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I

INTRODUCTION

DESPITE its vaunted reputation for rectitude, the United States Supreme Court has been the first to deny its own judicial infallibility. For in at least ninety decisions, dating as far back as 1810 and as recent as its 1956 Term, the Supreme Court has made public confession of error by overruling its previous determinations.

This is a study of those ninety decisions—a statistical accounting of overruling cases and cases overruled, and a listing of the judges who agreed and disagreed with what was said and done. And this is a study of the "right to be wrong"—an inquiry into when and under what circumstances the Supreme Court should overrule its prior dictates.

This is also an introduction to ninety studies which should be made on each of these ninety overrulings. For each of these "drastic" decisions warrants individual inquiry and analysis. The Supreme Court is a courageous court. Only a courageous court would have faced the reactions of the times to *Marbury v. Madison*,[1] *Dred Scott v. Sanford*,[2] *Schecter Corp. v. United States*,[3] and *Brown v. Board of Education*.[4] Yet even a courageous tribunal—especially one so adept at distinguishing and qualifying prior judicial pronouncements—is loath to admit judicial error. Has it really been necessary for the Supreme Court to take this drastic step on ninety separate occasions? And if not really necessary, can such decisions be justified?

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1 1 Cranch (5 U.S.) 137 (1803).
2 19 How. (60 U.S.) 393 (1857).
3 295 U.S. 495 (1935).
4 347 U.S. 483 (1954).

II

NINETY—MORE OR LESS

There is no magic in the number "ninety." The broad statement that the Supreme Court has overruled itself on ninety separate occasions is, like all broad statements, subject to qualifications. But the figure of ninety has not been lightly chosen. It represents a total of three categories of Supreme Court overrulings, selected on the basis of three definite criteria.

Here are (1) cases in which the Supreme Court has expressly stated that it was overruling a prior decision; or (2) cases which Justice Brandeis or Justice Douglas have cited as further examples of overrulings; or (3) other cases which the authors believe to be obvious instances in which the Supreme Court has overruled itself. Scant note has been made of those decisions which have become legal nullities through being qualified or distinguished.

In seventy of the ninety cases, the nine men made definite statements that they were overruling prior determinations. Such statements take many forms. The most clear-cut of these pronouncements appear (chronologically) in such cases as *County of Cass v. Johnston, Motion Picture Patents Company v. Universal Film Manufacturing Co., Chicago & Eastern Illinois R. Co. v. Industrial Commission, Smith v. Allwright* and *Girouard v. United States.*

In the 1877 *Cass County* case, for example, the Supreme Court had this to say: "It follows that our decision in *Harshman v. Bates County,*[5] in so far as it declares the law to be unconstitutional, must be overruled."[6] The overruling statement in the 1917 *Motion Picture Patents* case ran this way: "It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry v. Dick Co.*[7] must be regarded as overruled."[8] The 1932 *Chicago & Eastern Illinois R. Co.* case contained this statement: "Both [prior[9]] cases are out of harmony with the general current of the decisions of this court . . . and they are now definitely overruled."[10] *Smith v. Allwright* in 1944 ended

5 92 U.S. 569 (1875).
6 95 U.S. 360 at 369 (1877).
7 224 U.S. 1 (1912).
8 243 U.S. 502 at 518 (1917).
9 Erie R. Co. v. Collins, 253 U.S. 77 (1920), and Erie R. Co. v. Szary, 253 U.S. 86 (1920).
10 284 U.S. 296 at 299 (1932).

with the simple statement that, "*Grovey v. Townsend*[11] is overruled."[12] And the *Girouard* decision in 1946 was summed up in these words: "We conclude that the *Schwimmer*,[13] *Macintosh*[14] and *Bland*[15] cases do not state the correct rule of law."[16]

Other overrulings are expressed more hesitantly, even apologetically. Here, for example, is the statement in *Gordon v. Ogden* in 1830: "Although that case was decided by a divided court, and although we think [it was erroneous] . . . , we should be much inclined to adhere to the decision in *Wilson vs. Daniel*[17] had not a contrary practice since prevailed."[18] In *Mason v. Eldred* in 1867, the 1810 case of *Sheehy v. Mandeville*[19] was overruled in these words: "The decision in this [*Sheehy*] case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states."[20] And in *The Genesee Chief,* Taney used this language: "It is the decision in the case of Thomas Jefferson[21] which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell. . . ."[22]

Finally, in still other instances of express overrulings, the Supreme Court has appeared to disclaim responsibility for its action, intimating that the overrulings had already occurred in previous decisions. In *Olsen v. Nebraska,* for example, Justice Douglas had this to say: "The drift away from *Ribnik v. McBride*,[23] *supra,* has been so great that it can no longer be deemed a controlling authority."[24] Justice Bradley put it this way in *Kountze v. Omaha Hotel Co.*: "Subsequent decisions have undoubtedly modified the rule followed in this case, and, indeed,

11 295 U.S. 45 (1935).
12 321 U.S. 649 at 666 (1944).
13 United States v. Schwimmer, 279 U.S. 644 (1929).
14 United States v. Macintosh, 283 U.S. 605 (1931).
15 United States v. Bland, 283 U.S. 636 (1931).
16 328 U.S. 61 at 69 (1946).
17 3 Dall. (3 U.S.) 401 (1798).
18 3 Pet. (28 U.S.) 33 at 34 (1830).
19 6 Cranch (10 U.S.) 253 (1810).
20 6 Wall. (73 U.S.) 231 at 236 (1867).
21 10 Wheat. (23 U.S.) 173 (1825).
22 12 How. (53 U.S.) 443 at 456 (1851).
23 277 U.S. 350 (1928).
24 313 U.S. 236 at 244 (1941).

have overruled it, and are more in accordance with the views expressed by Mr. Justice Catron [dissenting in *Stafford v. Union Bank of La.*[25]]."[26] An even stronger statement to this effect appears in Justice Fuller's opinion in *Leisy v. Hardin*: "The authority of *Peirce v. New Hampshire*[27] . . . must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to."[28] And then Justice Fuller analyzed those "numerous cases" to prove his point.

Footnotes to a dissenting opinion by Justice Brandeis and to an address and a book by Justice Douglas add ten more cases to the list of Supreme Court decisions which have been overruled—cases in addition to the seventy expressly overruled. The fruits of Brandeis' research in this area are found in notes 1, 2 and 4 of his dissent in *Burnet v. Coronado Oil & Gas Co.*[29] in 1932. But of the 42 cases cited in these notes, only three are pertinent additions. Twenty-nine overrulings are listed, including 26 which are express; and Brandeis cites 13 decisions which have been qualified rather than overruled by subsequent Supreme Court dictates. The three "non-express" overrulings cited by Brandeis were in *Louisville, Cincinnati & Charleston R. R. Co. v. Letson* (1844),[30] *The Belfast* (1868),[31] and *Pollock v. Farmers' Loan & Trust* (1895).[32]

Justice Douglas, who more than any other member of the present court believes that "*stare decisis* must give way before the dynamic component of history,"[33] prepared his lists of overrulings for the 1949 Cardozo Lecture[34] before The Association of the Bar of the City of New York and for his 1956 volume, *We the Judges*.[35] The overrulings noted in his address cover two periods of Supreme Court history. To the extent that they discuss changes in Supreme Court holdings from 1860 to 1890, the list is largely repetitious of the Brandeis footnotes. But Douglas' lecture supplements the 1932 Brandeis study by covering the period 1937 to

25 16 How. (57 U.S.) 135 (1853).
26 107 U.S. 378 at 387 (1882).
27 5 How. (46 U.S.) 504 (1847).
28 135 U.S. 100 at 118 (1890).
29 285 U.S. 393 at 406-409 (1932).
30 2 How. (43 U.S.) 497 (1844).
31 7 Wall. (74 U.S.) 624 (1868).
32 158 U.S. 601 (1895). Despite Brandeis' characterization, there is, of course, much doubt as to whether the Pollock case was really an overruling decision.
33 Douglas, "Stare Decisis," 49 COL. L. REV. 735 at 737 (1949).
34 Published as "Stare Decisis," 49 COL. L. REV. 735 at 756-758 (1949).
35 At pp. 32-34.

1949, and the notes in *We the Judges* bring his listing up to 1955.

Yet Douglas cites only 51 cases and adds only eight instances of overrulings which are not express—and one of these, *The Belfast,*[36] is likewise on the Brandeis list. There are two early cases which Brandeis did not classify in this category, but which Douglas does. These overruling cases are *Trebilcock v. Wilson* (1871)[37] and *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886).[38] The other five instances characterized as overrulings by Douglas occur in the more recent decisions of *Phelps Dodge Corp. v. NLRB* (1941),[39] *United States v. Classic* (1941),[40] *Toucey v. N. Y. Life Ins. Co.* (1941),[41] *Mercoid Corporation v. Mid-Continent Co.* (1944)[42] and *United States v. South-Eastern Underwriters Assn.* (1944).[43]

There are ten additional cases which the authors believe to be obvious instances in which the Supreme Court had overruled itself by the end of its 1956 term. Two of these occurred subsequent to the Brandeis-Douglas studies: *Gayle v. Browder* in 1956[44] and the rehearing in *Reid v. Covert* in 1957.[45] Four of the other overrulings, like *Reid v. Covert,* involved rehearings[46] and the other four[47] are additions to (and represent disagreement with) the Brandeis-Douglas lists.

While these 90 examples of Supreme Court overrulings constitute the largest list ever compiled on the subject,[48] they do not encompass every instance in which the Court has specifically changed its collective mind. There are also 15 cases in which the

36 7 Wall. (74 U.S.) 624 (1868).
37 12 Wall. (79 U.S.) 687 (1871).
38 118 U.S. 557 (1886).
39 313 U.S. 177 (1941).
40 313 U.S. 299 (1941).
41 314 U.S. 118 (1941).
42 320 U.S. 661 (1944).
43 322 U.S. 533 (1944). There is a serious question whether the South-Eastern Underwriters Assn. case was really an overruling, and it is listed here only to make the Douglas classification complete.
44 352 U.S. 903 (1956).
45 354 U.S. 1 (1957).
46 Chesapeake & Ohio Ry. Co. v. Leitch, 276 U.S. 429 (1928); Railroad Commission v. Pacific Gas Co., 302 U.S. 388 (1938); Halliburton Co. v. Walker, 329 U.S. 1 (1946); and MacGregor v. Westinghouse Co., 329 U.S. 402 (1947).
47 Suydam v. Williamson, 24 How. (65 U.S.) 427 (1861); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Edwards v. California, 314 U.S. 160 (1941); and Ott v. Mississippi Bargeline, 336 U.S. 169 (1949).
48 Other important lists of Supreme Court overrulings, which largely duplicate the Brandeis-Douglas studies, include: Reed, J., majority opinion in Smith v. Allwright, 321 U.S. 649, 665, note 10 (1944); PRITCHETT, THE ROOSEVELT COURT 300, 301 (1948); Bernhardt, "Supreme Court Reversals on Constitutional Issues," 34 CORN. L. Q. 55 at 56-59 (1948).

