relevance of negative feedback to the decision to commit further resources to completion of a project").

17. *See* Brockner, *supra* note 3, at 40-41.

18. Ross & Staw, *Lessons from Shoreham*, *supra* note 2, at 702.

19. *See* BROCKNER & RUBIN, *supra* note 9, at 1-2.

20. *See id.* at 2.

21. *See id.*

22. *See id.* at 2-3.

23. *See id.* at 245-48.

24. A common experimental design involves an unusual auction situation in which the highest bidder wins a monetary purse but the loser has to pay the amount of his or her bid. This experimental setting creates a situation in which participants continue bidding in order to avoid a certain loss (the amount of their bid). Researchers have demonstrated that participants are likely to become so committed to their position that they will pay more for the monetary reward than it is worth. *See* Staw & Hoang, *supra* note 14, at 475-76.

tinue the previous course of action? In the parlance of decision-making theory, how much weight should be given to "sunk" costs in future decisions?

B. *Why Do Individuals Consider Sunk Costs?*

A number of factors have been advanced to explain why individuals tend to consider sunk costs in sequential decisions. In particular, four factors have been identified as affecting behavior in escalation situations: characteristics of the decision, and psychological, social and structural determinants. None of these factors are completely determinative of escalation and, as will be apparent shortly, their effect may vary at different points during an escalation of commitment experience.

1. *Characteristics of the Decision*

Many believe that the sunk costs problem is caused, in part, by the substantive aspects of the choice itself. For example, factors such as the expected value of the outcome of a particular decision,[25] the risks associated with the decision,[26] and the costs associated with changing the course of prior decisions[27] are likely to affect an individual's decision-making process. Whether these lead to escalation depends on the clarity of the available information.[28] To the extent that there is clear and salient information to explain the negative results of an allocation of resources, it is less likely that individuals will consider sunk costs in making their decisions.[29] Conditions of uncertainty, on the other hand, are likely to result in escalation.[30] For example, an individual's assessment of whether a

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25. *See id.*

26. For example, in their analysis of the Shoreham Nuclear Plant project, Professors Ross and Staw point out that the salvage value of the nuclear plant was never high as compared to it costs, and that following the initial testing of the plant, the salvage value was zero. *See* Ross & Staw, *Lessons from Shoreham*, *supra* note 2, at 716.

27. For example, a business manager will be more likely to stop a failing advertising campaign than the construction of a half-completed plant whose costs have substantially exceeded its budget. The manager will be more likely to consider the sunk costs of the plant project than those of the advertising campaign because of the costs associated with the decision to terminate the project. Notice that the argument is not that such closing costs should not be considered in making a decision; they indeed should be taken into account. The point is that the presence of large closing costs is likely to aggravate the escalation problem. *See id.*

28. *See* Edward J. Conlon & Judi McLean Parks, *Information Requests in the Context of Escalation*, 72 J. APPLIED PSYCHOL. 344, 345 (1987) (discussing the relevance of clarity of information to escalation situations).

29. *See id.*

30. *See* Ross & Staw, *Lessons from Shoreham*, *supra* note 2, at 715.

negative outcome is deemed to be due to a temporary or random setback, or to a permanent causal factor, will influence that person's decision.[31] Therefore, the type of information provided to the decision-maker can increase the tendency to escalate.

Another characteristic of the decision that is likely to influence the decision-maker's choice is whether an "active" or "passive" decision is required.[32] In passive situations, commitment to a previously chosen course of action will continue unless the individual deliberately decides to change course.[33] On the other hand, in active situations, continuing involvement requires the affirmative commitment of resources.[34] Escalation of commitment is expected to be more common in cases involving passive as opposed to active decisions.[35] Arguably, it is both physically and psychologically easier for the decision-maker to escalate in the case of passive decisions since no action need be taken to increase prior commitments.[36] Not only is it easier to escalate in the passive decision situation, but also it is true that requiring the decision-maker to take affirmative action is likely to make more salient the various aspects of the decision,[37]

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31. Consider, for example, the situation of a manager having to decide whether to maintain or discontinue a recently introduced product line after having received a negative marketing report on the product's sales. Whether the manager decides to continue to spend additional resources on the product is likely to be affected by whether he believes the problems to be related to temporary causes, such as unusually bad weather, or to permanent causes, such as technological changes that have made the product obsolete. *See* Staw & Ross, *Knowing*, *supra* note 3, at 69.

32. *See* BROCKNER & RUBIN, *supra* note 9, at 42-43.

33. *See id.* Typical examples include waiting for a bus or maintaining an unsatisfactory relationship or employment.

34. *See id.* Decisions such as further investment in a business venture or construction project are obvious examples.

35. *See id.* at 43. The passive/active variable has been manipulated in various experimental settings. One such experiment involves the use of the "counter game." In the counter game individuals are provided with a initial amount of money and are told that the money is theirs to keep and that they can leave the experiment at any time. The game involves placing the individuals in front of an electronic terminal. Individuals are told that the numbers they will observe will increase at a given rate per unit of time. The subjects are told that a winning number has been randomly selected, such that when the number appears in the screen an alarm will sound indicating that the subject has won the game prize. The prize is smaller than the initial amount. The subjects have to pay for each additional try. In the passive situation, subjects are told the following: "If you want to go on for the jackpot, *do not say anything. If you want to quit, announce out loud the word STOP. Unless you say STOP, the experimenter will re-start the [terminal]. . . .*" In the active decision, on the other hand, subjects are told that "If you want to go on for the jackpot, *you must announce out loud the words GO ON. Unless you say GO ON, the experimenter will not re-start the [terminal], and you will be forced to quit at that point.*" The results of the experiment show that those in the passive situation invest more money than those in the active situation. *Id.* at 43-46.

36. *See id.* at 50.

37. *See id.*

thereby reducing the likelihood of escalating-type behavior.

2. *Psychological Determinants*

In addition to factors associated with the substantive aspects of the decision, factors associated with the manner in which individuals make decisions are likely to influence a decision-maker's tendency to escalate. The focus here is not to provide an analysis of the decision-maker's psyche but to describe the structural factors that are likely to influence the manner in which a decision is made.

"Self-justification" is one of the key psychological factors affecting the behavior of individuals in escalating situations. Self-justification refers to the tendency of individuals to escalate their commitment to prior courses of action because of their unwillingness to admit to themselves, or to others, that earlier decisions were misguided.[38] Thus, escalation is often caused by the unwillingness of the decision-maker to admit that prior expenditures were in vain. Accordingly, as the investment made by the decision-maker increases, so too does the unwillingness to admit failure and, thus, the greater the likelihood of escalating behavior. It is important then to identify the factors likely to affect an individual's unwillingness to admit failure after having been confronted with negative feedback.[39]

The unwillingness to admit failure is directly related to a high need to justify the correctness of the initial allocation of resources.[40] Thus, individuals are expected to be more likely to escalate when they are personally responsible for the chosen course of action.[41] The need to justify the correctness of prior decisions is affected by the consequences of admitting failure. For example, research has shown that the extent to which the decision-maker's job security is dependent on the "correctness" of the decision is positively associated with the likelihood of escalation.[42]

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38. *See generally* F. David Schoorman, *Escalation Bias in Performance Appraisals: An Unintended Consequence of Supervisor Participation in Hiring Decisions*, 73 J. APPLIED PSYCHOL. 58 (1988) (finding that supervisors involved in hiring decisions are more likely to subsequently bias performance appraisal ratings for the hired employee even when confronted with performance data that suggests a different conclusion).

39. *See* BROCKNER & RUBIN, *supra* note 9, at 101.

40. This phenomenon has also been described as "face saving." Social behavior, it is argued, is motivated by the desire to "look good" and to present oneself favorably before others. *See id.*

41. *See generally* Staw, *supra* note 3.

42. *See* BROCKNER & RUBIN, *supra* note 9, at 111-12. As the text indicates, decision-making research has focused primarily on the negative consequences of a wrong decision on the job security of the decision maker. An interesting, although not yet explored question will be whether in situations where there is little relationship between the outcome of the decision and the individual's level

The need to justify is also related to the extent of controversy surrounding the initial allocation of resources. If the initial decision was made in the face of substantial resistance by other individuals within the organization, the decision-maker will likely feel a greater need to justify their prior decision and, therefore, to engage in escalating-type behavior.[43]

The tendency of individuals to escalate is also associated with the way they process information. In particular, prospect theory[44] focuses on the way in which decision-makers process information under conditions of uncertainty and describes decision-making rules under those circumstances.[45] The theory puts forth two observations. First, prospect theory postulates that people evaluate choices in terms of gains or losses relative to a reference point[46] and that "losses loom larger than the corresponding gains."[47] Second, prospect theory proposes that decision-makers are influenced by a "certainty effect."[48] This refers to the fact that individuals tend to "overweight" outcomes that are certain as compared to those that are merely probable.[49] These two observations help define a "value function" that captures the manner in which individuals make decisions.[50]

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of job security, escalation is also likely to occur. For example, in cases in which the individual's job security is completely unrelated to performance, the individual might ignore important information that would alert her to the possibility of escalation.

43. *See* Frederick V. Fox & Barry M. Staw, *The Trapped Administrator: Effects of Job Insecurity and Policy Resistance upon Commitment to a Course of Action*, 24 ADMIN. SCI. Q. 449, 464-65 (1979).

44. There is impressive and fast growing legal scholarship on the application of prospect theory to legal issues. *See, e.g.*, Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995).

45. *See* Glen Whyte, *Escalating Commitment to a Course of Action: A Reinterpretation*, 11 ACAD. MGMT. REV. 311, 314 (1986).

46. This basically refers to the notion of relative preferences. For a review and application of relative preferences to legal issues see Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992). McAdams notes that prospect theory differs from rational economic theory under which choices are evaluated in terms of changes in total wealth. *See id.* at 4-5.

47. This is referred to as "loss aversion." Hasen, *supra* note 44, at 397.

48. *See* Howard Garland et al., *De-Escalation of Commitment in Oil Exploration: When Sunk Costs and Negative Feedback Coincide*, 75 J. APPLIED PSYCHOL. 721, 721 (1990).

49. *See id.*

50. The value function is centered at the status quo and defined over deviations from the status quo; it is concave in the domain of gains, convex and steeper in the domain of losses, and steeper for losses than for gains. *See* Raymond S. Hartman et al., *Consumer Rationality and the Status Quo*, Q.J. ECON., Feb. 1991, at 141, 142. Rational theory assumes that the decision-maker has a utility function that is uniformly concave. *See id.* at 141. This represents the fact that while decision-makers are risk-averse, they calculate changes in total wealth, as opposed to relative changes in wealth. The shape of the value function advanced by prospect theory reflects the generalization that

The major insight provided by the value function is the observation that individuals exhibit risk-averting behavior in choices involving sure gains and risk-seeking behavior in choices involving sure losses.[51]

In the typical escalation situation, the individual, after receiving negative feedback, has the option of withdrawing from a given course of action (i.e., a certain loss) or continuing to commit resources in anticipation of an uncertain gain.[52] Individuals confronting this choice are likely to view the situation from the point of reference of a *loss*.[53] Given the likelihood of risk-seeking behavior in the domain of losses, individuals are likely to escalate rather than withdraw.

Prospect theory has also helped decision-making researchers to identify the so-called "status quo" effect. The status quo effect indicates that individuals favor preserving a state of affairs that they perceive to be the status quo rather than switching to an alternate state.[54] The status quo effect follows directly from the observation that losses are weighted substantially more than objectively commensurate gains.[55] Since changing courses of action in a sequential decision is likely to be evaluated as a loss, and given the "overweighting" of losses, on average, individuals are expected to choose the status quo over other options.

3. *Social Determinants*

Social factors also function into the forces at work among individual decision-makers. For example, the desire not to lose credibility with others is likely to cause individuals to persist in a failing course of action.[56] Thus, not only are decision-makers subject to the pressure of self-justification by not wanting to admit to themselves that they were wrong, but also they are likely to be extremely hesitant to expose their mistake

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just as a difference in subjective value between a move in utility from $50 to $150 appears greater that a change in utility from $1050 to $1150, the difference in subjective value between a loss of $150 and $50 appears greater than the difference in subjective value between a loss of $1150 and $1050. *See id.*; *see also* Brockner, *supra* note 3, at 50; Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268-69 (1979).

51. *See* Brockner, *supra* note 3, at 50.

52. *See id.* at 50-51.

53. *See id.* at 51.

54. *See* Korobkin, *supra* note 44, at 625. This effect has also been referred to as the "endowment effect" or the "willingness to pay versus willingness to accept" differential. McCaffery et al., *supra* note 44, at 1351.