Court reversed prior orders denying certiorari.[49] And there are hundreds of cases in which the Supreme Court has taken at least a "departure" from former dictates.

III

OVERRULINGS AND "EROSION"

Most students of Supreme Court law—especially of constitutional law—are far more interested in the erosion of Supreme Court doctrine than in overrulings. They are deeply concerned with something called judicial discretion, judicial statesmanship or judicial law-making—and are primarily interested in the process by which former decisions are avoided or evaded in developing new doctrine. They are, of course, aware of the many opinions which have ignored decisions of the past on the same subject—even when those decisions were diligently argued by counsel. And these students are similarly aware of the techniques of opinion writers in disposing of past decisions by separating what they call holdings from what they call dicta, and in distinguishing cases on supposed differences in facts. These are the students who continually look behind expressed rationale. They find erosion of Supreme Court doctrine as they question whether the old and new cases could have been decided as they were by the same nine men on the same day.

It is not always easy to separate instances of overrulings from instances of erosion. Such classification is arbitrary at best. For, as pointed out by Justice Douglas, "the distinguishing of precedents is often a gradual and reluctant way of overruling cases."[50] And, as Justice Brandeis observed, "Movement in constitutional interpretation and application—often involving no less striking departures from doctrines previously established—takes place also without specific overruling or qualification of the earlier cases."[51]

[49] The reversals which finally granted certiorari were Paramount Publix Corp. v. American Tri-Ergon Corp., 293 U.S. 528 (1934); Douglas v. Willcuts, 295 U.S. 722 (1935); New World Life Ins. Co. v. United States, 310 U.S. 654 (1940); Neuberger v. Commissioner of Internal Revenue, 310 U.S. 655 (1940); Esenwein v. Commonwealth ex rel. Esenwein, 322 U.S. 725 (1944); McCullough v. Karamerer Corp., 322 U.S. 766 (1944); Tomkins v. Missouri, 322 U.S. 725 (1944); Hickman v. Taylor, 328 U.S. 876 (1946); Gardner v. New Jersey, 328 U.S. 876 (1946); Madison Avenue Corp. v. Asselta, 329 U.S. 817 (1946); Interstate Natural Gas Co. v. Federal Power Commission, 330 U.S. 852 (1947); Alaska Juneau Gold Mining Co. v. Robertson, 331 U.S. 793 (1947); United States ex rel. Eichenlaub v. Watkins, 337 U.S. 955 (1949); Clark v. Manufacturers Trust, 337 U.S. 953 (1949); Sacher v. United States, 342 U.S. 858 (1951).

[50] Douglas, "Stare Decisis," 49 COL. L. REV. 735 at 747 (1949).

[51] Dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 at 408 (1932).

Where Supreme Court doctrine undergoes gradual changes over long periods of time, it is extremely difficult to pinpoint *the* decision which results in the actual, practical overruling. *Tigner v. Texas*[52] must be cited as the case which overruled *Connolly v. Union Sewer Pipe Co.*[53] But Justice Frankfurter, writing for the majority, clearly recognized the dwindling influence of the prior determination as a constitutional precedent. "*Connolly's* case," he wrote in *Tigner v. Texas,* "has been worn away by the erosion of time, and we are of opinion that it is no longer controlling."[54]

The problem of designating the actual overruling is even more difficult in the desegregation decisions. *Plessy v. Ferguson,*[55] the 1896 case which upheld racial discrimination where conditions were "separate but equal," died as a precedent long before the current spate of Supreme Court decisions on the issue. But when was *Plessy v. Ferguson* overruled? The last Supreme Court case which in any way upheld a racial classification was *Korematsu v. United States* in 1944.[56] But this decision, based on wartime powers and wartime emergencies, received no solace from the *Plessy* doctrine and could in no way be considered a determination in the *Plessy* spirit. The last decision of the Supreme Court consistent with the *Plessy* spirit—but by no means a reaffirmance of the *Plessy* holding—was *Gong Lum v. Rice* in 1927.[57] Thus, with the possible exception of the *Korematsu* determination, it can safely be said that every Supreme Court decision since 1927 involving racial discrimination constituted some erosion of the *Plessy* doctrine.

But it was virtually impossible to classify *Plessy v. Ferguson* as overruled until the school desegregation decision of *Brown v. Board of Education* in 1954. And even that decision was questionable on the point of overruling. Chief Justice Warren's unanimous opinion took pains to avoid an overruling statement. Further, in the absence of later cases which clarified the meaning of the *Brown* decision, it could well have been argued that "separate but equal" was still reasonable in transportation (*Plessy*), even if it was not reasonable in the public schools (*Brown*).

52 310 U.S. 141 (1940).
53 184 U.S. 540 (1902).
54 310 U.S. 141 at 147 (1940). In a similar vein, see cases cited, notes 23 to 28 supra. See also Louisville Railroad Co. v. Letson, 2 How. (43 U.S.) 497 at 554-555 (1844).
55 163 U.S. 537 (1896).
56 323 U.S. 214 (1944).
57 275 U.S. 78 (1927).

The decision which must be classified as the one overruling *Plessy v. Ferguson* was *Gayle v. Browder* in 1956.[58] For *Gayle,* like *Plessy,* involved transportation, and the facts were as similar as one could expect in two different cases before the Supreme Court. Yet even here there was no express overruling. The entire Supreme Court decision was set forth in a per curiam opinion of two brief sentences: "The motion to affirm is granted and the judgment is affirmed. *Brown v. Board of Education,* 347 U.S. 483; *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877; *Holmes v. Atlanta,* 350 U.S. 879."

Sometimes there is no *Gayle v. Browder* to assist the classifier who seeks the case which turns erosion into an overruling. Where is the decision, for example, which marks the end of such discredited and eroded opinions as *Gitlow v. New York*[59] and *Whitney v. California*?[60] The most clear-cut denunciation of the doctrine expressed in those cases appears in Chief Justice Vinson's opinion in *Dennis v. United States.*[61] Wrote the Chief Justice: "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined to the Holmes-Brandeis [dissenting] rationale."[62] And Vinson then cites nine cases in support of his position.[63]

It is impossible, however, to classify *Dennis v. United States* as a case overruling the *Whitney* and *Gitlow* decisions. Nor is it possible to cite numerous other instances of erosion as strong enough to constitute overrulings. Brandeis recognized this problem in his famous footnotes on the general subject in *Burnet v. Coronado Oil & Gas Co.*[64] There he lists sixteen striking examples of "qualifying" opinions—all of which are certainly close to overrulings, but which Brandeis and the authors have hesitated to place in this category.[65]

58 352 U.S. 903 (1956).
59 268 U.S. 652 (1925).
60 274 U.S. 357 (1927).
61 341 U.S. 494 (1951).
62 Id. at 507.
63 Ibid. Thornhill v. Alabama, 310 U.S. 88 at 104-106 (1940); Carlson v. California, 310 U.S. 106 at 113 (1940); Cantwell v. Connecticut, 310 U.S. 296 at 308, 311 (1940); Bridges v. California, 314 U.S. 252 at 260-263 (1941); Taylor v. Mississippi, 319 U.S. 583 at 589-590 (1943); West Virginia Board of Education v. Barnette, 319 U.S. 624 at 639 (1943); Thomas v. Collins, 323 U.S. 516 at 530 (1945); Pennekamp v. Florida, 328 U.S. 331 at 333-336 (1946); Craig v. Harney, 331 U.S. 367 at 373 (1947).
64 285 U.S. 393 at 406-409 (1932).
65 Id. at 406-408, notes 1 and 2.

Nor should a case like *Skinner v. Oklahoma*[66] be classified as having overruled *Buck v. Bell.*[67] True, if the concurring opinion of Jackson had been the majority opinion rather than that of Douglas, there would have been an express overruling. Such, however, was not the situation. True also, if both cases had been before the Supreme Court on the same day and had the *Skinner* philosophy prevailed, *Buck v. Bell* would probably have been decided differently. But this, of course, does not amount to an overruling.

Finally, there are instances of erosion which are so recent—and so subject to re-definition—that it would be presumptuous to apply the overruling label. *Yates v. United States*[68] in 1957 resulted in the reversal of 14 convictions for conspiracy to violate the Smith Act. It *distinguished* the *Dennis*[69] case of 1957 which had affirmed the conviction under the Smith Act of the so-called first-string Communist leaders. Thus the *Yates* case is certainly not an example of an express overruling. And whether it can be classified as any kind of overruling will depend upon other Communist conspiracy cases yet to come which will explain just what the *Yates* decision means.

IV

STATISTICS AND PERSONALITIES

The first overruling decision of the Supreme Court of the United States was handed down in 1810 in *Hudson v. Guestier.*[70] By a 4-1 vote, with Justice Brockholst Livingston delivering the majority opinion and Chief Justice John Marshall the lone dissenter, the Court overruled the two-year-old decision of Chief Justice Marshall in *Rose v. Himely.*[71] At issue was the right of French warships to seize American vessels trading with the revolutionary forces of French-owned Santo Domingo—and the Court finally upheld this right.

But what was far more important was that a supposedly Marshall-dominated Court, unmoved by a Marshall dissent, had

66 316 U.S. 535 (1942).
67 274 U.S. 200 (1927).
68 354 U.S. 298 (1957).
69 341 U.S. 494 (1951).
70 6 Cranch (10 U.S.) 281 (1810).
71 4 Cranch (8 U.S.) 241 (1808).

overturned a Marshall decision in establishing the right of the Supreme Court to re-evaluate and overrule its prior determinations. And there are today at least ninety precedents sustaining this right—up to and including the twin cases of *Reid v. Covert* and *Kinsella v. Krueger*[72] in 1957.

Rose v. Himely, decided in 1808, was not the earliest Supreme Court case to meet eventual overruling. *Hylton v. United States*[73] in 1796 was law for 99 years—until the "overruling" (according to Brandeis' characterization)[73a] in *Pollock v. Farmers' Loan & Trust*[74] in 1895. *Wilson v. Daniel,*[75] a 1798 case, was overruled by *Gordon v. Ogden*[76] in 1830; and the 1806 decision in *Strawbridge v. Curtiss*[77] was overruled in 1844 in *Louisville, Cincinnati & Charleston R. R. Co. v. Letson.*[78]

While *Hylton v. United States* survived for 99 years, it was not the longest-lived of the Supreme Court cases overruled. The doctrine of *City of New York v. Miln,*[79] a 6 to 1 decision in 1837, was not overruled until the unanimous decision in *Edwards v. California*[80] in 1941—104 years later. *Dobbins v. Erie County*[81] in 1842 was overruled 97 years later by the 1939 case of *Graves v. New York ex rel. O'Keefe.*[82] And *Swift v. Tyson,*[83] another 1842 decision, was law until *Erie R. Co. v. Tompkins*[84] in 1938, a period of 96 years.

At the other extreme are eight Supreme Court decisions which were overruled in less than a year. Seven of these cases were reversed on rehearings—one, *Thibaut v. Car & General Ins. Corp.,*[85] within 42 days. The eighth case was the 1942 decision in *Jones v. Opelika*[86] which was overruled eleven months later by *Murdock v. Pennsylvania*[87] and a per curiam opinion in

72 354 U.S. 1 (1957).
73 3 Dall. (3 U.S.) 171 (1796).
73a See note 32 supra.
74 158 U.S. 601 (1895).
75 3 Dall. (3 U.S.) 401 (1798).
76 3 Pet. (28 U.S.) 33 (1830).
77 3 Cranch (7 U.S.) 267 (1806).
78 2 How. (43 U.S.) 497 (1844).
79 11 Pet. (36 U.S.) 102 (1837).
80 314 U.S. 160 (1941).
81 16 Pet. (41 U.S.) 434 (1842).
82 306 U.S. 466 (1939).
83 16 Pet. (41 U.S.) 1 (1842).
84 304 U.S. 64 (1938).
85 332 U.S. 751 (1947), and 332 U.S. 828 (1947).
86 316 U.S. 584 (1942).
87 319 U.S. 105 (1943).

a rehearing of *Jones v. Opelika*[88] based on the reasoning of the *Murdock* decision.

The average (mean) life-span of cases overruled is 24 years. The median figure is 17 years.

Of the 90 overruling decisions, the largest percentage was rendered by the Stone Court from 1941 to 1946. There were 21 overrulings during this five-year period, as compared with only 7 overrulings down to the end of the Civil War. More than half (47) of the overruling opinions were handed down since 1937.

Here is a breakdown by Court:

Chief Justice	*Years*	*Number Overrulings*
Jay	1789-1795	0
Rutledge	1795	0
Ellsworth	1796-1800	0
Marshall	1801-1835	3
Taney	1836-1864	4
Chase	1864-1873	5
Waite	1874-1888	12
Fuller	1888-1910	4
White	1910-1921	5
Taft	1921-1930	5
Hughes	1930-1941	15
Stone	1941-1946	21
Vinson	1946-1953	13
Warren	1953-1957	3
		90

The 90 overruling decisions either expressly or impliedly overruled 122 decisions. Thus there were 122 old (overruled) cases in which dissenters might have argued for the contrary doctrine later accepted by the Court. Conversely, there were 90 new (overruling) cases in which dissenters might have argued stare decisis. In total, there were 212 overruling and overruled cases in which dissents might have been written.

Actually, there were dissents in 131 cases. In five of the old overruled cases, however, the Supreme Court handed down 4-4 per curiam affirmances, and the dissenting votes were not recorded. The other 81 opinions were unanimous. Dissents were recorded in 54 of the 90 overruling decisions and 72 of the 122 overruled decisions—a total of 126 cases having recorded dissents.

[88] 319 U.S. 103 (1943).

Fifty-nine of the 91 justices who served on the Court as of the end of the 1957 Term dissented in the 126 cases in which dissenting votes were recorded. There were 181 dissenters in the old (overruled) cases arguing for the views later adopted by the Court. There were 130 dissenters in the new (overruling) cases in which the dissenters argued for the affirmance of prior doctrine.

Here are these same figures in tabular form:

Number of—	*(New) Overruling Cases*	*(Old) Overruled Cases*	*Total*
Decisions Noted	90	122	212
Unanimous Decisions	36	45	81
Decisions with Dissents	54	77	131
Decisions with Dissenters Not Recorded	—	5	5
Decisions with Dissenters Recorded	54	72	126
Dissenting Votes Recorded	130	181	311

The "great dissenters" were Brandeis, Stone, Holmes and Frankfurter. Brandeis dissented in 22 old (overruled) decisions and in two new (overruling) decisions. Stone registered 20 dissents—15 in the old cases and five in the new. Holmes was a dissenter in 18 cases, 16 of them cases overruled. Frankfurter dissented in only three cases which were later overruled, but disagreed with the majority in 13 of the new (overruling) decisions.

The tabulation on judges who dissented six times or more is as follows:

	DISSENTING IN		
Judge	*Old (Overruled) Case*	*New (Overruling) Case*	*Total*
Brandeis	22	2	24
Stone	15	5	20
Holmes	16	2	18
Frankfurter	3	13	16
Reed	2	11	13
McReynolds	1	11	12
Roberts	2	10	12
Harlan (1st)	6	4	10
Jackson, R. H.	1	9	10
White	6	3	9

Black	5	4	9
Miller	5	3	8
Hughes	7	1	8
Burton	2	6	8
Catron	7	0	7
Butler	0	7	7
Murphy	2	5	7
Bradley	3	3	6
McKenna	4	2	6
VanDevanter	3	3	6
Cardozo	6	0	6
Douglas	4	2	6

V

THE RIGHT TO BE WRONG

Despite the fiction of judicial infallibility, judges have been known to be wrong. It may be useful to foster the illusion that "judges know more law than anybody else" and that "courts always decide every question correctly"[89]—but such illusions have value only if they are recognized as illusions. It is just not true that "the law makes few, if any, mistakes."[90] "To err is human." And, as at least one court has observed, "after all, judges are human."[91]

On seventy occasions, the Supreme Court of the United States has expressly overruled its decisions of the past. In at least twenty more cases, the Supreme Court has made a decision which can only be interpreted as an overruling. And this adds up to ninety public confessions of error. For even if the Supreme Court had erred in handing down its overruling opinions, there still would be ninety instances of being wrong. Thus Supreme Court error must be recognized as fact and analyzed as fact. And this fact raises certain basic quesions:

1. Does the Supreme Court have the "right" to overrule its prior decisions?
2. Assuming that this "right" exists, under what conditions should it be exercised?

89 Levitan, "Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?" 43 A.B.A.J. 628 at 630 (1957).

90 Hannah v. Lovelace-Young Lumber Co., 159 Ga. 856 at 861, 127 S.E. 225 (1925).

91 Stoner v. Iowa State Highway Commission, 227 Iowa 115 at 119, 287 N.W. 269 (1939).

3. Assuming that this "right" exists, when does the exercise of this right constitute an abuse of discretion?

A. *The "Right" To Overrule*

There may be a lack of logic in citing precedent for the proposition that precedent may be overruled. Yet such is the logic of law and legal analysis. The Supreme Court's ninety overruling decisions represent 89 judicial affirmances of the 1810 case of *Hudson v. Guestier*[92]—and a total of ninety precedents to uphold overrulings. It is unlikely that such quantity of opinions could be marshaled in support of any other Supreme Court doctrine.

But authority for this principle is not limited to what the United States Supreme Court has said and done. Blackstone took the position that a common law judge had the right to overturn any precedent which was "flatly absurd" or unjust or plainly inconvenient.[93] And, in a similar vein, Lord Coke stated that "inconvenience in the results of a rule established by precedent is strong argument to prove that the precedent itself is contrary to law."[94]

Lord Coke's statement is of particular significance. For even if one believes in the immutable nature of the law, there may still be a justification for the overruling of precedents. In the appropriate case, an overruling may be interpreted as the correction of a prior misunderstanding as to the meaning of an unchanging legal principle—just as that same overruling may be interpreted as a judge-made change of judge-made law.

There are, of course, those who decry the existence of overrulings—but even they do not deny the right to render such decisions. They are concerned with the *abuse* of that right. At its July 1957 convention, the State Bar of Texas passed a resolution deploring "the tendency of the Supreme Court to depart from judicial precedent in interpreting the Constitution";[95] but the proposed solution was to require ten years' experience as a judge or practicing attorney for nomination to the Court.[96] The

92 6 Cranch (10 U.S.) 281 (1810).

93 1 BLACKST. COMM. *70. See POUND, FUTURE OF THE COMMON LAW 120 (1937).

94 POUND, FUTURE OF THE COMMON LAW 125 (1937).

95 See 41 J. AM. JUD. SOC. 35 (1957).

96 It is, of course, highly unlikely that such a requirement would have any effect on overrulings. The only member of the present Court who has taken a strong stand against

Texas Bar was saying that the present Supreme Court *shouldn't* overrule, not that they *couldn't.*

From the Supreme Court bench itself have come some of the most scathing denunciations of overruling decisions. Dissenting in the overruling case of *Pollock v. Farmers' Loan & Trust Co.* in 1895, Justice (later Chief Justice) White had this to say:

> "The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."[97]

Yet White joined with the majority in four of the five overruling decisions handed down during his eleven years as chief justice.[98]

Similar comments appear in dissents of Justice Roberts. Here is his observation in *Smith v. Allwright*:[99] "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

And again, in *Mahnich v. Southern S. S. Co.* Justice Roberts said:[100] "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute

overrulings is Justice Frankfurter—the justice with the least number of years' experience as a judge or practicing attorney prior to his Supreme Court appointment.

97 157 U.S. 429 at 652 (1894).

98 Garland v. Washington, 232 U.S. 642 (1914); United States v. Nice, 241 U.S. 591 (1916); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Rosen v. United States, 245 U.S. 467 (1918). The fifth overruling decision during this period—a decision in which White dissented—was Penna. R. Co. v. Towers, 245 U.S. 6 (1917).

99 321 U.S. 649 at 669 (1944).

100 321 U.S. 96 at 112-113 (1944).

actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."

But then Justice Roberts, who had joined with the majority in a number of important overruling decisions,[101] qualified his objections in these words: "Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case."[102]

Thus the "right" to overrule, like the existence of at least ninety Supreme Court overrulings, is a fact. But when is an overruling "needed"? And if not "needed," when is an overruling at least "justified"?

B. *To Overrule or Not To Overrule—Basic Policies*

There are no legal limits to the "right" to overrule. Whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."[103] But what are—or should be—the metes and bounds of this discretion?

"In deciding whether or not to follow a precedent, the Court must eventually harmonize antipathetical goals. A balance must be struck between values which are inherent in consistency of decision and values which flow from judicial recognition of the changing nature and patterns of society. This is judicial labor at its highest level."[104] And it is judicial labor in which, as Roscoe Pound points out, "we must seek principles of change no less than principles of stability."[105]

101 E.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); United States v. Darby, 312 U.S. 100 (1941); United States v. Classic, 313 U.S. 299 (1941).

102 321 U.S. 96 at 113 (1944).

103 Hertz v. Woodman, 218 U.S. 205 at 212 (1910).

104 BLAUSTEIN AND FERGUSON, DESEGREGATION AND THE LAW 79 (1957).

105 POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

The metes and bounds of judicial discretion will vary depending upon whether a constitutional issue is involved. For there has been less adherence to precedent in the constitutional cases. Explained Stone and Cardozo, concurring in a 1936 decision: "The doctrine of *stare decisis,* however appropriate and even necessary at times, has only a limited application in the field of constitutional law."[106]

This is as it should be. The most important lesson from the pen of Chief Justice Marshall is that "we must never forget that it is a *constitution* we are expounding."[107] Justice Douglas has amplified this assertion in these words: "The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. . . . He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him."[108]

Brandeis gives the second basic reason for the "limited application" of precedent in constitutional law. *"Stare decisis,"* he said, "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. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. . . . In cases involving the Federal Constitution, the position of this Court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to *all classes of cases.* Parliament is free to correct any judicial error; and the remedy may be promptly invoked."[109]

Sixty of the Supreme Court's ninety overrulings have been in the constitutional law area.