55. *See* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326 (1990).

56. *See* Ross & Staw, *Expo 86*, *supra* note 3, at 277. Notice that unlike the self-justification factors, social determinants result from sources exogenous to the individual.

to others.[57] This kind of pressure is likely to be stronger in contexts where individuals make their decisions under the gaze of a large audience.[58]

In addition to the kind of social pressure described above, other forms of social pressure appear to influence escalating behavior. In particular, factors such as the effect of other's perceptions regarding the role of the decision-maker, and the need for the decision-maker to gain the approval of others, have been identified as significant determinants of escalation of commitment.[59] Decision-makers who show consistency rather than ambivalence tend to experience higher approval ratings.[60] Thus, persistence is seen as a sign of leadership.[61] Accordingly, it is not surprising that decision-makers refuse to withdraw from losing causes even when facing negative feedback.[62]

4. Structural Determinants

Decision making creates a set of relationships which become the structural context for the decision itself. The decision, in a sense, acquires a "life of its own." Changing courses of action becomes much more difficult since forces outside the reach of any one individual appear to take control. Three key factors—inertia, political alliances, and institutional identity—explain the effect that these relationships have on the tendency to escalate.[63] These factors are best explained in the context of the organization decision-maker.

The more time that has passed since the initial decision was made, the greater the likelihood that the initial outcome has become internalized by the organization affected.[64] Once internalized, the decision becomes part of the life of the organization: embedded into its structures and processes.[65] Any attempt to rectify or change the initial decision is likely to be complicated, requiring major disruptions throughout the organiza-

57. *See id.*

58. *See* Joel Brockner et al., *Face-saving and Entrapment*, 17 J. EXPERIMENTAL SOC. PSYCHOL. 68, 77-78 (1981) (describing the effects that the number of monitors have on the tendency of individuals to escalate).

59. *See id.*

60. *See* Ross & Staw, *Expo 86*, *supra* note 3, at 277.

61. *See* Staw & Ross, *Knowing*, *supra* note 3, at 70.

62. *See id.*

63. *See id.* at 70-71.

64. *See* Ross & Staw, *Expo 86*, *supra* note 3, at 277-78.

65. *See id.*

tion.[66] For example, a manager's decision to drop a previously adopted product line might involve not only the issue of stopping production, but also issues such as corporate restructuring, layoffs, and collective bargaining contracts.[67] The interrelationships that are created with the passage of time produce inertia: a tendency to leave things as they are.

Additionally, decisions are not made in a vacuum—particularly not in a political vacuum. Once a decision is made, political forces can provide independent pressure to continue a failing course of action.[68] Thus, individuals or groups that were positively affected by the initial decision are likely to exert pressure on the decision-maker to continue said decision. Again, using the example of a business organization, an initial decision to open a new product line will likely result in the creation of new positions and departments within the organization, and new contacts outside the organization (e.g., with suppliers). A decision to terminate the product line, even if objectively proper, might encounter resistance from these other groups, whose existence may depend upon the survival of that line.[69]

Finally, a decision can become so much a part of the institutional identity of the decision-maker that it becomes difficult—even impossible—to withdraw.[70] The decision, in this sense, becomes integrally tied to the identity of the organization. There have been multiple examples of business organizations that have refused to discontinue losing projects because the projects have become the core identities of those firms.[71]

C. *Summary*

Escalation of commitment refers to situations in which individuals increase their commitment to failing courses of action. The escalation problem is not unique to business organizations but appears to arise in a multiplicity of settings, at both the individual and group levels, since se-

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66. *See id.*

67. *See* Staw & Ross, *Knowing*, *supra* note 3, at 71.

68. *See id.*

69. *See* Ross & Staw, *Expo 86*, *supra* note 3, at 278.

70. *See* Staw & Ross, *Knowing*, *supra* note 3, at 71.

71. Professors Staw and Ross illustrate this point with the example of Pan American World Airways ("Pan Am"). After having experienced severe financial losses due to airline de-regulation, Pan Am insisted on maintaining its domestic routes and heavily crowded international markets, choosing instead to sell most of its other highly profitable assets (e.g., the Pan Am building in New York and the Intercontinental Hotels Corporation). Professors Staw and Ross suggest that Pan Am managers probably did not consider selling the airline, since that was the identity of the organization. *See id.*

quential decisions and the tendency to consider sunk costs are common in all kinds of environments. Four factors have been identified as contributing to the tendency of individuals to consider sunk costs in their decisions: the characteristics of the decision itself; the manner in which decision-makers process information; the existence of social pressure; and the structural context of the decision. These factors are common—maybe inherent—in the judicial decision-making process. Consequently, it is necessary to think of the judicial decision-making process as subject to the escalation of commitment problem.

III. PRECEDENT—AT ITS BEST

Stare decisis is probably the most basic principle of judicial decision-making in the Unites States.[72] As such, it is natural to expect that anyone seeking to challenge the validity of the use of precedent is subject to an enormous burden of proof.[73] An extensive body of literature exists on the doctrine of *stare decisis*.[74] Those who challenge the doctrine have raised two distinct arguments. Some critics of *stare decisis* have challenged the doctrine's rationales on the grounds that they are flawed.[75] Others have argued that, even assuming that the goals of *stare decisis* are worth pursuing, it is not clear that *stare decisis* is the best way of achieving them.[76]

My approach is different. I will assume that there are valid reasons to continue to adhere to the doctrine of *stare decisis*. I do not question

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72. *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735-37 (1949).

73. *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 69 (1991).

74. *See, e.g.*, Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605 (1990); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); James J. Eisenhower, III, *Four Theories of Precedent and Its Role in Judicial Decisions*, 61 TEMPLE L. REV. 871 (1988); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495 (1985); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

75. *See* Maltz, *supra* note 74, at 368-72. Critics have argued that none of the justifications advanced in favor of *stare decisis* are compelling enough to justify the adherence to precedent and that the goals of equity, efficiency, and consistency can be achieved through less draconian principles. Opponents also point out that there are costs associated with adherence to precedent. These costs include, for example, diminished flexibility and adaptability as well as inefficient decision-making. Professor Schauer has noted that "[i]f the best solution to today's case is identical to the best solution for tomorrow's different but assimilable facts, then there is no problem. But if what is best for today's situation might not be best for a different (but likely to be assimilated) situation, then the need to consider the future as well as the present will result in at least some immediately suboptimal decisions." Schauer, *supra* note 74, at 589.

76. *See generally* Alexander, *supra* note 74.

whether considerations based on fairness, equity, reliance, and efficiency are worthy goals, or that *stare decisis* is one way to accomplish those goals. Rather, my argument is that the justifications in favor of *stare decisis* are consistent with the factors that have fueled the escalation of commitment problem.

A. *Basic Definition*

One of the most basic principles of common law legal systems in general, and of the U.S. judicial system in particular, is the concept of *stare decisis*.[77] This principle requires courts to adhere to precedent in deciding cases.[78] Justice Harlan articulated the basic tenets of the doctrine in a passage that is particularly revealing given the framework proposed in this Article.

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[79]

Under *stare decisis*, the "precedent case" controls, in all relevant respects, the result in all future cases presenting similar facts.[80] In its strongest form, *stare decisis* requires the deciding court to follow precedent even though it believes that the precedent was wrongly decided.[81] "Weaker" forms of *stare decisis* recognize that, in the interest of growth and change, courts sometimes will deviate from earlier decisions.[82] In general, however, the basic argument for *stare decisis* can be described as follows: "[t]he previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs."[83]

While discussion about the doctrine of *stare decisis* is normally framed in terms of whether to follow or abandon a prior decision, these

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77. *See id.* at 3.

78. *See* Richard L. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2237 (1997).

79. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

80. *See* Maltz, *supra* note 74, at 372.

81. *See* Alexander, *supra* note 74, at 3.

82. *See* Eskridge, *supra* note 74, at 1361.

83. Schauer, *supra* note 74, at 571.

options are certainly not the only ones available to a deciding court. When faced with a set of facts, a judge can also find that no rule relates to those facts and, thus, expand the domain of the existing rule so as to perpetuate its validity.[84] The deciding court could, similarly, interpret the prior rule narrowly so as to require the adoption of a new rule to solve the existing dispute. In the latter case, the court would have managed to effectively abandon precedent without doing so directly. For purposes of this Article, these options are treated as indistinguishable since they all involve essentially the same ultimate decision: whether to make a judgment solely based on the rules and principles established in a prior case, or whether to consider the dispute anew.

B. Rationales for Stare Decisis

The adherence to precedent has been justified on various grounds ranging from efficiency and resource allocation to equity and fairness.[85] Supporters of precedent have argued, for example, that given the limited resources available to the judiciary, and given that having to reconsider each case from scratch would place undue burdens on these limited resources, the doctrine of *stare decisis* promotes judicial efficiency.[86] Others have argued that the use of precedent ensures that similarly situated litigants will be treated equally over time, thereby allowing individuals to plan their affairs by knowing the future legal consequences of their actions.[87]

1. The Efficiency Argument

Every organization operates within the constraints imposed by limited resources. Courts are no exception. Deciding legal disputes is a difficult and time-consuming process.[88] Courts, it is argued, do not have the luxury of considering every issue as a new one each time it is raised. In Justice Cardozo's words, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every

84. *See* Lawrence E. Blume & Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 407 (1982) (providing a dynamic analysis of the judicial decision-making process).

85. *See* Maltz, *supra* note 74, at 668-72; Padden, *supra* note 8, at 1691-94; Pierce, *supra* note 78, at 2237-48; James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347-64 (1986).

86. *See* Pierce, *supra* note 78, at 2237-48.

87. *See* Maltz, *supra* note 74, at 368.

88. *See* Pierce, *supra* note 78, at 2238.

case, and one could not only lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[89] This theory holds that courts following precedent are able to conserve scarce decisional resources which, in turn, frees up time to address new and challenging cases.[90]

Stare decisis increases efficiency in yet another way. Knowing that a decision made today could have precedential effect in future cases, *stare decisis* encourages judges to exercise foresight in deciding present cases.[91] The principle anticipates that judges will take into account the future types of cases to which the rule adopted in the current case will apply, and upon that consideration will more carefully craft their rules.

2. *The Equality Argument and its Effect on Institutional Reputation*

Stare decisis has also been defended on the grounds that it is necessary to promote equality and fairness. Supporters say that like cases should produce like results, independent of the time in which the dispute is litigated.[92] Furthermore, fairness in decision-making is achieved through rules designed to achieve consistency across a range of decisions.[93] Reliance on precedent is a way of achieving consistency and, thus, fairness across time.[94]

An important aspect of the equality argument is the effect that fair results have on the reputation of the decision-maker. *Stare decisis* allows courts to strengthen their reputation by promoting the perception that decisions are consistent over time.[95] Thus, not only fairness in fact, but the appearance of fairness, are advanced as rationales for the use of *stare decisis*.[96]

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89. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

90. *See* Schauer, *supra* note 74, at 599.

91. *See* Pierce, *supra* note 78, at 2238. Professor Schauer refers to this issue as the "forward-looking" aspect of precedent. Today's decision can be viewed as a precedent for future decisions. "Today is not only yesterday's tomorrow; it is also tomorrow's yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there." Schauer, *supra* note 74, at 573.

92. *See* Pierce, *supra* note 78, at 2243.

93. *See* Schauer, *supra* note 74, at 596.

94. *See id.*

95. *See* Maltz, *supra* note 74, at 371.

96. *See* Padden, *supra* note 8, at 1693.

3. *The Certainty/Reliance Argument*

In addition to considerations of efficiency and fairness, the doctrine of *stare decisis* has also been justified on the basis of a need for certainty in the law.[97] Under this theory, individuals should be able to predict the legal consequences of their behavior and that ability would be seriously eroded if courts were free to disregard precedent.[98] A similar rationale is advanced in a reliance argument.[99] As such, a prior decision serving as precedent is likely to induce reliance on the understanding that the decision is valid and that it will continue to be followed in the future.[100] In these cases, overruling precedent can result in extreme hardship to those who have relied on the prior ruling.[101]

C. *Different Types of* Stare Decisis

1. *Basic Scheme: Statutory, Constitutional, and Common Law Precedent*

The doctrine of *stare decisis* is particularly interesting because it has been applied with different force in a number of contexts. In particular, courts and commentators refer to three types of *stare decisis*: statutory, constitutional, and common law. The theory of *stare decisis* advanced in this Article sheds some light on the validity of this distinction.