[106] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 at 94 (1936).
[107] McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 at 407 (1819).
[108] Douglas, "Stare Decisis," 49 COL. L. REV. 735 at 736 (1949).
[109] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 at 406-410 (1932). Emphasis added.

VI

"NECESSARY," "JUSTIFIED" AND "UNWARRANTED" OVERRULINGS

Supreme Court overrulings can be conveniently divided into three categories: (1) those which are necessary; (2) those which are not necessary but which may be justified; and (3) those which are unwarranted. Such division is arbitrary at best. The various arguments under each category tend to merge with others in other categories—for many of the arguments are based on differences in degree rather than differences in kind. But the classification does clarify analysis.

A. *"Necessary" Overrulings*

There are some cases in which even the most stalwart adherent of stare decisis would agree that overrulings were "necessary." Again classification becomes arbitrary. But it can be argued that a precedent *should* be overruled—

1. Where the Supreme Court must choose between conflicting precedents;
2. Where the Supreme Court must follow a state court's interpretation of a state constitution or statute—and that interpretation is contrary to the Supreme Court's prior decision;
3. Where the Supreme Court's prior interpretation is impracticable, resulting in *great* hardship or inconvenience;
4. Where there has been *obvious* error in the prior Supreme Court decision; and
5. Where an express overruling is merely declaratory of a prior *virtual* overruling.

All of these arguments, especially the last, require explanation. The first—in which the Supreme Court must choose between conflicting precedents—is the most apparent. And the overruling in *Mahnich v. Southern S. S. Co.*[110] is an excellent example of a case in point. Chief Justice Stone posed and settled the conflicting precedents issue in the concluding words of the Court's opinion: "We cannot follow [*The Pinar Del Rio*[111]] . . . and also follow *The Osceola,*[112] . . . the cases which it approved

110 321 U.S. 96 (1944).
111 277 U.S. 151 (1928).
112 189 U.S. 158 (1903).

and *Carlisle Packing Co. v. Sandanger.*[113] . . . We prefer to follow the latter as the more consonant with principle and authority."[114] Thus the 1928 case of *The Pinar Del Rio* was overruled. Adherence to that precedent, on the other hand, would have necessitated the overruling of the *Osceola* and *Carlisle* cases.

As far as the second argument is concerned, there are, of course, many instances in which the United States Supreme Court has been called upon to interpret a state constitution or statute. And there are likewise instances in which the same issues later came before state supreme courts—and where the state supreme courts rendered decisions contrary to those of the United States Supreme Court. In four cases[115] (two involving state constitutions and two involving state statutes) the issue returned once again to the Supreme Court of the United States. And in these four cases the high tribunal overruled its prior decisions to comply with the state determinations. According to the United States Supreme Court, it was necessary to do so.

Here is language from two of these cases on this necessity for overrulings. In *Fairfield v. County of Gallatin* in 1879, the Court had this to say: "And it has been held that this court will abandon its former decision construing a State statute if the State courts have subsequently given to it a different construction."[116] Likewise, in *County of Cass v. Johnston* in 1877, the Court

[113] 259 U.S. 255 (1922).

[114] 321 U.S. 96 at 105 (1944).

[115] Greene v. Neal's Lessee, 6 Pet. (31 U.S.) 291 (1832), overruling Patton's Lessee v. Easton, 1 Wheat. (14 U.S.) 476 (1816) (state statute); Suydam v. Williamson, 24 How. (65 U.S.) 427 (1861), overruling Williamson v. Berry, 8 How. (49 U.S.) 495 (1850) (state statute); County of Cass v. Johnston, 95 U.S. 360 (1877), overruling Harshman v. Bates County, 92 U.S. 569 (1875) (state constitution); and Fairfield v. County of Gallatin, 100 U.S. 47 (1879), overruling Town of Concord v. Savings Bank, 92 U.S. 625 (1875) (state constitution).

[116] 100 U.S. 47 at 54 (1879). Outlining the legal background of Supreme Court adherence to state interpretations of state law, the Court also said (at p. 52): "At a very early day it was announced that in cases depending upon the Constitution or statutes of a State this court would adopt the construction of the statutes or Constitution given by the courts of the State, when that construction could be ascertained. *Polk's Lessee v. Wendell,* 9 Cranch [13 U.S.] 87 [1815]. In *Nesmith v. Sheldon,* 7 How. [48 U.S.] 812 [1849], it is declared to be the 'established doctrine that this court will adopt and follow the decisions of the State courts in the construction of their own Constitution and statutes, when that construction has been settled by the decisions of its highest tribunal.' In *Walker v. State Harbor Commissioners,* 17 Wall. [84 U.S.] 648 [1874], we said, 'This court follows the adjudications of the highest court of the State' in the construction of its statutes. 'Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness.' "

expressed its holding in these words: ". . . as a rule of State statutory and constitutional construction, [the Missouri Supreme Court's decision] is binding upon us. It follows that our decision in *Harshman v. Bates County,* in so far as it declares the law to be unconstitutional, must be overruled."[117]

It can also be argued that an overruling is "necessary" where a prior interpretation is impracticable, resulting in great hardship or inconvenience. But whether an overruling based on this argument is in fact necessary (or merely "justified" or even "unwarranted") depends upon the extent of that hardship or inconvenience.

Two famous overrulings illustrate this argument. *Hepburn v. Griswold*[118] resulted in hardship and would have resulted in still more hardship. *Swift v. Tyson,*[119] which originally "did no great harm when confined to what Story dealt with,"[120] gradually caused inconvenience and eventually also resulted in hardship.

It was by a 5-4 decision that the Court, in the 1872 *Legal Tender Cases,*[121] overruled the 5-3 decision in *Hepburn v. Griswold,* decided three years earlier. And there certainly would not have been an overruling at that time had there not been two convenient vacancies on the Supreme Court which were immediately filled by proponents of the Legal Tender Acts. But the political implications of those appointments had nothing to do with the fact of hardship and potential hardship. Here is what Justice Strong wrote for the majority in the *Legal Tender Cases*:

> "The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring treasury notes a legal tender. . . . If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin . . . ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. . . . [S]erious as they are

117 95 U.S. 360 at 369 (1877).
118 8 Wall. (75 U.S.) 603 (1869).
119 16 Pet. (41 U.S.) 1 (1842).
120 2 HOWE, HOLMES-POLLOCK LETTERS 215 (1941).
121 12 Wall. (79 U.S.) 457 (1872).

> [however, they] must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears."[122]

The 1842 decision of *Swift v. Tyson* was long in bringing hardship. But by the time of the overruling opinion of *Erie R. Co. v. Tompkins*[123] in 1938, it has imposed an intolerable burden upon litigants, lawyers and the courts. Justice Brandeis emphasized this argument at various points in his unanimous opinion:

> "Experience in applying the doctrine of *Swift* v. *Tyson,* had revealed its defects, political and social; . . . the mischievous results of the doctrine had become apparent. . . . *Swift* v. *Tyson* introduced grave discrimination by noncitizens against citizens . . . the doctrine rendered impossible equal protection of the law. . . . The injustice and confusion incident to the doctrine of *Swift* v. *Tyson* have been repeatedly urged. . . ."[124]

The fourth argument is that an overruling is "necessary" where there has been *obvious* error in a prior Supreme Court decision. There should be no disagreement on this point; but it would be hard to find unanimity on what is *obvious.* The now-condemned separate-but-equal case of *Plessy v. Ferguson*[125] is certainly not an apt illustration.

Yet it is not difficult to find examples of what might be considered *obvious* error. Thirty-seven of the ninety overruling decisions were unanimous—with the justices at least indicating the "obviousness" of prior error by sheer weight of numbers. And two of these cases contain statements which should leave no doubt as to the mistakes of the past.

The will of Jacob Dawson, for example, was twice before the Supreme Court. And both times, with a thirteen-year interval, the Court rendered 9-0 decisions. The overruling opinion contained these words: "And this court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject, and of the learned briefs of counsel, is of opinion that the sound construction of this will, . . . is in ac-

122 Id. at 529-531.
123 304 U.S. 64 (1938).
124 Id. at 74-77.
125 163 U.S. 537 (1896).

cordance with the conclusion of the state court, and not with the former decision of this court, which must, therefore, be considered as overruled."[126]

An even stronger assertion of prior error appears in a 9-0 opinion by Justice Miller which overruled another 9-0 opinion by Justice Miller, written only two years before. Said the justice: "we are now of the opinion, on a fuller argument and more mature consideration, that the [former] position is not tenable."[127]

There are also cases in which the Supreme Court was so unlawyer-like or so unmindful of the consequences of its conclusions that the decisions must likewise be regarded as erroneous. *The Thomas Jefferson*[128] and *Supreme Tribe of Ben Hur v. Cauble*[129] are examples of such cases.

The Thomas Jefferson was decided in 1825 and was overruled in 1851 by *The Genesee Chief*.[130] At issue was the admiralty jurisdiction of the federal government. The earlier decision had limited such jurisdiction "to the ebb and flow of the tide"; the latter decision held that this jurisdiction extended to all navigable waters. Wrote Chief Justice Taney:

> "[W]e are convinced that, if we follow . . . [*The Thomas Jefferson*], we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day."[131]

Justice Frankfurter wrote the majority opinion in *Toucey v. N. Y. Life Ins. Co.*,[132] which not only overruled one aspect of *Supreme Tribe of Ben Hur v. Cauble*[133] but also criticized it

126 Roberts v. Lewis, 153 U.S. 367 at 377 (1894), overruling Giles v. Little, 104 U.S. 291 (1881).

127 Railway Co. v. McShane, 22 Wall. (89 U.S.) 444 at 461 (1874), overruling Railway Co. v. Prescott, 16 Wall. (83 U.S.) 603 (1872).

128 10 Wheat. (23 U.S.) 173 (1825).

129 255 U.S. 356 (1921).

130 12 How. (53 U.S.) 443 (1851).

131 Id. at 456. See also note 22 supra.

132 314 U.S. 118 (1941).

133 255 U.S. 356 (1921).

as "sporadic" and "ill-considered." Said Frankfurter: "The Court disposed of the . . . question in one sentence, citing only one case in support of its conclusion, . . . which, as we have seen, was not a relitigation case [and therefore not in point]."[134]

Fifth and finally, some overrulings are "necessary" to point out the fact that prior decisions have already been overruled, but that the Court has thus far neglected to say so. These are the cases in which the Court asserts that its overrulings are merely declaratory of an existing state of the law.

So in the overruling case of *Leisy v. Hardin,* the Court took the position that, "The authority of Peirce *v.* New Hampshire[135] . . . must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to."[136] Similarly, in *Brenham v. German American Bank,* the Court said: "We, therefore, must regard the cases of *Rogers v. Burlington*[137] and *Mitchell v. Burlington,*[138] as overruled . . . by later cases in this court."[139]

The best illustration of the "necessity" for *declaratory* overrulings is found in the wages and hours litigation which came before the Supreme Court. At issue was the validity of statutes setting minimum wages and maximum hours. Here is what happened in these cases:

Cases	*Date*	*Upheld or Denied Validity*	*Vote*	*Citation*
Holden v. Hardy	1898	Upheld	7-2	169 U.S. 366
Lochner v. New York	1905	Denied	5-4	198 U.S. 45
Bunting v. Oregon	1917	Upheld	5-3	243 U.S. 426
Adkins v. Children's Hospital	1923	Denied	5-3	261 U.S. 525
West Coast Hotel Co. v. Parrish	1937	Upheld	5-4	300 U.S. 379[140]

134 Id. at 138-139.
135 5 How. (46 U.S.) 504 (1847).
136 135 U.S. 100 at 118 (1890). See also notes 23 to 28 supra.
137 3 Wall. (70 U.S.) 654 (1866).
138 4 Wall. (71 U.S.) 270 (1867).
139 144 U.S. 173 at 187 (1892).
140 This is by no means a complete list of the wage and hour cases. Important decisions which upheld statutes setting maximum working hours for women included Muller v. Oregon, 208 U.S. 412 (1908); Riley v. Massachusetts, 232 U.S. 671 (1914); Miller v. Wilson, 236 U.S. 373 (1915); Bosley v. McLaughlin, 236 U.S. 385 (1915); and Radice v. New York, 264 U.S. 292 (1924). An important case reaffirming the 1923 decision in Adkins v. Children's Hospital was Morehead v. New York, 298 U.S. 587 (1936).

Thus, in a sense, *West Coast Hotel* overruled *Adkins,* which had overruled *Bunting,* which had overruled *Lochner,* which had overruled *Holden.* Yet *Lochner* sought to "distinguish" *Holden, Bunting* ignored *Lochner,* and *Adkins* discussed *Bunting* only as a historical event. It was not until the decision in *West Coast Hotel* that the Court clarified its position, finally overruling *Adkins* and, by implication, *Lochner.*

The various opinions in *Adkins* reflect the confusion which results when the Supreme Court changes its views without announcing a definite stand on prior decided cases.

Speaking for the majority, Justice Sutherland wrote that *Lochner* had declared *Holden* to be "inapplicable"[141] and that *Lochner* was still good law. "Subsequent cases [to *Lochner*]," he said, "have been distinguished from that decision, but the principles therein stated have never been disapproved."[142]

The dissenters took a different view. Chief Justice Taft had this to say: "It is impossible for me to reconcile the *Bunting Case* and the *Lochner Case* and I have always supposed that the *Lochner Case* was thus overruled *sub silentio.*"[143] Holmes was even more definite on this point. "But after Bunting," he wrote, "I had supposed . . . that *Lochner v. New York* would be allowed a deserved repose."[144]

True, the reluctance to overrule doctrine which can be avoided has its advantages in terms of judicial flexibility. But despite such advantages, there are instances when clarity is still more important and where it is "necessary" for the Court to express a definite stand by means of an overruling.

B. *"Justified" Overrulings*

By a change in degree, a "necessary" overruling becomes merely "justified."

1. Just as an overruling is "necessary" in resolving prior conflicting precedents, so an overruling is at least "justified" where the Court must choose between following a precedent and following a contrary philosophy expressed in other cases. The Court

141 261 U.S. 525 at 548 (1923).
142 Id. at 550.
143 Id. at 564.
144 Id. at 570.

in the school segregation case of *Brown v. Board of Education*[145] and the transportation case of *Gayle v. Browder*[146] finally overruled *Plessy v. Ferguson.*[147] And the Court was severely criticized for its departure from this acknowledged precedent. But what the critics failed to realize was that adherence to the 1896 case of *Plessy v. Ferguson* would have resulted in a decision contrary to the philosophy and spirit of at least four cases involving Negro rights in education, decided between 1938 and 1950.[148] Faced with the task of determining the constitutionality of laws based on racial segregation, the Supreme Court could not have reconciled all of the prior cases on the subject. Some decision or decisions had to be overruled—at least in spirit.

2. Just as an overruling is "necessary" where a prior decision has resulted in great hardship or inconvenience, so an overruling is at least "justified" where a prior decision fails to meet the needs of subsequent times. This is particularly applicable in the field of constitutional law. "While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning."[149] It was this philosophy which led the New Deal and Fair Deal Courts to re-examine the economic realities of the complex society which they served and to overrule decisions which had not stood the test of time. In 1944, for example, the Court re-examined the activities of insurance companies—companies which insured property in many jurisdictions and issued coverage for articles moving from state to state. And in the 1944 case of *United States v. South-Eastern Underwriters Assn.,*[150] the Court, at least according to Justice Douglas,[150a] overruled the 1869 decision in *Paul v. Virginia*[151] which had declared that insurance was not interstate commerce.

3. Just as it is "necessary" for the Supreme Court to correct the obvious errors of the past, so the Court is "justified" in changing its views after re-examination and reconsideration of prior

145 347 U.S. 483 (1954).
146 352 U.S. 903 (1956).
147 163 U.S. 537 (1896).
148 Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
149 Sweezy v. State of New Hampshire, 354 U.S. 234 at 266 (1957).
150 322 U.S. 533 (1944).
150a See note 43 supra.
151 8 Wall. (75 U.S.) 168 (1869).

doctrine. It is, of course, "revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[152] And "it is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations."[153] As Justice Reed declared in the overruling case of *Smith v. Allwright,* "when convinced of former error, this Court has never felt constrained to follow precedent."[154] Another example of an overruling based on this argument is *United States v. Nice.*[155] There the unanimous Court had this to say: "We recognize that a different construction was placed upon §6 of the act of 1887 in *Matter of Heff,*[156] but after re-examining the question in light of other provisions of the act and of many later enactments clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled."[157]

4. Every overruling is reflective of a judicial change of mind. Every overruling means that at least a majority of the Court believes that a former majority erred in rendering a prior decision. When the collective majority in a new decision changes the collective mind of the majority in a former decision, it may be argued that the overruling was "unwarranted." But when the *same* judges change their minds, the overruling is at least "justified." An 8-1 decision in *West Virginia Board of Education v. Barnette*[158] in 1943 overruled the 8-1 decision in *Minersville School District v. Gobitis*[159] in 1940. There were only two changes in Court personnel during this period. The Court took a different position in the latter case because three of the judges—Black, Douglas and Murphy—changed their minds. Commenting on these decisions, one observer presents the justification argument in these words: "This may be done without embarrassment when the error is confessed by those who joined in the former opinion, as in the recent Jehovah's Witness flag salute case."[160]

152 Holmes, "The Path of the Law," 10 HARV. L. REV. 457 at 469 (1897).
153 Barden v. Northern Pacific R. Co., 154 U.S. 288 at 322 (1894).
154 321 U.S. 649 at 665 (1944).
155 241 U.S. 591 (1916).
156 197 U.S. 488 (1905).
157 241 U.S. 591 at 601 (1916).
158 319 U.S. 624 (1943).
159 310 U.S. 586 (1940).
160 Wilson, "Stare Decisis, Quo Vadis? The Orphaned Doctrine in the Supreme Court," 33 GEO. L. J. 251 at 253 (1945).

Under this theory, virtually all of the Supreme Court's reversals on rehearings are likewise "justified."[161]

C. *"Unwarranted" Overrulings*

There is no question of the Supreme Court's "right" to overrule. And there is no question but that the exercise of that "right" is purely discretionary. Thus it follows that an "unwarranted" overruling would be an abuse of judicial discretion. But how realistic is a charge of "abuse" when the judicial discretion of the Supreme Court knows no limits? For, as Justice Stone pointed out, "the only check upon our own exercise of power is our own sense of self-restraint."[162]

In a strictly legalistic sense, no overrulings are "unwarranted." Yet this does not mean that some precedents *should not* be overruled. And this does not mean that lawyers should not argue that an overruling under such-and-such circumstances *may* be "unwarranted." In any event, it can at least be argued that an overruling is inappropriate—

1. Where the Supreme Court fails to give due consideration to the reasoning and analysis which led to the now overruled decision;
2. Where the Supreme Court fails to give due weight to the "values which are inherent in consistency of decision"—meaning specifically the uniformity, stability and security of law upon which there can be reliance; and
3. Where the overruling results solely from changes in Court personnel—the new members having been appointed because of their known or promised opposition to prior decisions.

Just as it is "necessary" for the Supreme Court to correct the obvious errors of the past, and just as the Supreme Court is "justified" in changing its views after re-examination and reconsideration of prior doctrine, so an overruling may be "unwarranted" where there has not been adequate evaluation of the reasoning and analysis which led to the now overruled decision.

Antiquity is no guaranty of rectitude. No Court should be enslaved by the avowed wisdom of the past or overawed by the stature of its predecessors. But this view can be carried to an

161 See notes 45, 46 and 49 supra.
162 Dissenting in United States v. Butler, 297 U.S. 1 at 79 (1936).

undesirable extreme. It is also important that the Court remembers that there were able lawyers who sat on prior Courts, and that their judgments should be given due consideration. Certainly an overruling is "unwarranted" where the wisdom of able judges is ignored. Certainly an overruling is "unwarranted" if it disregards the possible unanimity which created prior doctrine or disregards the fact that the doctrine was frequently reaffirmed. Certainly an overruling is "unwarranted" when a hastily-made determination is substituted for a decision made after extensive deliberation.

The 5-3 decision in *Hornbuckle v. Toombs*[163] in 1873 overruled three unanimous decisions: an 8-0 determination in *Noonan v. Lee*[164] in 1862, a 10-0 determination in *Orchard v. Hughes*[165] in 1863, and a 9-0 determination in *Dunphy v. Kleinsmith*[166] in 1870. This, of course, does not necessarily make the *Hornbuckle* overruling "unwarranted," but it does serve as an example of an overruling which the Court should have taken pains to justify. And all that the Court said was that, "On a careful review of the whole subject, we are not satisfied that those [overruled] decisions are founded on a correct view of the law."[167]

The *Legal Tender Cases*[168] were undoubtedly correctly decided. This, however, is a conclusion based on hindsight. Contemporary lawyers might well have questioned the extent of judicial deliberation which led to this overruling decision. As Chief Justice Chase pointed out in his dissent, "A majority of the court, five to four, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration. . . ."[169]

Frankfurter and Burton sum up this argument in their dissents in *Commissioner v. Church*.[170] This was a 5-3 decision in 1949, overruling the 9-0 decision of *May v. Heiner*[171] in 1930. Wrote Frankfurter: "If such a series of decisions, viewed in all their circumstances, as that which established the rule in *May v.*

163 18 Wall. (85 U.S.) 648 (1873).
164 2 Black (67 U.S.) 499 (1862).
165 1 Wall. (68 U.S.) 73 (1863).
166 11 Wall. (78 U.S.) 610 (1870).
167 18 Wall. (85 U.S.) 648 at 653 (1873).
168 12 Wall. (79 U.S.) 457 (1872).
169 Id. at 572.
170 335 U.S. 632 (1949).
171 281 U.S. 238 (1930).