A three-tiered hierarchy of *stare decisis* has developed over the years.[102] Statutory *stare decisis*, which refers to the role of precedent in interpreting statutes, involves a heightened adherence to precedent.[103] Courts should, under this version of *stare decisis*, overrule statutory precedent only under the most compelling of circumstances.[104] *Stare decisis* is, on the other hand, weakly applied in the context of constitutional precedent.[105] The Supreme Court, for instance, has consistently followed the

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97. *See* Maltz, *supra* note 74, at 368.
98. *See id.*
99. *See* Schauer, *supra* note 74, at 572-75.
100. *See id.*
101. *See id.*
102. *See* Eskridge, *supra* note 74, at 1362.
103. *See id.*
104. *See id.*
105.

> [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

proposition that precedents should carry less weight in constitutional cases than in cases involving statutory interpretation.[106] Application of *stare decisis* in the common law area is somewhere in between the constitutional and statutory areas.[107] Therefore, common law precedents enjoy a presumption of correctness stronger than that applied to constitutional cases, but not as constraining as that enjoyed by statutory precedents.

2. *Rationale for the Distinction*

Various reasons have been advanced for the development of the three-tiered approach to *stare decisis*.[108] Viewing common law precedent as the base form of *stare decisis*, the question then becomes: why should we raise or lower the base presumption in the case of statutory and constitutional precedent, respectively?

The strong presumption applied to statutory precedent is based on the proposition that legislative silence amounts to legislative approval and that judicial interpretation of a statute over time becomes part of the statute itself.[109] As such, any further judicial reinterpretation of the statute amounts to a statutory amendment, and thus, a usurpation of the legislature's power.[110] The Supreme Court has advanced this argument in some fairly notorious cases.[111] Chief Justice Harlan Stone argued, for example, that Congress' failure to amend a statute to overrule statutory precedent

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Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (footnotes omitted), *overruled by* Helvering v. Producers Corp., 303 U.S. 376 (1938).

106. *See* Rehnquist, *supra* note 85, at 348.

107. *See* Eskridge, *supra* note 74, at 1362.

108. *See id.*

109. *See id.* at 1366-67. "After a statute has been settled by judicial construction, the construction becomes . . . as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect . . . as an amendment of the law by means of a legislative enactment." Douglass v. County of Pike, 101 U.S. 677, 687 (1879); *see also* C. Paul Rogers, III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 626-29 (1977).

110. *See* Rogers, *supra* note 109, at 626. The statutory amendment argument is illustrated by the following excerpt by Justice Black:

> When this Court is interpreting a statute, however, an additional factor must be weighed in the balance. It is the deference that this Court owes to the primary responsibility of the legislature in the making of laws. . . . When the law has been settled by an earlier case then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute.

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting), *overruled in part by* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1970).

111. *See* Flood v. Kuhn, 407 U.S. 258, 284 (1972).

raises the presumption that Congress approves of the judicial interpretation.[112]

The conditions that support the heightened presumption in the statutory context are weakened in the context of constitutional case law.[113] Constitutional precedent, therefore, is subject to a weak presumption of correctness. That is, in the constitutional context, *stare decisis* is at it weakest. Unlike in the statutory context, the judiciary, not the legislature, is the ultimate arbiter of the Constitution. Since there is no other direct means by which to correct wrongly decided cases, and in order to allow for the adoption of necessary changes in the law, the "[judiciary] must not be constrained by precedent."[114] Otherwise, "incorrect doctrine could never be changed."[115] Similar to the legislative acquiescence argument, the argument in favor of a weak version of *stare decisis* in constitutional cases is motivated by the relationship between the judiciary and the legislature.[116] Unlike the legislative acquiescence argument, it is the legislature's inability to readily amend a constitution, instead of its silence, that requires the judiciary to adopt a different form of the use of precedent.[117]

IV. CAN CASE LAW DEVELOPMENT BE CONCEPTUALIZED AS AN ESCALATION PROBLEM?

A. *Overview*

Having considered the concept of escalation of commitment and the doctrine of *stare decisis*, it is appropriate to question whether case law development, with its central reliance on precedent, can be conceptualized as a sunk costs problem. My contention is that even if we are to agree that there are strong reasons for supporting the doctrine of *stare decisis*, the use of precedent still presents a sunk costs problem. The manner in which case law develops under our judicial system fits the escalation of commitment prototype. In particular, reliance on *stare decisis*

112. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940).

113. It could be argued that since there are mechanisms to amend the Constitution, the failure of the community to challenge the court's interpretation is similar to congressional silence and thus signifies acquiescence. The more difficult process of amending the Constitution as compared to enacting new legislation weakens the strength of that argument. *See* Rehnquist, *supra* note 85, at 350-51.

114. *Id.* at 350.

115. *Id.*

116. *See id.* at 369-70.

117. *See id.*

makes it very likely that courts will, in considering the case at hand, tend to overemphasize the weight and value to be given to precedent.

B. Case Law Development as Sequential Decision-Making

The sunk costs problem occurs in situations involving sequential decisions.[118] Thus, to argue that case law development and adherence to precedent involves sunk costs, the sequential decision-making characteristics of case law development must first be established.

1. The Initial Decision

Sequential decisions begin with an individual making a decision in the hope of achieving certain goals.[119] In the context of case law development, it makes sense to consider the initial case interpreting a statute, construing a constitutional provision, or deciding a common law dispute as the starting point. The initial decision then becomes a sunk cost and, therefore, should not be a factor in future decisions. Thus, to conceptualize case law development as a sunk costs problem, we must identify the costs associated with judicial decision-making and what aspects of it amount to a sunk cost.

Judicial decisions are, in a very real sense, costly. There are various costs associated with reaching a judicial decision.[120] Direct costs include those associated with reaching a decision as, for example, the effort and resources that a court must devote to consider and research a case.[121] In addition, opportunity costs are involved since other cases not yet before a court either are not considered at all (in situations in which the court has discretion over the cases it hears) or are forced to await consideration due to the longer queue that is created.[122]

In escalation situations the initial decision is undertaken with a goal in mind. In the context of judicial decision-making, it is not difficult to think of possible goals that judges seek to achieve when reaching deci-

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118. *See supra* Part II.A.

119. *See supra* notes 9-13 and accompanying text.

120. *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258-71 (1974) (describing the costs associated with the creation of rules); Ronald A. Heiner, *Imperfect Decision and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227, 232-34 (1986) (analyzing the evolution of *stare decisis* as a dominant mode of decision in the common law); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 250-51 (1976) (analyzing legal precedent as inputs into the production of judge-made rules of law).

121. *See* Ehrlich & Posner, *supra* note 120, at 267.

122. *See* Landes & Posner, *supra* note 120, at 268-70.

sions. A recent yet voluminous body of literature addresses the question of the goals judges pursue in their role as decision-makers.[123]

Various positions have been identified in this literature. The traditional position states that a judge's goal is to follow the law.[124] Under this view, judges discern the law governing a particular dispute and then decide the case in a manner consistent with the basic rule.[125] A second position argues that judges seek to maximize prestige.[126] Finally, the "public choice" model advances yet another view. The general impact of this literature is that "judges are primarily motivated by a desire to impose their normative views, beliefs, and mores on the society in which they live."[127]

For the objectives of this Article it is not necessary to resolve the issue of which of these views is the proper one. The point is that regardless of the particular goal judges have in mind when deciding a case, their behavior is always purposive. Judges decide cases with some purpose in mind and, once a decision is made, that purpose serves as a benchmark by which to evaluate the degree of success of their decision.

In the context of case law development, the specific contours of the judges' goals are dependent on the type of dispute—statutory, constitutional, or common law—the judge is asked to decide. Regardless of the individual judge's goal, the type of case before the court can impose additional burdens on the judge's ability to achieve his or her goal. For example, in cases in which the court's role is to interpret a legislative act, the initial goal is, to some extent, established not by the court but by constraints imposed by the legislature.[128] Thus, the court, under this view, will try to discern and give effect to the legislature's intent in enacting

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123. See, e.g., Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1310-11 (1997) (analyzing the effect of judicial selection mechanisms on the behavior of judges) and references cited therein.

124. *See* Douglas, *supra* note 72, at 735 (discussing the role of *stare decisis* in constitutional cases).

125. *See id.*

126. *See* Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983).

127. Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward A Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738 (1993). As Professor Hasen notes, however, this view has been challenged in several respects. *See* Hasen, *supra* note 123, at 1310.

128. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Harold J. Krent, *The Failed Promise of Regulatory Variables*, 73 WASH. U. L.Q. 1117, 1118-19 (1995) (discussing the *Chevron* decision and its implications for statutory interpretation); *see also* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS., Winter 1994, at 3.

the statute.[129] In common law and constitutional cases, judges are potentially less constrained in terms of the range of options available since the legislature's intent is no longer a determinative factor.[130]

2. *Feedback Phase*

Sequential decisions involve a feedback period in which decision-makers receive information concerning the extent to which their initial goal has been achieved.[131] During this phase, the decision-maker may receive feedback indicating that the initial goal has or has not been obtained. If the feedback indicates that the goal has been achieved, then there is no sunk costs problem since no further decision need be made. On the other hand, the decision-maker may receive feedback indicating that the initial decision has produced negative results or that the desired outcome has not been achieved. For example, consider a car owner who must decide whether to put additional money into fixing a broken car. This person's goal is obviously to have a car that works properly. Feedback comes in the form of information concerning the mechanical condition of the car.

After making an initial decision, judges are in the position to receive feedback about that decision. Whether the feedback is considered negative or positive clearly depends on the goal the judge is pursuing. Judges who adhere to the traditional position and seek exclusively to find the law and follow it will evaluate the dispute from the perspective of that goal. Judges who seek to impose their own views on society will make a similar assessment. In either case, an opportunity to obtain feedback exists after the initial decision, and that supports the sequential character of the judicial decision-making process.

In this particular process, feedback may result from a number of unintended sources. Litigants may not intend to provide feedback to the court as to a prior decision, but they are, nonetheless, creating a situation for the deciding court to obtain feedback. In addition to the litigants, other potential sources of feedback exist. Two possible sources are discussed below: the legislature and the judiciary. The degree to which these sources are relevant depends on the type of dispute (i.e., statutory, constitutional, or common law) with which the court is dealing. Regardless of

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129. *See generally* Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS., Winter 1994, at 51.

130. *See* Rehnquist, *supra* note 85, at 347-53.

131. *See supra* notes 10-11 and accompanying text.

the context, however, all of the following are potential sources of negative feedback.

a. The Legislature as a Source of Feedback

Legislatures and courts are distinct yet related parts of our system of law.[132] The extent to which courts should interact with legislatures, the role that legislatures should play in case law development, and the deference that courts should give to the legislatures are subjects of considerable debate.[133] Two approaches have been advanced as delineating the basic parameters of this debate.

Under the "static" view, elements of government are believed to act in isolation from one another.[134] Accordingly, the static view tends to segregate the worlds of common law and statutory law.[135] This approach holds that courts should pay little attention to—even disregard—legislative interventions into common law since common law is an area of judicial responsibility.[136] By the same token, in areas where the legislature has taken statutory action and decided public policy, the only role left for the courts to play is that of enforcing the intent of the legislature.[137] The direction of public policy will, under this approach, only change when the legislature chooses to act again.[138] Under the static model, courts are limited in their ability to develop case law concerning statutory interpretation. In particular, the court's main task when confronted with interpreting statutes is to discern the meaning of the statute when enacted.[139] While the static view permits consultation of not only the statute's text but also a variety of legislative materials, it strictly limits the relevant time period to that of the statute's enactment.[140]

The "dynamic" approach allows for a much more active relationship between the legislature and the judiciary.[141] The dynamic view proposes that common law and statutory law are parts of the legal land-

132. *See* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 437 (1994) (describing the relationship between courts and legislatures).

133. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983).

134. *See* Strauss, *supra* note 132, at 437.

135. *See id.* at 437-38.

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.* at 439-40; *see also* Aleinikoff, *supra* note 133, at 47-54.

140. *See* Strauss, *supra* note 132, at 440.

141. *See id.* at 437.

scape.[142] Legislatures act on the understanding that courts will "flesh out" statutes.[143] Therefore, courts should recognize this interaction and be willing to enter the public policy debate with an interpretative approach different from that suggested by the "static" model. In particular, courts should recognize that statutes acquire meaning over time as social and legal contexts change.[144] Under the dynamic approach, courts are free to consult not only the statute's text and its legislative history, but any material that allows the court to arrive at the outcome that best fits contemporary law.[145] The dynamic approach envisions a significant role in the process of case law development for both the enacting legislature and for future legislatures.[146]

Legislative feedback could take a number of forms. A legislature may attempt to overturn a judicial decision by means of a legislative act.[147] If the court's goal was to discern and implement the legislature's intent, and the legislature feels that the court deviated from the statute's design, the legislature can intervene or enact legislation to correct what it perceives to be a wrongheaded course of action.[148] Additionally, developments in other areas of the law can serve as feedback to the courts with regard to different yet related areas.[149] Such developments may reveal substantive inconsistencies that should be attended to by the courts.[150] Similarly, legislative developments can uncover more favorable approaches to public policy.[151]

Thus, to the extent that courts operate under some version of the dynamic model, the possibility of the legislature serving as a form of feedback becomes workable. The relevance of the legislature as a form of feedback will be reduced to the extent that courts adhere to the static model. Still, the legislature could serve as a source of feedback within the escalation of commitment context.