Heiner, is to have only contemporaneous value, the wisest decisions of the present Court are assured no greater permanence."[172]

Burton amplified this statement: ". . . this Court will exercise extreme self-restraint in using its power of self-reversal. . . . I find nothing sufficient to justify the reversal of this Court's original construction 18 years after this Court approved it unanimously and 17 years after this Court unanimously reaffirmed that approval."[173]

The basic opposition to overrulings is couched in terms of reliance. For reliance is the key factor in any consideration of the "values which are inherent in consistency of decision."[174] And even the most outspoken adherents of the right to overrule concede the necessity of making judicial determinations upon which courts, lawyers and the public may rely. "Stare decisis," wrote Brandeis, "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."[175] *"Stare decisis,"* wrote Douglas, "provides some moorings so that men may trade and arrange their affairs with confidence."[176]

The importance of reliance has even led the Supreme Court to render what it considered to be "wrong" decisions rather than to hand down overrulings which might cause confusion or "unfortunate practical results." *Helvering v. Griffiths*[177] and *Davis v. Department of Labor*[178] are examples of such determinations.

The 5 to 3 majority in *Helvering v. Griffiths* refused to reconsider the discredited decision in *Eisner v. Macomber.*[179] Wrote Jackson for the majority: "To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety . . . a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change."[180]

Another discredited decision, *Southern Pacific Co. v. Jen-*

172 335 U.S. 632 at 675 (1949).
173 Id. at 699.
174 Note 104 supra.
175 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 at 406 (1932).
176 Douglas, "Stare Decisis," 49 COL. L. REV. 735 at 736 (1949).
177 318 U.S. 371 (1943).
178 317 U.S. 249 (1942).
179 252 U.S. 189 (1920).
180 318 U.S. 371 at 403 (1943).

sen,[181] was before the Court in *Davis v. Department of Labor.* Black, writing for the majority, avoided the *Jensen* result by limiting that precedent to the facts. Chief Justice Stone, the sole dissenter, agreed with the majority conclusion, but stated that he could not join in the opinion unless the *Jensen* case were overruled. And here is what Frankfurter wrote in his concurring opinion:

"Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement. That was the aim of Congress when . . . it afforded to harbor-workers the benefits of state workmen's compensation laws. . . . But *Southern Pacific Co. v. Jensen* . . . frustrated this purpose. Such a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. . . . Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us."[182]

Overrulings may be even more "unwarranted" when reliance is in conflict with what might be termed "fashions in scholarship." There is much merit in Justice Black's contention that the Fourteenth Amendment, ratified in 1868, was not designed to protect corporations. And this is what he argued in his dissent in the 1938 case of *Connecticut General Co. v. Johnson.*[183] But the majority refused to overrule the long line of judicial pronouncements, dating back to the 1886 decision in *Santa Clara Co. v. Southern Pacific Railroad,*[184] which had declared corporations to be "persons" under the amendment. Assuming that Black is correct on the basis of now recognized legal scholarship, and supposing that he could convince a majority of the Court to overrule all of the decisions holding corporations to be "persons," what judicial action would be proper if as yet undiscovered evidence were unearthed indicating that the Fourteenth Amendment was intended to include corporations after all? What would happen if the Court were to reinterpret present doctrine on the basis of the highly-commended and yet hotly disputed legal

181 244 U.S. 205 (1917).
182 317 U.S. 249 at 258, 259 (1942).
183 303 U.S. 77 at 83-90 (1938).
184 118 U.S. 394 (1886).

scholarship of William W. Crosskey in his *Politics and the Constitution*?[185] Surely the desire for the consistency, uniformity, stability and security of the law upon which there can be reliance would make overrulings "unwarranted" under these circumstances.

There may be a middle-of-the-road position which would resolve the change-consistency conflict. It was the view of Cardozo and some other legal scholars that courts should satisfy the need for legal change by rendering prospective overrulings—giving judgment in a particular case in conformity with an old rule, but announcing that a different rule would be followed in subsequent cases.[186] Justice Roberts indicated his approval of this idea in his dissent in *Mahnich v. Southern S. S. Co.*[187] He took the position that certain overrulings would "leave the courts below on an uncharted sea of doubt and difficulty . . . unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change in views and to indicate that they will change their votes on the same question when another case comes before the court."[188] The "modern instance" to which Roberts referred was the 1932 case of *Great Northern Ry. Co. v. Sunburst Co.*[189] which upheld the right of the Supreme Court of Montana[190] to make such a prospective overruling.

The third and final argument is that overrulings are "unwarranted" when they result solely from changes in Court personnel—the new members having been appointed because of their known or promised adherence or opposition to prior decisions. This is something quite different from an individual change-of-

185 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

186 Cardozo, Address before the New York State Bar Association, Jan. 22, 1932. In 1932 N. Y. STATE B. ASSN. REP. 263, 293, 294.

187 321 U.S. 96 (1944).

188 Id. at 113.

189 287 U.S. 358 (1932).

190 The Supreme Court decision in Great Northern Ry. Co. v. Sunburst Co. affirmed the decision in Sunburst Co. v. Great Northern Ry. Co., 91 Mont. 216, 7 P. (2d) 927 (1932), which had followed the prospective overruling announced and discussed in the companion case of Montana Horse Products Co. v. Great Northern Ry. Co., 91 Mont. 194, 7 P. (2d) 919 (1932). Many comments have been written on this subject including: Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision," 18 COL. L. REV. 230 (1918); Notes, 60 HARV. L. REV. 437 (1947), 25 VA. L. REV. 210 (1938); Snyder, "Retrospective Operation of Overruling Decisions," 35 ILL. L. REV. 121 (1940); von Moschzisker, "Stare Decisis in Courts of Last Resort." 37 HARV. L. REV. 409 (1924).

mind. And this is something quite different from a *general* change in the Court's position due to the appointment of justices whose *general* views of the law differ from those of their predecessors.

The argument is a good one—but only in theory. Justice Jackson can be quoted for the proposition that "constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors."[191] But this is not necessarily wrong. The evil exists only where appointments are based on an expected or pledged judicial vote on a certain issue. And this is difficult, if not impossible, to establish.

Some Southern spokesmen have asserted that Chief Justice Warren's appointment was predicated on his promise to desegregate the schools.[192] And there was much criticism when the appointment of Justice Rutledge to replace the retiring Justice Byrnes resulted in a 5-4 overruling in *Jones v. Opelika*[193] of the 5-4 decision in that same case[194] only eleven months before. And some New Deal legislation met a more favorable judicial reception after President Roosevelt was able to replace a number of the "nine old men" with his appointees. Yet in none of these instances was there any real evidence of an appointment based on a promise to decide any particular case in any particular way.

True, most chief executives tend to appoint justices who share their *general* political and social views. But this is certainly not a guaranty of future judicial expression. President Roosevelt never could have predicted so conservative a Frankfurter; President Eisenhower must be surprised at so liberal a Warren. And President Truman was actually outraged when two of his four appointees—Burton and Clark—voted against the Government in the *Steel Seizure Case*.[195]

Perhaps the best illustration of judicial appointments designed to achieve a particular result on a particular issue occurred in connection with the *Legal Tender Cases*.[196] *Hepburn v. Griswold*[197] was decided by the 5-3 vote of an eight-man Court. Justice

191 Jackson, "The Task of Maintaining Our Liberties; The Role of the Judiciary," 39 A.B.A.J. 961 at 962 (1953).

192 BLAUSTEIN AND FERGUSON, DESEGREGATION AND THE LAW 13-14 (1957).

193 319 U.S. 103 (1943).

194 316 U.S. 584 (1942).

195 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

196 12 Wall. (79 U.S.) 457 (1872).

197 8 Wall. (75 U.S.) 603 (1869).

Grier, one of the five-man majority, resigned shortly thereafter. And then President Grant named Justices Bradley and Strong to create a nine-man Court. The result was the overruling in the *Legal Tender Cases* by a 5-4 vote, with "no change in the opinions of those who concurred in the former judgment."[198] There was no question of Grant's desire for an overruling; and there was no doubt that the Court was increased in size to facilitate such overrulings. But whether Bradley and Strong were appointed because of promises to overrule or because it was known that they would vote to overrule is another matter. Evidence both for and against this proposition is inconclusive.

VII

CONCLUSION

Here then are the basic data on the ninety overruling decisions of the Supreme Court of the United States. In these pages—and in the Appendix which follows—are the statistics. Here, too, is a discussion of the judicial discretion which leads to overrulings, and a presentation of some of the criteria which determine when the exercise of that discretion was "necessary," "justified" or possibly "unwarranted."

Here also is a plea for more definite and expressed overrulings—and a plea for the proposition that it is "the duty of every judge and every court to examine its own decisions, . . . without fear, and to revise them without reluctance."[199] For there is nothing wrong with a public confession of error. It is, of course, far more important that the Supreme Court be right than that it be consistent. It is far more important that the law be definite than that discredited and outmoded doctrine be permitted to survive.

"[W]e worry ourselves overmuch about the enduring consequences of our errors," wrote Cardozo. "They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things."[200] But the future does not take care of such things unless the courts act. The problem is what the role of overrulings should be in that future.

198 12 Wall. (79 U.S.) 457 at 572 (1872).
199 Baker v. Lorillard, 4 N.Y. 257 at 261 (1850).
200 CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 179 (1921).