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142. *See* CALABRESI, *supra* note 133, at 81-90.

143. *See id.* at 91-109.

144. *See id.*

145. *See* Strauss, *supra* note 132, at 440.

146. *See id.*

147. *See* Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503 (1996) (discussing a rational choice model of congressional reversals).

148. *See id.* at 503-04.

149. *See* Strauss, *supra* note 132, at 439 (pointing to economic regulation at the federal level over the last two decades as an example of this situation).

150. *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 708-11 (1995), *superseded by* 18 U.S.C. § 1001 (Supp. II 1996).

151. *See* CALABRESI, *supra* note 133, at 90-109.

b. Other Courts as a Source of Feedback

A court also receives feedback by considering the impact of its decision on other courts. For example, lower courts or appropriate agencies must apply the rulings of higher courts within their jurisdiction to similar factual situations.[152] The higher court can assess the continuing development of the case law by analyzing how lower courts or agencies are dealing with the issue.[153] Through this process, a dialogue is established across the levels of the judicial hierarchy to ascertain the effect of prior rulings.[154]

Lower courts have various ways of communicating with higher courts. Lower courts, for example, can "underrule" superior court precedents.[155] Underruling refers to the practice of lower courts disregarding the precedent of a higher court.[156] While commentators disagree about the propriety of underruling as a judicial strategy, the general consensus holds that there are cases in which underruling may be desirable.[157] For example, cases in which the lower court judge possesses a better understanding of the implications of a ruling than members of a higher court,[158] or where the lower court concludes that a given procedural ruling is unmanageable in practice,[159] have been cited as examples of proper cases for underruling. In addition, lower courts can issue a "critical concurrence."[160] By so doing, a lower court can stimulate legal reform while following precedent by criticizing but maintaining that precedent and urg-

152. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994) (discussing the practice of hierarchical precedent).

153. *See id.*

154. *See id.*

155. Underruling has been supported as necessary to spur legal reform. *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82-83 (1989) (arguing that underruling may be an essential part of the process of judicial self-correction). It is not clear, however, that underruling will necessarily lead to reform since the higher court always has the option of reversing the defiant lower court, resulting in the same ruling but with a corresponding loss in reputation. *See* Caminker, *supra* note 152, at 863-65.

156. *See* Paulsen, *supra* note 155, at 82-83. For a recent example of underruling, see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

157. *See* Caminker, *supra* note 152, at 862.

158. Professor Caminker argues that underruling would be proper in cases in which the inferior court judge is confident that the higher court judge has failed to appreciate a significant negative consequence of its precedent. "For example, the Supreme Court might have interpreted an environmental statute without foreseeing the negative effect its interpretation would have on a particular region of the country. A lower court in that region, in contrast, could easily foretell that result." *Id.* at 862 n.197.

159. *See id.*

160. *Id.* at 863.

ing its reversal.[161]

Whether either of these two practices are used, courts and agencies serve as a valuable source of feedback to other courts. Courts deciding whether to follow precedent have this information available to them and can use it to improve their decision-making process.

3. *Uncertainty*

Under the typical escalation scenario, decision-makers operate under a degree of uncertainty. Uncertainty here refers to whether committing further resources (i.e., to continue the same course of action) is likely to produce the desired result.[162] In the case development process, uncertainty is likely to permeate decision-making. Judges normally make decisions in a state characterized by incomplete information about the implications of their decisions.[163] Thus, it is easy to see how this aspect of escalation can be identified in case law development.

4. *Real Choice*

Finally, decision-makers must have a "real choice" in deciding whether to continue or withdraw from their previous course of action.[164] Again, it is easy to see the applicability of this factor to the case development context. Except for their duty to rely on precedent, little else binds judges to follow previous decisions.[165] Judges possess substantial flexibility in deciding whether to continue or change directions in the development of a legal doctrine.[166] In fact, as discussed earlier, the doctrine of *stare decisis* has been applied with different force in different contexts.[167] This suggests that courts have some flexibility in deciding whether to follow precedent.[168] While there may be other constraints im-

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161. *See id.*

162. *See* Brockner, *supra* note 3, at 40.

163. *See* Heiner, *supra* note 120, at 242-46.

164. *See* Brockner, *supra* note 3, at 40.

165. Obviously, precedent in this sense cannot be a justification for not changing course since the doctrine of precedent only dictates that precedent should be followed, not why it should be followed.

166. The degree of flexibility is greater for judges sitting on higher courts than judges sitting on lower courts. Still, as discussed earlier, even lower court judges have some degree of flexibility in the development of legal doctrine.

167. *See supra* notes 102-07 and accompanying text.

168. Various commentators have noted that courts have been inconsistent in the application of *stare decisis*, suggesting that the doctrine can be manipulated by the interests of the deciding judge. *See supra* note 8 and accompanying text.

posed on judges limiting their ability to have a real choice,[169] in general, a high degree of flexibility is inherent in the judicial process. United States Supreme Court Justices, for example, have few internal constraints on their ability to change directions in the development of legal doctrines.[170]

C. *Case Law Development as an Escalation Problem*

Assuming that the prior discussion is correct and that case law development can be characterized as a sequential decision-making process, an interesting question is raised: are decision-makers in the judicial process subject to the sunk costs problem? Likewise, are the factors that affect the tendency of decision-makers to consider sunk costs operating in the context of case law development? To the extent that some or all of these factors can be hypothesized to influence the behavior of judges, the proposition that case law development is indeed an example of escalation is bolstered.

1. *The Substance of the Dispute*

Escalation situations are associated with substantive aspects of the relevant choice itself.[171] In the case law development context, these substantive aspects include consideration of possible doctrinal frameworks, public policy considerations, and underlying factual assumptions. The escalation framework suggests that, to the extent that information about these substantive aspects is available and indisputable, judges are less likely to place inordinate weight on precedent and will, instead, reconsider the issue anew.[172]

Not surprisingly, some would likely argue that there is a relationship between precedent and substance which helps to explain judicial decisions. The escalation framework, however, provides a different kind of insight. The use of precedent instead of substance as the basis for a decision has been traditionally explained on efficiency grounds.[173] That is, by

169. For example, lower courts might be restricted to follow a given doctrinal bent not because of precedent, but due to the hierarchical nature of the judicial system.

170. Of course, there are other constraints imposed in the Supreme Court. *See, e.g.*, Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 266-74 (1990) (discussing the constraints imposed on the Court from a public choice perspective).

171. *See supra* notes 25-31 and accompanying text.

172. *See supra* notes 29-30 and accompanying text.

173. *See supra* notes 85-86 and accompanying text.

relying on precedent, the court avoids having to delve into the substantive aspects of the case, thereby making the judicial decision-making process more efficient. The escalation framework suggests that the causal direction could go the other way. Under this model, efficiency appears to be used as a "smoke-screen." Generally, when processing information necessary to reach a decision, a decision-maker confronting inadequate data chooses to rely on sunk costs as the source of information.[174] Courts appear to act in a similar manner by relying on precedent when information as to the substantive aspects of a dispute is unavailable, unclear, or useless.

Another characteristic of a decision that relates to the tendency of individuals to escalate is the distinction between "passive" and "active" decisions.[175] In passive situations, commitment to a previously chosen course of action will continue unless the individual deliberately decides to change courses.[176] In the case of active decisions, continuing involvement requires the affirmative commitment of resources.[177] Escalation of commitment is expected to be more common in cases involving passive as opposed to active decisions.[178]

The passive/active distinction in escalation research is useful in understanding the difference between constitutional and statutory *stare decisis* and, in that sense, helps us to analyze the process of case development as an escalation of commitment problem. Courts have traditionally applied *stare decisis* with more force in statutory cases as compared to constitutional cases.[179] The basic rationale for the distinction is that in statutory cases the role of courts is to interpret the intent of the legislature.[180] Once a court has reached a conclusion regarding the legislature's intent, the court's job has been completed. Thereafter, any further changes in the law should be initiated by the legislature, not by the courts. In constitutional interpretation, the courts play a more central role and, thus, adherence to precedent is subject to a weaker presumption.[181]

The escalation framework suggests a curious explanation for the distinction between statutory and constitutional use of precedent. The passive/active distinction in escalation research has been identified in terms

174. *See supra* note 30 and accompanying text.
175. *See supra* notes 32-37 and accompanying text.
176. *See supra* note 33 and accompanying text.
177. *See supra* note 34 and accompanying text.
178. *See supra* note 35 and accompanying text.
179. *See supra* notes 105-06 and accompanying text.
180. *See supra* notes 109-12 and accompanying text.
181. *See supra* notes 113-17 and accompanying text.

of the actions that the decision-maker must take to escalate.[182] For example, in the "counter game," the active condition requires the decision-maker to take an affirmative action to continue to play, while in the passive condition playing automatically continues.[183] Although researchers employing the game relate its nature to their experimental subjects, the subjects do not choose which game to play.[184] In this sense, the substantive aspects of the decision are isolated from other factors affecting the decision-maker. In the context of judicial decision-making, the divide between statutory and constitutional *stare decisis* suggests that courts are "choosing the rules of the game," and that they have chosen to play a passive role in statutory cases but an active one in constitutional disputes. By viewing its role more passively in statutory cases, courts are defining these decisions as passive. Accordingly, courts are more likely to rely on precedent, as opposed to reevaluating decisions in subsequent cases.

2. *Institutional Reputation and Certainty*

The tendency to consider sunk costs is also related to the need to justify one's actions to self or to others, the tendency of individuals to treat the prospect of losses differently than the possibility of gains, and the propensity to treat certain outcomes differently than probable outcomes.[185] All three of these factors appear to be part of the case law development process, manifesting themselves in self-justification and an information processing bias.

Self-justification refers to the tendency of individuals to escalate their commitment to prior courses of action because of their unwillingness to admit to themselves or to others that earlier decisions were misguided.[186] In the context of the application of *stare decisis*, there is a notably interesting parallel situation. One of the traditional arguments for following precedent is the institutional reputation argument, which holds that the reputation of the judiciary will be adversely affected if the public thinks that decisions are made in unprincipled manners.[187] Concerns about reputation are, in a sense, a matter of self-justification. Consistent with the escalation framework, courts that focus their attention on the is-

182. *See supra* notes 36-37 and accompanying text.
183. *See supra* note 35.
184. *See id.*
185. *See supra* notes 38-55 and accompanying text.
186. *See supra* note 38 and accompanying text.
187. *See supra* notes 92-96 and accompanying text.

sue of reputation are more likely to rely on precedent.[188]

Notice the lack of a perfect correspondence between the reputation effect in escalation situations and the reputation effect of *stare decisis*. *Stare decisis* protects institutional reputation while, in the business context, escalation relates to the protection of individual reputation. Moreover, in the business context, escalating situations are normally associated with the need for individuals to justify to themselves or others the correctness of their actions.[189] In this context, the reputation of the institution is normally not a concern. In the judicial decision-making context, however, institutional concerns are likely to be of great significance. Depending on the particular court and on the manner of appointment to that court, judges may have little concern about their individual reputation, but much more concern about the reputation of the institution.[190] It is not only concern over individual reputation that fuels the sunk costs problem, but also concerns about institutional reputation.[191] Applying the escalation framework to the judicial decision-making context suggests a point for further development of the escalation literature.

A second type of psychological factor that appears to be relevant in the application of the escalation framework to the case law development process relates to information processing bias. As discussed earlier, decision-makers tend to be risk-seeking in the domain of losses and to excessively discount probable, as opposed to certain, outcomes.[192] What this means is that there is a tendency for decision-makers to continue a failing course of action as long as there is any probability, however small, that the desired outcome will be attained.

While it is difficult to isolate this type of tendency in the process of case law development, the comments of judges that have discussed the doctrine of *stare decisis* illustrate that this phenomenon is at work. Justice Brandeis, for example, admitted that "*[s]tare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[193] Judges that

188. As discussed below, *infra* note 324 and accompanying text, the recent Supreme Court decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992), provides an example of a discussion concerning the issue of institutional reputation and how it affected the Court's decision-making process.

189. *See supra* notes 41-43 and accompanying text.

190. Elected judges, for instance, might be more concerned about individual reputation than judges appointed for life. *See* Hasen, *supra* note 123, at 1309-13.

191. *See supra* notes 70-71 and accompanying text.

192. *See supra* notes 44-55 and accompanying text.

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

follow this reasoning may fall into something akin to the "gambler's fallacy," under which individuals erroneously believe that a series of losses makes the prospect of a win more likely.[194] That is, by deciding one more case in a manner consistent with precedent, the whole doctrine will be clarified without having to undertake major doctrinal revisions.

Probably the most revealing parallel between *stare decisis* and the information processing bias that causes individuals to consider sunk costs is the status-quo effect. Deciding to reject precedent is like a decision to change courses in the typical escalation situation. Accordingly, the judicial decision-maker must realize that the prior decision was incorrect, or at least inapplicable to the present dispute, and reverse course. The decision-maker is likely to see rejecting precedent as a loss given the value that the system places on *stare decisis*.[195] As in the typical escalation situation, losses are likely to be "overweighted";[196] thus, judges considering whether to follow precedent are likely to place an inordinate amount of weight on the value of staying on course. Such a manner of processing information is likely to fuel the escalation problem.

3. *Legitimacy Through Consistency*

The need to maintain credibility by showing persistence and consistency has been identified as one of the factors associated with a tendency to escalate.[197] These factors may operate at both individual and institutional levels within the judicial system, making it more likely that courts will escalate. At the institutional level, the concern over institutional reputation appears to relate to the question of credibility and consistency. One of the justifications of *stare decisis* is the level of legitimacy that it provides the courts as decision-makers.[198] The desire to achieve that legitimacy can be explained, in part, by the concerns of judges about maintaining credibility. Again, this basic premise of *stare decisis* is closely related to one of the factors that has been identified with an increased tendency to escalate.

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overruled by Helvering v. Producers Corp., 303 U.S. 376 (1938).

194. *See* Garland et al., *supra* note 48, at 722.

195. *See* Rehnquist, *supra* note 85, at 353-43 (discussing adherence to precedent as a way of legitimizing the authority of the Supreme Court).

196. *See supra* notes 47, 55 and accompanying text.

197. *See supra* notes 57-62 and accompanying text.

198. *See* Lyons, *supra* note 74, at 512.

4. *Inertia and Identity*

Structural forces also appear to influence the tendency to escalate in the judicial context. Inertia, one of the structural determinants identified in the escalation literature,[199] appears to operate in the context of case law development. The more time that has passed since the initial decision was made, the more likely the initial outcome has become internalized by the individuals affected.[200] Once internalized, any attempts to rectify or to change the initial decision are likely to require major disruptions throughout the organization.[201] The interrelationships created with the passage of time produce inertia: a tendency to leave things as they are.[202]

In the case law development context, an "older" precedent can become institutionalized, not only as part of the doctrinal framework in a given area of the law, but also as part of the political identity of a given judge or court. Over time, inertia makes it increasingly difficult to abandon such a position.[203] Therefore, the internal[204] and external[205] forces of inertia make it increasingly difficult for the court to change directions and increasingly likely that escalation will occur.

V. NORMATIVE CONSIDERATIONS

The process of case law development, with *stare decisis* as its center, apparently shares some common characteristics with the type of decisions likely to involve sunk costs. This is evidenced by the fact that judicial decision-making is sequential in nature, and that the factors associated with the sunk costs problem appear to operate in the case law development context. The following discussion considers the normative implications of this realization.

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199. *See supra* note 63 and accompanying text.

200. *See supra* notes 63-67 and accompanying text.

201. *See supra* note 64 and accompanying text.

202. *See supra* notes 63-67 and accompanying text.

203. See *infra* notes 301-06 and accompanying text for a discussion regarding the effect of a precedent's age on the application of the doctrine of *stare decisis*.

204. *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (discussing the rational choice and attitudinal models of Supreme Court decision-making). While the attitudinal model holds that judges generally have the ability to decide disputes based primarily on their sincere ideological attitudes and values, it still recognizes the constraints imposed by both the facts of the disputes and the group dynamics generated in a multi-member court. *See id.* at 28-29.

205. *See generally* Gely & Spiller, *supra* note 170 (explaining that as a political actor, the judiciary is subject to the constraints imposed by the other branches of government).

A. *Sauce for the Goose . . . ?*

While traditional law and economics scholars disagree with much of what behavioral law and economics scholars have to say, they probably agree on the view that the sunk costs problem is real and that it tends to result in less than optimal outcomes.[206] Decision-makers, it is argued, will be better off by learning to disregard sunk costs in all cases. As will be discussed later, researchers have identified "de-escalation" strategies to alleviate this decision-making flaw.[207]

Having asserted that judicial decision-making suffers from a sunk costs problem, the remaining question is: is this bad? Is *stare decisis* to be condemned because of its escalation of commitment tendencies or are there other reasons that justify adherence to precedent despite the existence of a sunk costs problem?

B. *The Saving Grace: Judges' Roles in the Lawmaking Process*

As discussed earlier, the doctrine of *stare decisis* has been justified under three different theories: efficiency, equality and institutional reputation, and certainty and reliance.[208] I have shown that these rationales are indeed the reasons why the doctrine can be described as an escalation of commitment problem. Each of the arguments advanced in favor of *stare decisis* include factors that decision-making researchers have identified as producing escalation of commitment situations. If the efficiency, equality, and certainty/reliance rationales were the doctrine's only support there would be but one conclusion: get rid of it!

There is, however, a saving grace for *stare decisis*. A common theme pervades among the various rationales advanced in favor of the doctrine of *stare decisis*. This common theme is, in effect, bigger than each of its individual components. *Stare decisis* reinforces one of the most central values in the American political system: the belief that principles governing society should be "rules of law and not merely the opinions of a small group of men who temporarily occupy high office."[209] This argument reflects the understanding that judges play a criti-

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206. For an interesting debate between traditional and behavioral law and economics proponents, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577 (1998); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

207. *See infra* notes 211-19 and accompanying text.

208. *See supra* notes 85-100 and accompanying text.

209. Maltz, *supra* note 74, at 371 (citing Florida Dep't of Health & Rehabilitative Serv. v.

cal role in developing the law, a role that is different from any other function within our political system—and probably different from any other type of decision-making in general. The public perception of what the "rule of law" is involves a "blend of the value systems of both past and present judges, leaving room for both continuity and change."[210] Under this rule of law view, prior case law is essential to maintaining the supremacy of law over the opinion of current office holders and, thus, judges must pay attention to it.

This view suggests that judges are different from other types of decision-makers in a very important way. While other decision-makers should not include prior decisions (sunk costs) in their calculus, judges are expected to do exactly that because of their role in developing the law. Therefore, a judge's tendency to consider sunk costs is not pathologic, but a required component of the job description.

Attention to prior decisions, however, should not be absolute. The rule of law requires a combination of both present and past considerations and allows for continuity and change. Although judges are different kinds of decision-makers, they are also subject to the sunk costs problem. The issue then becomes how to apply *stare decisis* so as to maximize both rule of law values and minimize escalation of commitment problems. The remainder of this Article focuses on that issue.

VI. A POSSIBLE SOLUTION

A. *De-escalating Commitment*

Decision-making researchers have identified two approaches for reducing escalation.[211] Under the reverse-treatment approach, researchers have sought to manipulate the forces believed to create the tendency to escalate.[212] Reducing these forces is expected to result in de-escalation.[213] This approach attempts to reduce those forces believed to increase the tendency of individuals to justify—either to self or to others—a prior decision.[214] For example, researchers have suggested that separating the in-

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Florida Nursing Home Ass'n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring)).

210. *Id.* at 372.

211. *See* Itamar Simonson & Barry M. Staw, *Deescalation Strategies: A Comparison of Techniques for Reducing Commitment to Losing Courses of Action*, 77 J. APPLIED PSYCHOL. 419, 419 (1992) (developing a model of de-escalation situations).

212. *See id.* at 419-20.

213. *See id.*

214. *See id.*

dividuals who made an initial decision from those responsible for allocation of further project resources should reduce the tendency to escalate since such a separation reduces the social and psychological forces likely to lead to escalation.[215]

A second approach to reducing escalation has focused on improving the prowess of decision-makers.[216] This approach aims to improve aspects of the decision-making process itself which, if left unattended, can lead to escalation.[217] For example, the consideration of sunk costs in future decisions is linked to the tendency of decision-makers to "continue with old policies without reevaluating their earlier decisions, thus saving decision time and effort."[218] To overcome this tendency, researchers suggest establishing procedures to force decision-makers to thoroughly evaluate all options, including comprising a detailed list of the reasons for and against each potential alternative.[219]

Both of these approaches attempt to create a link among sunk costs, negative feedback, and the subjective probability of future returns.[220] That is, de-escalation is possible when the uncertainty inherent in future decisions is reduced by relying on the diagnostic value provided by the negative feedback individuals receive.[221] It is critical, then, to take some initiative that helps decision-makers to identify the informational value encoded in negative feedback so that they may realize when "persistence is more costly than withdrawal."[222]

B. Can Case Law be De-escalated?

Having discussed the de-escalation framework, the focus now shifts to applying the insights acquired from this consideration to the question posed earlier: what is the proper weight to be given to precedent? Additionally, how can judges fulfill their role under the rule of law while avoiding excessive escalating-type behavior?

De-escalation research suggests two approaches to reduce the decision-maker's tendency to escalate: (1) manipulation of the factors that cause individuals to justify (to self or others) prior decisions; and (2) im-

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215. *See* Staw & Ross, *Knowing*, *supra* note 3, at 71-74.
216. *See* Simonson & Staw, *supra* note 211, at 420.
217. *See id.*
218. *Id.*
219. *See id.*
220. *See* Garland et al., *supra* note 48, at 722.
221. *See id.* at 726.
222. *Id.* (quoting Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations: Antecedents, Prototypes and Situations*, *in* 9 RES. ORGANIZATIONAL BEHAV. 39, 69 (Barry M. Staw ed., 1987)).

provement of decision-making by making apparent the diagnostic value of the negative feedback received by the individual making the decision.[223] Normally, the escalating effects of the need to justify could be limited by: separating the initial decision-maker from the individual in charge of deciding future allocations;[224] providing assurances of confidentiality;[225] and reducing the risk of failure by limiting the implications to the individual having made a decision that led to a negative outcome.[226]

In the context of judicial decision-making, however, not much can be done to reduce the need to justify to self or others. Indeed, several safeguards are already built into the system to prevent such occurrences. Natural turnover in the judiciary is likely to result in situations in which the same court, but not the same judges, is involved in decisions in the same area. Since legal disputes can last for long periods of time, it is possible that different decision-makers will be involved in future decisions. Similarly, at the federal level, the fact that judges are appointed for life minimizes concerns that their decisions will be influenced by potential career implications.[227]

The other approach to reducing the tendency to escalate involves focusing on improving aspects of the decision-making process itself.[228] In particular, the challenge here is to force the decision-maker to recognize the sunk costs character of the prior decision and to become aware of the diagnostic value imbedded in the negative feedback received. In this area, de-escalation theory could exert a positive influence in the development of case law. By characterizing prior decisions as sunk costs, judges should be able to recognize prior cases for what they are and, thus, be more willing to consider the arguments for or against a given course of action without the taint introduced by precedent. Obviously, in making new decisions, judges should be free to consider the costs associated with reevaluating all the arguments advanced for and against a given course of action,[229] the costs associated with changing the direction of the law,[230]

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223. *See supra* notes 216-22 and accompanying text.

224. In commercial lending institutions, for example, the individuals that handle problem loans are not the same as those that were responsible for initially approving and serving the loan. *See* Staw & Ross, *Knowing*, *supra* note 3, at 73.

225. *See* Simonson & Staw, *supra* note 211, at 420.

226. *See* Staw & Ross, *Knowing*, *supra* note 3, at 73.

227. *See* Hasen, *supra* note 123, at 1319-20. On the other hand, life tenure could increase identity problems, with judges and their views becoming more institutionalized in a given court. This tendency could result in an increased tendency to escalate.

228. *See supra* notes 216-19 and accompanying text.

229. A common argument in favor of a system of precedent is the cost-saving aspect of such a system. The argument is that it is efficient to allow courts to be free from the burden of reconsid-

and the costs associated with the substantive nature of the decision itself. There is nothing inconsistent about considering these issues as part of a sound de-escalation strategy. Indeed, de-escalation requires a critical assessment of all of these issues when making a decision.