APPENDIX

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
Alabama v. King & Boozer	1941	13	E	8-0	Stone	—	314 U.S. 1
overruling							
Panhandle Oil Co. v. Knox	1928			5-4	Butler	Holmes, Brandeis, Stone, McReynolds	277 U.S. 218
Graves v. Texas Co.	1936			6-2	Butler	Brandeis, Cardozo	298 U.S. 393
Alpha Cement Co. v. Massachusetts	1925	12	E	8-1	McReynolds	Brandeis	268 U.S. 203
overruling							
Baltic Mining Co. v. Massachusetts	1913			6-3	Day	White, Van Devanter, Pitney	231 U.S. 68
Angel v. Bullington	1947	35	E	6-3	Frankfurter	Reed, Jackson, R. H., Rutledge	330 U.S. 183
overruling							
Lupton's Sons Co. v. Automobile Club	1912			9-0	Hughes	—	225 U.S. 489
In re Ayres	1887	63	E	7-1	Matthews	Harlan (1st)	123 U.S. 443
overruling							
Osborn v. United States Bank	1824			6-1	Marshall	Johnson, Wm.	9 Wheat. (22 U.S.) 738
The Belfast	1868	10	B, D	8-0	Clifford	—	7 Wall. (74 U.S.) 624
overruling							
Allen v. Newberry	1858			6-3	Nelson	Wayne, Catron, Grier	21 How. (62 U.S.) 244
Board of Education v. Barnette	1943	3	E	6-3	Jackson, R. H.	Frankfurter, Reed, Roberts	319 U.S. 624
overruling							
Minersville School District v. Gobitis	1940			8-1	Frankfurter	Stone	310 U.S. 586
Brady v. Roosevelt Steamship Co.	1943	13	E	9-0	Douglas	—	317 U.S. 575
overruling							
Johnson v. Fleet Corporation	1930			9-0	Butler	—	280 U.S. 320
Brenham v. German American Bank	1892	26	E	5-3	Blatchford	Harlan (1st), Brewer, Brown	144 U.S. 173
overruling							
Rogers v. Burlington	1866			5-4	Clifford	Field, Chase, Grier, Miller	3 Wall. (70 U.S.) 654
Mitchell v. Burlington	1867			9-0	Clifford	—	4 Wall. (71 U.S.) 270
Burstyn v. Wilson	1952	37	E	9-0	Clark	—	343 U.S. 495
overruling							
Mutual Film Corp. v. Industrial Commission	1915			9-0	McKenna	—	236 U.S. 230

* Category: E, *expressly overruled;* B, *not expressly overruled but listed as overruled by Justice Brandeis;* D, *not expressly overruled but listed as overruled by Justice Douglas;* O, *otherwise overruled in the opinion of the authors.*

California v. Thompson	1941			9-0	Stone	—	313 U.S. 109
overruling		14	E				
DiSanto v. Pennsylvania	1927			6-3	Butler	Holmes, Brandeis, Stone	273 U.S. 34
Chesapeake & Ohio Ry. Co. v. Leitch (Rehearing)	1928			9-0	Holmes	—	276 U.S. 429
overruling		4 mos.	O				
Chesapeake & Ohio Ry. Co. v. Leitch	1927			4-4	Per Curiam	(Not Recorded)	275 U.S. 507
Chicago & Eastern Illinois R. Co. v. Industrial Commission	1932			9-0	Sutherland	—	284 U.S. 296
overruling		12	E				
Erie R. Co. v. Collins	1920			7-2	McKenna	VanDevanter, Pitney	253 U.S. 77
Erie R. Co. v. Szary	1920			7-2	McKenna	VanDevanter, Pitney	253 U.S. 86
Commissioner v. Church	1949			5-3	Black	Reed, Frankfurter, Burton	335 U.S. 632
overruling		19	E				
May v. Heiner	1930			9-0	McReynolds	—	281 U.S. 238
Cosmopolitan Co. v. McAllister	1949			5-4	Reed	Black, Douglas, Murphy, Rutledge	337 U.S. 783
overruling		3	E				
Hust v. Moore-McCormack Lines, Inc.	1946			5-3	Rutledge	Reed, Frankfurter, Burton	328 U.S. 707
County of Cass v. Johnston	1877			7-2	Waite	Bradley, Miller	95 U.S. 360
overruling		2	E				
Harshman v. Bates County	1875			9-0	Bradley	—	92 U.S. 569
East Ohio Gas Co. v. Tax Commission	1931			9-0	Butler	—	283 U.S. 465
overruling		11	E				
Penna. Gas Co. v. Public Service Commission	1920			9-0	Day	—	252 U.S. 23
Edwards v. California	1941			9-0	Byrnes	—	314 U.S. 160
overruling		104	O				
City of New York v. Miln	1837			6-1	Barbour	Story	11 Pet. (36 U.S.) 102
Erie R. Co. v. Tompkins	1938			8-0	Brandeis	—	304 U.S. 64
overruling		96	E				
Swift v. Tyson	1842			8-1	Story	Catron	16 Pet. (41 U.S.) 1
Fairfield v. County of Gallatin	1879			9-0	Strong	—	100 U.S. 47
overruling		4	E				
Town of Concord v. Savings Bank	1875			9-0	Strong	—	92 U.S. 625

APPENDIX—*Continued*

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
Farmer's Loan & Trust Co. v. Minnesota	1930	27	E	7-2	McReynolds	Holmes, Brandeis	280 U.S. 204
overruling							
Blackstone v. Miller	1903			8-1	Holmes	White	188 U.S. 189
Federal Power Commission v. Hope Gas Co.	1944	14	E	6-3	Douglas	Reed, Frankfurter, Jackson, R. H.	320 U.S. 591
overruling							
United Railways v. West	1930			6-3	Sutherland	Holmes, Brandeis, Stone	280 U.S. 234
Fox Film Co. v. Doyal	1932	4	E	9-0	Hughes	—	286 U.S. 123
overruling							
Long v. Rockwood	1928			5-4	McReynolds	Holmes, Brandeis, Sutherland, Stone	277 U.S. 142
Funk v. United States	1933	41	E	7-2	Sutherland	McReynolds, Butler	290 U.S. 371
overruling							
Hendrix v. United States	1911			8-1	McKenna	Harlan (1st)	219 U.S. 79
Logan v. United States	1892			7-1	Gray	Lamar	144 U.S. 263
Jin Fuey Moy v. United States	1920			9-0	Pitney	—	254 U.S. 189
Garland v. Washington	1914	18	E	9-0	Day	—	232 U.S. 642
overruling							
Crain v. United States	1896			6-3	Harlan (1st)	Peckham, Brewer, White	162 U.S. 625
Gayle v. Browder	1956	60	O	9-0	Per Curiam	—	352 U.S. 903
overruling							
Plessy v. Ferguson	1896			7-1	Brown	Harlan (1st)	163 U.S. 537
Gazzam v. Phillip's Lessee	1857	12	E	9-0	Nelson	—	20 How. (61 U.S.) 372
overruling							
Brown's Lessee v. Clements	1845			5-3	McKinley	Catron, Daniel, Taney	3 How. (44 U.S.) 650
The Genesee Chief v. Fitzhugh	1851	26	E	8-1	Taney	Daniel	12 How. (53 U.S.) 443
overruling							
The Thomas Jefferson	1825			7-0	Story	—	10 Wheat.(23 U.S.)173
The Orleans v. Phoebus	1837			7-0	Story	—	11 Pet. (36 U.S.) 175
Girouard v. United States	1946	17	E	5-3	Douglas	Stone, Reed, Frankfurter	328 U.S. 61
overruling							
United States v. Schwimmer	1929			6-3	Butler	Holmes, Brandeis, Sanford	279 U.S. 644
United States v. MacIntosh	1931			5-4	Sutherland	Hughes, Holmes, Brandeis, Stone	283 U.S. 605
United States v. Bland	1931			5-4	Sutherland	Hughes, Holmes, Brandeis, Stone	283 U.S. 636

Gleason v. Seaboard Air Line Ry. Co.	1929	40	E	9-0	Stone	—	278 U.S. 349
overruling							
Friedlander v. Texas & Pacific Ry. Co.	1889			8-0	Fuller	—	130 U.S. 416
Gordon v. Ogden	1830	32	E	7-0	Marshall	—	3 Pet. (28 U.S.) 33
overruling							
Wilson v. Daniel	1798			5-1	Ellsworth	Iredell	3 Dall. (3 U.S.) 401
Graves v. New York ex rel. O'Keefe	1939	97	E	7-2	Stone	Butler, McReynolds	306 U.S. 466
overruling							
Dobbins v. Erie County	1842			9-0	Wayne	—	16 Pet. (41 U.S.) 434
Collector v. Day	1870			8-1	Nelson	Bradley	11 Wall. (78 U.S.) 113
New York ex rel. Rogers v. Graves	1937			8-0	Sutherland	—	299 U.S. 401
Brush v. Commissioner	1937			7-2	Sutherland	Brandeis, Roberts	300 U.S. 352
Greene v. Neal's Lessee	1832	16	E	6-1	McLean	Baldwin	6 Pet. (31 U.S.) 291
overruling							
Patton's Lessee v. Easton	1816			7-0	Marshall	—	1 Wheat. (14 U.S.) 476
Powell's Lessee v. Harmon	1829			6-0	Marshall	—	2 Pet. (27 U.S.) 241
Halliburton Co. v. Walker (Rehearing)	1946	11 mos.	O	8-1	Black	Burton	329 U.S. 1
overruling							
Halliburton Co. v. Walker	1946			4-4	Per Curiam	(Not Recorded)	326 U.S. 696
Helvering v. Hallock	1940	5	E	7-2	Frankfurter	Roberts, McReynolds	309 U.S. 106
overruling							
Helvering v. St. Louis Union Trust Co.	1935			5-4	Sutherland	Stone, Hughes, Brandeis, Cardozo	296 U.S. 39
Becker v. St. Louis Union Trust Co.	1935			5-4	Sutherland	Stone, Hughes, Brandeis, Cardozo	296 U.S. 48
Helvering v. Mountain Producers Corp.	1938	16	E	5-2	Hughes	Butler, McReynolds	303 U.S. 376
overruling							
Gillespie v. Oklahoma	1922			6-3	Holmes	Pitney, Brandeis, Clarke	257 U.S. 501
Burnet v. Coronado Oil & Gas Co.	1932			5-4	McReynolds	Brandeis, Roberts, Cardozo, Stone	285 U.S. 393
Hornbuckle v. Toombs	1873	11	E	5-3	Bradley	Clifford, Davis, Strong	18 Wall. (85 U.S.) 648
overruling							
Noonan v. Lee	1862			8-0	Swayne	—	2 Black (67 U.S.) 499
Orchard v. Hughes	1863			10-0	Nelson	—	1 Wall. (68 U.S.) 73
Dunphy v. Kleinsmith	1870			9-0	Bradley	—	11 Wall. (78 U.S.) 610

APPENDIX—*Continued*

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
Hudson v. Guestier	1810	2	E	4-1	Livingston	Marshall	6 Cranch (10 U.S.) 281
overruling							
Rose v. Himely	1808			6-1	Marshall	Johnson, Wm.	4 Cranch (8 U.S.) 241
In re Disbarment of Isserman (Rehearing)	1954	6 mos.	E	4-3	Per Curiam	Burton, Reed, Minton	348 U.S. 1
overruling							
In re Disbarment of Isserman	1953			4-4	Vinson	Jackson, R. H., Black, Frankfurter, Douglas	345 U.S. 286
Jones v. Opelika	1943	11 mos.	E	—	Per Curiam	—	319 U.S. 103
Murdock v. Pennsylvania	1943			5-4	Douglas	Reed, Roberts, Frankfurter, Jackson, R. H.	319 U.S. 105
overruling							
Jones v. Opelika	1942			5-4	Reed	Stone, Murphy, Black, Douglas	316 U.S. 584
Kilbourn v. Thompson	1880	59	E	7-0	Miller	—	103 U.S. 168
overruling							
Anderson v. Dunn	1821			6-0	Johnson, Wm.	—	6 Wheat. (19 U.S.) 204
Kountze v. Omaha Hotel Co.	1882	29	E	7-2	Bradley	Miller, Field	107 U.S. 378
overruling							
Stafford v. Union Bank of Louisiana	1853			8-1	McLean	Catron	16 How. (57 U.S.) 135
Lee v. Chesapeake & Ohio Ry. Co.	1923	17	E	9-0	Van Devanter	—	260 U.S. 653
overruling							
Ex parte Wisner	1906			9-0	Fuller	—	203 U.S. 449
Legal Tender Cases[1]	1872	3	E	5-4	Strong	Chase, S. P., Clifford, Field, Nelson	12 Wall. (79 U.S.) 457
overruling							
Hepburn v. Griswold	1869			5-3	Chase, S. P.	Miller, Swayne, Davis	8 Wall. (75 U.S.) 603
Leloup v. Port of Mobile	1888	16	E	9-0	Bradley	—	127 U.S. 640
overruling							
Osborne v. Mobile	1872			9-0	Chase, S. P.	—	16 Wall. (83 U.S.) 479
Leisy v. Hardin	1890	43	E	6-3	Fuller	Gray, Harlan, Brewer	135 U.S. 100
overruling							
Peirce v. New Hampshire	1847			8-1	Taney	Daniel	5 How. (46 U.S.) 504

[1] In 1870, a Memorandum Opinion was handed down in the Legal Tender Cases, 11 Wall. (78 U.S.) 682, reaching a conclusion directly opposite the decision reached in Hepburn v. Griswold. It was not until 1872, however, that the Supreme Court rendered its opinion in the Legal Tender Cases, expressly overruling Hepburn v. Griswold.