This second strategy for de-escalation involves educating the decision-maker about the informational value of negative feedback. De-escalation research suggests that even in cases in which the need for justification is strong, and in which withdrawal is likely to be framed as a loss, making it painfully clear to decision-makers that continuing reliance on sunk costs has produced—and will likely continue to produce—failure will generally improve their decision-making abilities.[231] Applying this suggestion in the case law development context will require judges to engage in explicit and detailed analyses of the impact of their decisions and the reasons why those outcomes may be considered failures. In particular, it will require that decisions be analyzed not only in their immediate context, but also in a larger context that captures all of the costs and complications associated with the decision.

VII. IMPLICATIONS OF THE ESCALATION MODEL OF PRECEDENT

This section identifies some of the major implications of the approach to *stare decisis* developed earlier. First, the analysis focuses on the distinction between constitutional and statutory *stare decisis*. The escalation of commitment framework suggests that such a distinction is unwarranted and that, instead, a weaker form of precedent should be applied to all types of cases. The analysis then shifts to the recent model of *stare decisis* developed over the last decade by the Rehnquist Court. The Rehnquist Court's model of precedent is evaluated against the escalation framework. Finally, this section considers a model of *stare decisis* recently advanced by Professor William Eskridge. Both the Rehnquist and Eskridge models of *stare decisis* are interesting because they can be interpreted as consistent with the concerns that the escalation of commitment framework raises about the use of precedent. In that sense, both models provide supporting justification for the propositions advanced in this Article.

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ering similar arguments each time a case is brought before the court because of the savings produced in terms of administrative resources. *See supra* note 86 and accompanying text.

230. The concerns here relate to the importance that predictability has in both the ability of society to arrange its affairs without worrying about abrupt changes in the law and in fostering respect for the rule of law. *See supra* notes 95-100 and accompanying text.

231. *See* Garland et al., *supra* note 48, at 726.

A. *Legal Implications: Statutory and Constitutional Precedent*

As described earlier, courts have developed a three-tiered hierarchy of *stare decisis*, giving precedent a different presumption of correctness depending on the context in which the dispute arises.[232] Statutory precedent has been subject to the strongest presumption of correctness, imposing on the deciding court a strict obligation to follow precedent.[233] Constitutional precedents, on the other hand, are subject to a weak presumption of correctness.[234] The presumption given to common law precedent is somewhere in between.[235] Does the escalation analysis support or contradict the current hierarchy? Are there reasons idiosyncratic to the decision-making process in each of the three contexts that require us to make these distinctions? The escalation of commitment paradigm suggests that there is no "internal" reason to distinguish between various forms of *stare decisis*.

The distinction between statutory and constitutional *stare decisis* is based on two premises.[236] First, once the judiciary has interpreted a statute, that interpretation becomes part of the statute and, thereafter, only the legislature can alter its meaning.[237] The failure to do so suggests that the legislature has agreed with the judicial interpretation.[238] Second, in constitutional adjudication no readily accessible body exists to correct mistakes by the judiciary.[239] The judiciary must, therefore, be willing to revisit its prior decisions without the constraints imposed by *stare decisis*.

Because the use of precedent in case law development can be characterized as an escalation of commitment problem,[240] the distinction between constitutional and statutory *stare decisis* loses some—if not all—of its force. Indeed, one can argue that recognizing case law development as an escalation of commitment problem provides a rationale for expanding the constitutional form of *stare decisis* to both statutory and common law disputes. This proposition is discussed towards the end of this section. First, however, I contend that while the escalation of commitment model is consistent with the current constitutional approach to *stare decisis*, it also presents some new challenges.

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232. *See supra* notes 102-04 and accompanying text.
233. *See supra* notes 103-04 and accompanying text.
234. *See supra* notes 105-06 and accompanying text.
235. *See supra* note 107 and accompanying text.
236. *See supra* notes 108-15 and accompanying text.
237. *See supra* note 109 and accompanying text.
238. *See supra* note 110 and accompanying text.
239. *See supra* note 114 and accompanying text.
240. *See supra* notes 171-205 and accompanying text.

1. Challenges to Constitutional Stare Decisis

The rationale of constitutional *stare decisis* is, in general, consistent with the concerns raised by the escalation model of precedent. The escalation model proposes that courts considering constitutional disputes should be willing to evaluate prior decisions in light of changing circumstances and with an eye towards the future marginal benefits and costs of their decisions. However, the rationale for this conclusion has little to do with the theory that *stare decisis* should apply with less force to questions of constitutional law since these are immune from legislative upset. Rather, the rationale advanced in this Article is based on the internal characteristics of the judicial decision-making process itself. The fact that no other decision-maker is available to review a given decision should not, in itself, be reason to give precedent an inordinate amount of weight. The current decision-maker should utilize a decision-making process that is likely to result in optimal decisions. In the context of legal disputes, courts should adopt a process that frees them from the decision-making traps of escalation, regardless of whether other political bodies could come to their rescue.

The escalation model raises yet another challenge to the current justification for the loose application of *stare decisis* in constitutional cases. Judge Easterbrook has noted that our Constitution is similar to most statutes in that it is textual; yet it constitutes a text of a different kind.[241] A constitution is overarching in the sense that it affects major aspects of the workings of the organization governed by it.[242] In the case of our national government, the Constitution establishes structures that affect all political interactions.[243] Consequently, argues Judge Easterbrook, revising constitutional decisions ought to be harder than revising statutory ones.[244] The current justification for constitutional *stare decisis* fails to respond to this criticism.

The escalation model, however, addresses this issue. The escalation model advances the argument that it is inappropriate to give inordinate weight to a prior decision simply because that is the way things were done in the past. This does not mean that all aspects of the decision should not be properly considered, including the costs associated with changing an already established course of action. Consideration of

241. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430-31 (1988).

242. *See id.*

243. *See id.*

244. *See id.*

whether a change in a constitutional ruling will have rippling effects on other areas of the law does not, in itself, constitute escalation-type behavior. Indeed, sound decision-making so requires this consideration. By pointing out the features of proper decision-making, the escalation model responds to the challenge raised by Judge Easterbrook.

2. *Revising Statutory* Stare Decisis

Based on an application of the escalation model, current adherence to precedent in statutory disputes is also, as a matter of decision-making, unwarranted. The strong presumption of correctness applied in statutory cases is justified by legislative acquiescence.[245] The underlying rationale is that the legislature should be responsible for correcting judicial misinterpretation of statutes, and that legislative failure to do so indicates agreement with the prior judicial interpretation.[246]

This argument is basically the flip-side of the justification for weak use of precedent in constitutional cases. Nonetheless, the escalation model raises the same basic criticism. This presumption is explained by factors unrelated to the decision-making process itself. The judiciary is responsible for providing a better decision-making process regardless of the ability of the legislature to intervene. There is no reason, therefore, to burden statutory precedent with a stronger presumption of correctness than any other. While this suggestion might seem an extraordinary departure from current judicial practice, it is similar to approaches advocated by the Supreme Court and legal scholars.

B. The Supreme Court and Stare Decisis*: If We Could Only Take Them Seriously!*

While the development of a unifying approach to the use of precedent has been a topic of discussion for the Supreme Court for many years,[247] over the last ten years there appears to have been a renewed interest in such an endeavor.[248] Various Supreme Court Justices have attempted to provide some guidance regarding the proper use of *stare decisis* in the context of statutory, constitutional, and common law disputes. Surprisingly, the Court's current interpretation of the doctrine is fairly

245. *See supra* notes 109-12 and accompanying text.

246. *See supra* notes 109-12 and accompanying text.

247. *See* Rehnquist, *supra* note 85, at 347-48.

248. *See* Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1781-90 (1996); Padden, *supra* note 8, at 1689-90.

consistent with the criticisms and reform proposals that follow from the escalation paradigm. Unfortunately, given what has been characterized as the "spasmodic way" in which the Court has manipulated *stare decisis*,[249] it is not clear whether the Court is serious about its new approach and, thus, whether we can expect the Court to remain loyal to it.[250]

1. Precedent in the Rehnquist Supreme Court: The Basic Model

The most extensive discussion of *stare decisis* provided by the Court over the last decade took place in the controversial *Planned Parenthood v. Casey* decision.[251] In *Planned Parenthood*, the Court was confronted with the issue of the constitutionality of a Pennsylvania statute imposing a number of restrictions on women seeking abortions.[252] As evidenced by the opening sentence of Justice O'Connor's opinion,[253] the Court's goal was to resolve the doubt and confusion concerning a woman's constitutional right to terminate her pregnancy, which the Court had recognized some nineteen years earlier in *Roe v. Wade*.[254] The Court sought to achieve this clarification by announcing its unwavering support for the "central holding" of *Roe*.[255] Justice O'Connor's justification for the Court's holding relied heavily upon the doctrine of *stare decisis*.[256] O'Connor's opinion is relevant in that it provides the basic model of *stare decisis* used by the Rehnquist Court.

The opinion begins by pointing out that the obligation to follow precedent is not absolute.[257] The opinion notes the outer limits of the doc-

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249. *See* Freed, *supra* note 248, at 1778.

250. Various commentators have noted how, over time, the doctrine of *stare decisis* has been supported or abandoned as a matter of political expediency. In the 1960s, for example, facing a liberal Court, conservatives attacked the inclination of the Court to overrule precedent. By contrast, more recently, and now facing a conservative Court, liberals are quick to criticize the court for failing to adhere to precedent. *See id.* at 1779.

251. 505 U.S. 833 (1992).

252. *See id.* at 844.

253. *Id.* ("Liberty finds no refuge in a jurisprudence of doubt.").

254. 410 U.S. 113 (1973).

255. *See* John Wallace, Comment, Stare Decisis *and the Rehnquist Court: The Collision of Activism, Passivism and Politics in* Casey, 42 BUFFALO L. REV. 187, 188 (1994). According to O'Connor, the central holding of *Roe v. Wade* was threefold. First, "a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State." *Id.* Second, "the State has the power to restrict abortions after viability." *Id.* Finally, "the State has legitimate interests from the outset of the pregnancy in protecting the life of the woman and the life of the fetus." *Id.*

256. *See Planned Parenthood*, 505 U.S. at 854.

257. *See id.* "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit." *Id.*

trine, stating that on the one hand, efficiency and consistency arguments make precedent indispensable,[258] while on the other hand, precedent should be abandoned when "a prior judicial ruling . . . come[s] to be seen so clearly as error that its enforcement [is] for that very reason doomed."[259] The opinion then describes what factors, or in Justice O'Connor's words "pragmatic considerations," courts use to decide when to overrule or reaffirm a prior case.[260] These four considerations include

> whether the rule has proven to be intolerable simply in defying practical workability . . .; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . .; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . .; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[261]

a. Workability

The first consideration in deciding whether to follow precedent is whether the rule established in a prior case has proven unworkable. *Planned Parenthood* appears to define workability in terms of whether the prior rule required courts to undertake tasks outside their realm of competence. In finding that *Roe* had not proven unworkable, O'Connor noted that although the decision required courts to assess state laws affecting the exercise of the choice to terminate a pregnancy, such determinations were "within judicial competence."[262]

The opinion also cited approvingly the Supreme Court's decisions in *Garcia v. San Antonio Metropolitan Transit Authority*[263] and *Swift & Co. v. Wickham*.[264] *Garcia* and *Swift* define workability not only in terms of judicial competence, but also in terms of the actual effects of the prior

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258. *See id.*

> With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.

Id. (citation omitted).

259. *Id.*

260. *Id.*

261. *Id.* at 854-55 (citations omitted).

262. *Id.* at 855.

263. 469 U.S. 528 (1985), *overruled in part by* 42 U.S.C. § 2000d-7 (1994).

264. 382 U.S. 111 (1965).

ruling.[265] In particular, workability requires an examination of whether the prior ruling has produced inconsistent results in its application,[266] and whether the ruling has produced "mischievous consequences" to litigants and courts alike.[267]

Finally, workability has also been defined in terms of the relationship between the precedent case and other relevant statutes. In *Patterson v. McLean Credit Union*,[268] for example, the Court noted that a prior ruling would be found to be unworkable to the extent that it "poses a direct obstacle to the realization of important objectives embodied in other laws."[269]

b. Reliance

In deciding whether to adhere to a prior ruling, courts should also consider the cost of repudiating the rule as "it would fall on those who have relied reasonably on the rule's continued application."[270] This second element equates to the theory of reliance advanced as a justification for *stare decisis*.[271] In *Planned Parenthood*, Justice O'Connor provided a useful summary of the relevant considerations in assessing the reliance factor.

The Court began its discussion of reliance by pointing out that reliance is, to a large extent, context specific.[272] Reliance, according to the Court, weighs more heavily in the commercial context, i.e., in cases involving property and contract rights, "where advance planning of great precision is most obviously a necessity."[273] In other contexts, such as cases involving procedural and evidentiary rules, the issue of reliance is of less significance.[274]

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265. *See Garcia*, 469 U.S. at 546-47; *Swift*, 382 U.S. at 116.

266. In *Garcia* for example, the Supreme Court pointed out that the application of the holding in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled in *Garcia*), requiring the Court to decide whether a particular governmental function was integral or traditional and, thus, immune from particular federal regulation, led to inconsistent results.

267. *Swift*, 382 U.S. at 116.

268. 491 U.S. 164 (1989), *overruled by* 42 U.S.C. § 1981(b) (1994).

269. *Id.*, at 173.

270. Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

271. *See supra* notes 97-101 and accompanying text.

272. *See Planned Parenthood*, 505 U.S. at 855-56.

273. *Id.* at 856.

274. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 275-78 (1994) (noting the distinction between procedural decisions as presumptively retroactive and substantive decisions as not presumptively retroactive).

The Court defined reliance broadly by stating that when assessing reliance, courts should consider more than specific and clearly defined instances of reliance. O'Connor conceded that since abortion could be seen as an "unplanned response to the consequence of unplanned activity," a reliance claim appeared to be fairly weak.[275] She argued, however, that reliance should be defined broadly enough to include both consideration of "specific instances of sexual activity" and the role that *Roe* has played in other areas.[276] In particular, Justice O'Connor pointed out two key developments. First, for over two decades people had relied on the availability of abortion to organize intimate relationships and make choices that defined their views of themselves and society.[277] Second, the opportunity conferred upon women by *Roe* to control their reproductive lives had impacted substantially the "ability of women to participate equally in the economic and social life of the Nation."[278] Both of these factors, concluded Justice O'Connor, should be factored into the reliance argument since they are evidence of the way individuals have ordered their thinking and living around the rule established by the *Roe* decision.[279]

c. Intervening Developments in the Law

In further developing her view of the role of *stare decisis*, Justice O'Connor considered the role played by intervening developments in the law since the time the prior case was decided. The decision whether to adhere to precedent will also be affected by the extent to which related developments in the law have either removed or weakened the underpinnings of the precedential decision.[280] The court should assess whether later developments have rendered the prior decision "irreconcilable with competing legal doctrines or policies."[281] The focus of the inquiry here is on legal developments related to the precedent case. It is not clear whether the factor of "intervening development[s] of the law" encompasses only decisional law of the Supreme Court, or whether it includes decisions by lower courts and actions by the legislature.[282] The

275. *Planned Parenthood*, 505 U.S. at 856.
276. *Id.*
277. *See id.*
278. *Id.*
279. *See id.*
280. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), *overruled by* 42 U.S.C. § 1981(b) (1994).
281. *Id.*
282. *Id.* An interesting debate has developed with respect to which "intervening develop-

Supreme Court originally defined intervening developments only in terms of its own decisions.[283] However, in a 1995 decision, *Hubbard v. United States*,[284] a plurality of the Court defined intervening developments more broadly, including not only Supreme Court decisional law but also decisions of lower courts as well as actions of Congress.[285]

d. Changed Facts or Perceptions

Finally, Justice O'Connor stated that the decision to follow precedent will depend in part on "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[286] This fourth factor appears to require the decision-maker to evaluate two different aspects of the initial decision. First, it requires an evaluation of the factual background supporting the prior ruling. Second, it goes further by permitting the decision-maker to evaluate not only factual changes but also society's perceptions of those changes.

With respect to the first element—consideration of changed facts—the decision-maker is asked to inquire about the factual assumptions underlying the prior ruling, and to decide whether changes in the landscape of potential relevant facts now challenge the central holding of that decision.[287] The second element allows the decision-maker to inquire not only about factual changes but also about society's interpretation of those changes. In a case decided just a couple of years before *Planned Parenthood*, the Supreme Court described this element as follows: "It has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'"[288]

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ments" can be properly considered under this third factor. Can the Supreme Court justify the abandonment of precedent on a body of law developed by lower courts, or are "intervening developments" limited to the Court's own prior jurisprudence? *See* Freed, *supra* note 248, at 1782-90.

283. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 321-22 (1972).

284. 514 U.S. 695 (1995), *superseded by* 18 U.S.C. § 1001 (Supp. II 1996).

285. *See id.* at 711-15.

286. Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

287. In *Planned Parenthood*, for example, while admitting that technological changes in maternal and neonatal health care have changed since the *Roe* decision, Justice O'Connor concluded that those changes did not affect the central ruling in *Roe*, "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860.

288. Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) (quoting CARDOZO, *supra* note 89, at 150), *overruled by* 42 U.S.C. § 1981(b) (1994).

In short, in deciding whether to follow precedent, courts should consider the factual context in which the prior ruling arose and evaluate whether the circumstances have so changed, or come to be seen so differently, as to justify a refusal to follow the prior ruling.

2. Modifications to the Basic Model of Precedent Used by the Rehnquist Court

The model discussed above provides the basic framework currently used by the Supreme Court in evaluating the doctrine of *stare decisis*. This basic model, however, has been subject to a number of variations. The four major modifications relate to the type of case, the margin of victory, the age of the prior ruling, and the "correctness" of the prior decision.

a. Type of Case

One theme on which there has been—and continues to be—total unanimity among Supreme Court Justices is the distinction between constitutional and statutory precedent. As discussed earlier, a stronger presumption of correctness is attached to precedent in statutory cases as opposed to constitutional cases.[289] Both empirical and anecdotal evidence suggests that the Court is more likely to overrule constitutional as compared to statutory precedent.[290]

b. Margin of Victory

In several recent decisions, various members of the Court have modified the basic *stare decisis* model by adding an additional factor to those described above. In particular, attention has been focused on the distribution of votes in the precedent case; that is, the margin of victory. For example, in *Payne v. Tennessee*,[291] the Court was confronted with the issue of whether to permit victim-impact evidence in capital punishment cases. In evaluating the constitutionality of this practice, the Court had to consider whether to follow two decisions the Court itself had issued within the last four years.[292] The Court had previously found the introduction of

289. *See supra* notes 102-07 and accompanying text.

290. *See* Gerhardt, *supra* note 73, at 87-90; Padden, *supra* note 8, at 1715 (noting that of 84 cases overruled by the Supreme Court overruling precedent between 1970 and 1993, 63 or roughly 75% involved constitutional questions).

291. 501 U.S. 808 (1991).

292. *See id.* at 811.

such evidence to be a violation of the defendant's constitutional rights.[293] In deciding to overrule these two decisions, Chief Justice Rehnquist noted that *stare decisis* is not an "inexorable command,"[294] but rather a "principle of policy and not a mechanical formula of adherence to the latest decision."[295] After stating that the rule requiring adherence to precedent was less strict in constitutional cases,[296] the Chief Justice concluded that since the two recent opposing decisions had been decided "by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," they were not entitled to a strong precedential effect.[297] The majority then reversed the earlier decisions.[298] This new element—the margin of victory in the prior ruling—has been alluded to in other recent cases[299] and appears to have the support of at least two other Justices: Scalia and Thomas.[300]

c. *Age of the Prior Decision*

A third modification of the basic *stare decisis* model regards the age of the prior ruling. As described earlier, a traditional argument made in favor of following precedent focuses on the reliance effect of prior rulings.[301] Under this view, individuals plan their affairs in reliance upon a certain amount of stability in the rule of law.[302] The reliance argument appears to rest on a temporal element. Prior rulings that have endured the passage of time are likely to have spawned a larger degree of reliance than recent cases and, thus, are arguably subject to a stronger form of *stare decisis*.[303]

Justice Scalia has advanced this rationale in a number of recent

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293. *See* South Carolina v. Gathers, 490 U.S. 805 (1989) (finding that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987) (same finding), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

294. *Payne*, 501 U.S. at 828.

295. *Id.* (citing Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

296. *See id.*

297. *Id.* at 829.

298. *See id.*

299. *See, e.g.*, Seminole Tribe v. Florida, 116 S. Ct. 1114, 1127 (1996).

300. *See* Padden, *supra* note 8, at 1708.

301. *See supra* notes 97-101 and accompanying text.

302. *See supra* notes 99-100 and accompanying text.

303. This argument appears to be contrary to the conventional wisdom regarding the age of precedents. It is conventionally accepted that it should be easier to overrule older cases since they represent outdated interpretations of the law. *See* Padden, *supra* note 8, at 1718 (indicating that, as an empirical matter, recent decisions are not more frequently overruled).

opinions,[304] adding yet another element to the basic model of *stare decisis* developed by the Rehnquist Court. Scalia first developed this theme in his dissenting opinion in *South Carolina v. Gathers*.[305] In arguing that the court should overrule a 2-year-old prior ruling, Justice Scalia noted:

> Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.[306]

d. The Merits of the Prior Decision

Finally, recent Supreme Court decisions have placed a strong emphasis on whether the Justice deciding the case believes the prior decision was wrongly decided.[307] The Court plainly feels it should not be constrained by precedent when it believes that a prior ruling was incorrect.[308] Obviously, the merit of the relevant precedent case has always been an element in courts' decision-making processes.[309] In fact, commentators that have criticized the practice of adhering strongly to precedent have argued that *stare decisis* is merely a doctrine of convenience in that it has little or no influence in preventing a court from doing what it would wish to do otherwise.[310]

In recent cases, however, the merit issue has resurfaced in a different context. In *Payne v. Tennessee*,[311] the Court overruled two prior decisions which found jury consideration of victim-impact statements in capital punishment cases to be unconstitutional.[312] In his dissenting opinion, Justice Marshall challenged the majority's decision, pointing out that in the past the Court had never departed from precedent without "special justification."[313] According to Justice Marshall, special justifications in-

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304. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

305. *See id.*

306. *Id.*

307. *See* Hubbard v. United States, 514 U.S. 695, 708 (1995); *superseded by* 18 U.S.C. § 1001 (Supp. II 1996); Payne v. Tennessee, 501 U.S. 808, 833-35 (1991) (Scalia, J., concurring).

308. *See Payne*, 501 U.S. at 833-35 (Scalia, J., concurring).

309. *See* Easterbrook, *supra* note 241, at 423-24.

310. *See* Rehnquist, *supra* note 85, at 371-75.

311. 501 U.S. 808 (1991).

312. *See id.* at 828-30.

313. *Id.* at 849.

clude intervening developments in the law, changed facts or perceptions, and a showing that a particular decision has become unworkable.[314] Therefore, under Marshall's approach, the decision to follow precedent must be evaluated in light of the factors included in the basic model of *stare decisis*.

In response, Justice Scalia's concurring opinion attacked the proposition that special justification is required to overrule precedent.[315] Scalia argued that when precedent is "wrong," sufficient reason exists for the Court to overrule it.[316] Any further requirement, he argued, would not be fair.[317] Thus, according to Scalia, once the Court decides that the precedent case was wrongly decided, there is little to stop the Court from overruling it, even if the other factors included in the basic model—workability, changed facts or perceptions, and intervening developments in the law—point in the opposite direction.

3. Evaluating the Supreme Court's Approach to Precedent from the Escalation Framework

How does the basic model of precedent advanced by the Rehnquist Court fare when evaluated from the escalation of commitment framework? Does the current Supreme Court model account for the escalation problem? When evaluated against the escalation framework, the current Supreme Court model of *stare decisis* does surprisingly well. This model is generally consistent with the solutions identified in the escalation framework. While some aspects of the Court's model—particularly two of the modifications proposed by some of the most conservative members of the Court—are likely to result in increased escalation of commitment, the basic model and two other recent modifications are quite consistent with a strategy of de-escalation.

a. Evaluating the Basic Model

Of the components of the basic model, three—workability, intervening developments in the law, and changed facts or perceptions[318]—are consistent with the strategy of improving the decision-making process. Workability, the factor that requires the court to evaluate whether the

314. *See id.*
315. *See id.* at 833 (Scalia, J., concurring).
316. *See id.* at 834.
317. *See id.*
318. *See supra* notes 262-69, 281-88 and accompanying text.

precedent in question has become a detriment to coherence and consistency in the law,[319] is consistent with the goal of making the decision-maker aware of the diagnostic value of the feedback received. By requiring the Court to evaluate its decision on the basis of the manner in which the prior ruling has been implemented, the workability requirement incorporates into the Court's calculus what is probably the clearest source of feedback available.[320]

The Court's consideration of intervening developments in the law and changed facts or perceptions is also consistent with the de-escalation strategy. The effect of these elements on the decision-making process, however, is different. Instead of facilitating the recognition of the diagnostic value of the feedback received, these two elements help the decision-maker recognize the need to reevaluate all available options. By recognizing intervening developments in the law, courts must consider whether subsequent changes in the law, either through judicial doctrine or legislative intervention, have removed or weakened the conceptual underpinnings from the precedential ruling.[321] Similarly, the existence of changed facts or perceptions requires courts to consider whether the factual assumptions supporting the prior ruling have changed,[322] or whether the precedent established is now inconsistent with justice or social welfare.[323] Both of these elements thus require the decision-maker to evaluate the dispute in the present context as opposed to that in which the precedent case was decided. This framework then should help the decision-maker to understand the prior ruling as a sunk cost since it forces him or her to recognize that the prior decision was made in a specific context which should not, just because of its historical pedigree, be determinative of the current outcome.

While these three elements—workability, intervening developments in the law, and changed facts or perceptions—are consistent with the de-escalation strategy, the reliance element is probably inconsistent with de-escalation. As described in *Planned Parenthood*, this element focuses on the "cost of a rule's repudiation as it would fall on those who have re-

319. *See Payne*, 501 U.S. at 849 (Marshall, J., dissenting).

320. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 538-47 (1985), *overruled in part by* 42 U.S.C. § 2000d-7 (1994), the Court considered at length how the standard developed in a prior case involving governmental immunity for state and local governments and how it has been applied in later cases.

321. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), *overruled by* 42 U.S.C. § 1981(b) (1994).

322. *See* Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

323. *See Patterson*, 491 U.S. at 174.

lied reasonably on the rule's continued application."[324]

Evaluating reliance from the de-escalation perspective requires clarifying whether the focus of the reliance element is on the costs associated with past behavior or on future costs. The traditional argument in favor of *stare decisis* has framed reliance in terms of the costs associated with past behavior.[325] Under this theory, individuals that have relied on a prior ruling will "lose" if the rule is changed. Framing the issue in this way is suggestive of the typical decision-making flaw in escalation situations in which the decision-maker believes that there is too much invested to quit. If reliance is interpreted in this manner, it indeed appears inconsistent with a de-escalation strategy.

In *Planned Parenthood*, however, the majority appeared to develop a forward-looking, more comprehensive view of reliance. In particular, Justice O'Connor noted that in *Roe v. Wade* the Court was concerned not as much with the way that individuals would rely on *Roe*'s ruling with respect "to specific instance of sexual activities," but with the effect that overruling the decision would have on broader patterns of social interaction.[326] Thus, *Planned Parenthood* appears to draw a distinction between individual reliance and societal reliance, noting that there is a heightened concern with reliance when it occurs at the societal level. Although at the individual level reliance is reminiscent of the "too much invested to quit" type of reasoning, societal reliance is consistent with a de-escalation strategy. At the societal level, reliance becomes so widespread that the court is well-advised to consider it. Short of this threshold, reliance is likely to result in escalating-type behavior.

b. Evaluating the Modifications

The four recent modifications advanced concerning the basic model of precedent raise an interesting issue: are they consistent with a de-escalation strategy? In every instance, each of these modifications—type of case, margin of victory, and the age and merit of the precedent—was raised in a case in which a precedent was overruled.[327] This suggests that these modifications are intended to diminish the weight given to precedent and that they are, therefore, less likely to result in escalation of commitment. Evaluating these modifications from the escalation of com-

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324. *Planned Parenthood*, 505 U.S. at 855.

325. *See supra* notes 97-101 and accompanying text.

326. *See Planned Parenthood*, 505 U.S. at 173.

327. *See* State Oil Co. v. Khan, 118 S. Ct. 275 (1997); Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996); Payne v. Tennessee, 501 U.S. 808 (1991).

mitment framework, however, leads us to a more sophisticated conclusion. While margin of victory and merit are consistent with a strategy of de-escalation, the other two modifications, type of case and age of precedent, are inconsistent with the goals of de-escalation.

Consider, for instance, the margin of victory factor. Under the view of Justices Rehnquist and Scalia, prior decisions that were decided by narrow margins, i.e., 5-4, should be given less precedential value.[328] While the rationale for this approach has not been explicitly developed by the Court, it is likely based on the fact that a 5-4 decision is an indication of a divided Court that wrestled with an issue that was substantively difficult and highly contentious. Accordingly, the Court allows for the opportunity to reevaluate potentially wrongly-decided opinions by giving less weight to these rulings.

This reasoning is consistent with a major finding from escalation research. As discussed, escalation of commitment is associated with decision-makers' unwillingness to admit failure.[329] Individuals, escalation research suggests, are less likely to admit failure when they are asked to justify their initial allocation of resources.[330] Furthermore, the need to justify is related to the extent of controversy surrounding the initial decision.[331] If the initial decision was contentious, involving opposition from within the organization, the decision-maker will likely feel a greater need to justify and, thus, will have a greater tendency to escalate.

Consideration of the margin of victory may allow the deciding court to avoid this decision-making trap. By giving less precedential weight to 5-4 decisions, the Court can avoid any likelihood that the "winners" in a prior case would block attempts to reevaluate that decision in an effort to self-justify the initial outcome. Thus, by reducing the opportunity for self-justification the corresponding tendency to escalate is reduced.[332]

Similarly, consideration of the precedent's merit appears to be fundamentally consistent with a de-escalation strategy. As developed by Justice Scalia, this approach involves evaluating the substance of a prior ruling.[333] Under this factor, little reason to follow precedent exists if the

328. *See Payne*, 501 U.S. at 828-29.

329. *See supra* notes 56-58 and accompanying text.

330. *See supra* notes 40-43 and accompanying text.

331. *See supra* note 43.

332. Note that the margin of victory factor does not entirely solve the sunk costs problem. For instance, this factor's focus on 5-4 decisions does not deal with the possibility that unanimous or virtually unanimous decisions (e.g., 9-0) could also result in escalation. A unanimous decision might produce complacency and a greater tendency to escalate.

333. *See Payne*, 501 U.S. at 833-34 (Scalia, J., concurring).

Court believes that the prior ruling was wrongly-decided.[334] While this element has been criticized for turning the doctrine of *stare decisis* on its head,[335] it is consistent with the major goal of de-escalation: to motivate decision-makers to reevaluate decisions based on their merits.

The other two elements—type of case and age of precedent—present some problems from the de-escalation view. When considering the type of case, courts distinguish between constitutional and statutory cases, applying a weaker form of *stare decisis* to the former.[336] As discussed, there is little justification from the perspective of decision-making theory to justify that distinction.[337] Whether or not there are other sources available to remedy a wrong course of action, a decision-maker should not make decisions using flawed approaches.

The age of precedent factor focuses, of course, on the age of the prior ruling. It proposes that older decisions should be afforded a greater degree of precedential respect than more recent ones.[338] This distinction has been justified on reliance grounds.[339] Under this theory, older decisions are more likely to have resulted in a larger degree of reliance and, thus, courts should be more hesitant to overrule them.[340] To the extent that this theory rests on reliance, it suffers from the same sunk costs flaw as the reliance rationale. The age justification appears to suggest that older cases involve a larger or more costly investment; therefore, older precedent should not be disturbed. Again, the decision-maker appears to be saying, "we have too much invested to quit."

In short, two of the factors that various members of the Court have advanced as proper considerations in evaluating precedent—the margin of victory and the precedent's merit—are consistent with a strategy of de-escalation. The other two factors—the type of case and the precedent's age—are not. To the extent that all of these factors have been introduced in cases that have resulted in overruling prior decisions, it would appear that the two factors consistent with de-escalation have dominated.

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334. *See id.*

335. *See* Padden, *supra* note 8, at 1708-15.

336. *See supra* notes 102-07 and accompanying text.

337. *See supra* notes 245-46 and accompanying text.

338. *See supra* notes 303-06 and accompanying text.

339. *See supra* note 303 and accompanying text.

340. *See supra* note 303 and accompanying text.

C. *The Evolutive Approach of Professor Eskridge*

While my discussion of and proposed solution to the problems that I believe are inherent in a strict doctrine of *stare decisis* may seem unconventional, my call for change is hardly unique. As the prior section illustrates, the Supreme Court itself has provided a road map to avoidance of the escalation problem. Other commentators have provided, albeit in different contexts, similar prescriptions. At least one of those commentators has proposed a model consistent with my arguments herein.

In an extremely thought-provoking article, Professor Eskridge offers what he refers to as an "evolutive" approach to statutory precedent in the context of Supreme Court decision-making.[341] Under the evolutive approach, the Supreme Court should consider the following three questions when evaluating whether to follow precedent:

> (1) Informed by criticism of the precedent and its reasoning by commentators, lower court judges, and the Court's own opinions, can the Court now say with confidence that the precedent was wrongly decided? (2) Is the precedent not just wrong, but also pernicious, detracting from overall national policies (3) Do the policy problems engendered by the rule outweigh the potential unfairness to private persons and the uncertainty for the other rules based upon the challenged rule, which will occur if the precedent is overturned?[342]

Eskridge justifies his evolutive approach on the ground that it "focuses on substance and policy rather than on procedure and form."[343] The evolutive approach, according to Eskridge, is consistent with the Supreme Court's own practice in the field of admiralty, an area of the law under the jurisdiction of the Supreme Court and in which the Court is consistently faced with reconsideration of its own common law precedents.[344]

The evolutive approach and its rationale are generally consistent with the lessons from the escalation model of precedent. In order to avoid the escalation of commitment problem, decision-makers must, at times, critically challenge their own initial decision, without giving it any greater weight than warranted by its merits. The first two questions identified by Professor Eskridge are consistent with this framework. In fact, Eskridge argues that the Court should consider a broad amount of information when determining whether to stray from precedent. The Court, according to Eskridge, should be willing to reconsider the validity of a

341. *See* Eskridge, *supra* note 74, at 1386.
342. *Id.* at 1388.
343. *Id.* at 1393.
344. *See id.* at 1386.

precedent not only when it is clear that the Court, in deciding the precedent case, failed to carefully consider all arguments and evidence, but also when the assumptions of the prior holding have changed over time.[345] Similarly, says Eskridge, when looking at sources outside the case, the Court should evaluate both legislative developments and developments "in social mores, public policy, and social trends."[346]

The final prong of the evolutive approach focuses the attention of the Court on evaluating all costs and benefits associated with possible outcomes, with a view primarily towards finding consistency among a broader set of policies and goals. As suggested by the escalation framework, a core problem with sequential-type decisions is the tendency of decision-makers to consider sunk costs, that is, to make decisions based on the costs of prior expenditures instead of focusing on the comparison of future marginal quantities. Professor Eskridge avoids this problem by shifting the focus of the inquiry towards the broader issue of costs and benefits in decisions which may overrule existing precedent. This approach is further consistent with the goal of avoiding the escalation trap.

VIII. CONCLUSION

In an interesting article published in 1982 discussing the manner in which legal rules evolve, Professors Blume and Rubinfeld posed the following question: "Should the legal system follow a *stare decisis* policy with legal precedent remaining essentially undisturbed over time and avoid transition costs, or should precedent change rapidly over time to keep apace with changing social, economic, and technological conditions?"[347] "Our intuition," they concluded, "is that there is little reason for the observed time path of legal rules to approximate the optimal time path. . . . [W]e see reasons for expecting judges and other relevant parties to behave in a socially suboptimal manner."[348] They, however, left their intuition untested, leaving it to future research to take on this issue. This call, however, has remained unanswered for over a decade. This Article hopefully begins to bridge this gap.

I have suggested a possible new way of looking at the doctrine of *stare decisis*. I argue that the development of case law, with the use of precedent at its core, resembles in many ways the escalation problem. The Article describes the process of case law development through the

345. *See id.* at 1392.
346. *Id.*
347. Blume & Rubinfeld, *supra* note 84, at 406.
348. *Id.* at 418.

lenses of the escalation of commitment model. This analysis suggests that the various rationales advanced in support of the doctrine of *stare decisis* are similar to the factors that decision-making research has identified as responsible for the sunk costs problem. I argue that this is evidence that the judicial decision-making process with *stare decisis* at its core is likely to lead to an escalation of commitment situation.

The Article then discusses the normative implications of this conclusion. I argue that despite the existence of sunk costs, *stare decisis* is an important component of the judicial decision-making process. However, having identified the sunk costs problem, the question then becomes what is the proper role that precedent should play in the case law development process. The Article concludes by providing a framework to help courts find the right amount of weight to be given to precedent. By looking at *stare decisis* as a decision-making rule, the Article contributes to our understanding of the case law development process and to the advancement of the application of decision-making theory to legal phenomena.