Louisville, Cincinnati & Charleston R. R. Co. v. Letson	1844			8-0	Wayne	—	2 How. (43 U.S.) 497
overruling		38	B				
Strawbridge v. Curtiss	1806			5-0	Marshall	—	3 Cranch (7 U.S.) 267
Bank of the United States v. DeVeaux	1809			6-0	Marshall	—	5 Cranch (9 U.S.) 61
Commercial & R. R. Bank v. Slocum	1840			9-0	Barbour	—	14 Pet. (39 U.S.) 60
MacGregor v. Westinghouse Co. (Rehearing)	1947			5-4	Black	Frankfurter, Reed, Jackson, Burton	329 U.S. 402
overruling		11 mos.	O				
MacGregor v. Westinghouse Co.	1946			4-4	Per Curiam	(Not Recorded)	327 U.S. 758
Madden v. Kentucky	1940			7-2	Reed	Roberts, McReynolds	309 U.S. 83
overruling		5	E				
Colgate v. Harvey	1935			6-3	Sutherland	Stone, Brandeis, Cardozo	296 U.S. 404
Mahnich v. Southern S. S. Co.	1944			7-2	Stone	Roberts, Frankfurter	321 U.S. 96
overruling		16	E				
Plamals v. The Pinar Del Rio	1928			9-0	McReynolds	—	277 U.S. 151
Mason v. Eldred	1867			8-0	Field	—	6 Wall. (73 U.S.) 231
overruling		57	E				
Sheehy v. Mandeville	1810			5-0	Marshall	—	6 Cranch (10 U.S.) 253
Mercoid Corporation v. Mid-Continent Co.	1944			5-4	Douglas	Roberts, Reed, Frankfurter, Jackson, R. H.	320 U.S. 661
overruling		34	D				
Leeds & Catlin Co. v. Victor Talking Machine Co. (2)	1909			9-0	McKenna	—	213 U.S. 325
Morgan v. United States	1885			8-0	Matthews	—	113 U.S. 476
overruling		17	E				
Texas v. White	1868			5-3	Chase, S. P.	Grier, Swayne, Miller	7 Wall. (74 U.S.) 700
Motion Picture Patents Co. v. Universal Film Mfg. Co.	1917			6-3	Clarke	Holmes, McKenna, Van Devanter	243 U.S. 502
overruling		5	E				
Henry v. A. B. Dick Co.	1912			4-3	Lurton	White, Hughes, Lamar	224 U.S. 1

APPENDIX—*Continued*

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
Nye v. United States	1941			6-3	Douglas	Stone, Hughes, Roberts	313 U.S. 33
overruling		23	E				
Toledo Newspaper Co. v. United States	1918			5-2	White	Holmes, Brandeis	247 U.S. 402
Oklahoma Tax Commission v. Texas Co.	1949			9-0	Rutledge	—	336 U.S. 342
overruling		35	E				
Choctaw, O. & G. R. Co. v. Harrison	1914			9-0	McReynolds	—	235 U.S. 292
Indian Territory Illuminating Oil Co. v. Oklahoma	1916			9-0	McKenna	—	240 U.S. 522
Howard v. Gipsy Oil Co.	1917			9-0	Per Curiam	—	247 U.S. 503
Large Oil Co. v. Howard	1919			9-0	Per Curiam	—	248 U.S. 549
Oklahoma v. Barnsdall Refineries	1936			9-0	Stone	—	296 U.S. 521
Oklahoma Tax Commission v. United States	1943			5-4	Black	Murphy, Stone, Reed, Frankfurter	319 U.S. 598
overruling		17	E				
Childers v. Beaver	1926			9-0	McReynolds	—	270 U.S. 555
Olsen v. Nebraska	1941			9-0	Douglas	—	313 U.S. 236
overruling		13	E				
Ribnik v. McBride	1928			6-3	Sutherland	Stone, Holmes, Brandeis	277 U.S. 350
O'Malley v. Woodrough	1939			7-1	Frankfurter	Butler	307 U.S. 277
overruling		19	E				
Evans v. Gore	1920			7-2	Van Devanter	Holmes, Brandeis	253 U.S. 245
Miles v. Graham	1925			8-1	McReynolds	Brandeis	268 U.S. 501
Ott v. Mississippi Bargeline	1949			8-1	Douglas	Jackson, R. H.	336 U.S. 169
overruling		78	O				
St. Louis v. Ferry Co.	1870			9-0	Swayne	—	11 Wall. (78 U.S.) 423
Old Dominion S. S. Co. v. Virginia	1905			9-0	Brewer	—	198 U.S. 299
Ayer & Lord Tie Co. v. Kentucky	1906			9-0	White	—	202 U.S. 409
Penna. R. R. Co. v. Towers	1917			6-3	Day	White, McKenna, McReynolds	245 U.S. 6
overruling		18	E				
Lake Shore Ry. Co. v. Smith	1899			6-3	Peckham	Fuller, Gray, McKenna	173 U.S. 684

Phelps Dodge Corp. v. N.L.R.B.	1941	34	D	8-0[2]	Frankfurter	—	313 U.S. 177
overruling							
Adair v. United States	1908			6-2	Harlan (1st)	McKenna, Holmes	208 U.S. 161
Coppage v. Kansas	1915			6-3	Pitney	Holmes, Day, Hughes	236 U.S. 1
Philadelphia Steamship Co. v. Pennsylvania	1887	14	E	8-0	Bradley	—	122 U.S. 326
overruling							
State Tax On Ry. Gross Receipts	1872			6-3	Strong	Miller, Field, Hunt	15 Wall. (82 U.S.) 284
Pollock v. Farmers' Loan & Trust Co.	1895	99	B	5-4	Fuller	Harlan, Brown, Jackson, H. E. White	158 U.S. 601
overruling							
Hylton v. United States	1796			3-0	Chase, S.	—	3 Dall. (3 U.S.) 171
Railroad Commission v. Pacific Gas Co. (Rehearing)	1938	6 mos.	O	6-2	Hughes	Butler, McReynolds	302 U.S. 388
overruling							
Railroad Commission v. Pacific Gas Co.	1937			4-4	Per Curiam	(Not Recorded)	301 U.S. 669
Railway Co. v. McShane	1874	2	E	9-0	Miller	—	22 Wall. (89 U.S.) 444
overruling							
Railway Co. v. Prescott	1872			9-0	Miller	—	16 Wall. (83 U.S.) 603
Reid v. Covert (Rehearing)							
Kinsella v. Krueger	1957	1	O	6-2	Black	Clark, Burton	354 U.S. 1
overruling							
Reid v. Covert	1956			5-3	Clark	Warren, Black, Douglas	351 U.S. 487
Kinsella v. Krueger	1956			5-3	Clark	Warren, Black, Douglas	351 U.S. 470
Roberts v. Lewis	1894	13	E	9-0	Gray	—	153 U.S. 367
overruling							
Giles v. Little	1881			9-0	Woods	—	104 U.S. 291
Rochester Tel. Corp. v. United States	1939	27	O	7-2[3]	Frankfurter	Butler, McReynolds	307 U.S. 125
overruling							
Proctor & Gamble v. United States	1912			9-0	White	—	225 U.S. 282
Rosen v. United States	1918	66	E	7-2	Clarke	Van Devanter, McReynolds	245 U.S. 467
overruling							
United States v. Reid	1852			9-0	Taney	—	12 How. (53 U.S.) 361

[2] Unanimous on the point of overruling the prior decisions on the question.

[3] The actual decision was unanimous as to result. Justices Butler and McReynolds, however, dissented on the issue of overruling the prior decision.

APPENDIX—*Continued*

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
Sherrer v. Sherrer	1948			7-2	Vinson	Frankfurter, Murphy	334 U.S. 343
overruling		45	E				
Andrews v. Andrews	1903			5-3	White	Brewer, Shiras, Peckham	188 U.S. 14
Smith v. Allwright	1944			8-1	Reed	Roberts	321 U.S. 649
overruling		9	E				
Grovey v. Townsend	1935			9-0	Roberts	—	295 U.S. 45
State Tax Commission v. Aldrich	1942			7-2	Douglas	Jackson, R. H., Roberts	316 U.S. 174
overruling		10	E				
First National Bank v. Maine	1932			6-3	Sutherland	Stone, Holmes, Brandeis	284 U.S. 312
Suydam v. Williamson	1861			8-0	Campbell	—	24 How. (65 U.S.) 427
overruling		11	O				
Williamson v. Berry	1850			6-3	Wayne	Taney, Catron, Nelson	8 How. (49 U.S.) 495
Williamson v. Irish Presbyterian Congregation	1850			6-3	Wayne	Taney, Catron, Nelson	8 How. (49 U.S.) 565
Williamson v. Ball	1850			6-3	Wayne	Taney, Catron, Nelson	8 How. (49 U.S.) 566
Terral v. Burke Construction Co.	1922			9-0	Taft	—	257 U.S. 529
overruling		46	E				
Doyle v. Cont. Ins. Co.	1876			6-3	Hunt	Bradley, Swayne, Miller	94 U.S. 535
Security Mutual Life Ins. Co. v. Prewitt	1906			7-2	Peckham	Day, Harlan (1st)	202 U.S. 246
Thibaut v. Car & General Ins. Corp. (Rehearing)	1947			7-2	Per Curiam	Black, Burton	332 U.S. 828
overruling		42 days	E				
Thibaut v. Car & General Ins. Corp.	1947			9-0	Per Curiam	—	332 U.S. 751
Tigner v. Texas	1940			8-1	Frankfurter	McReynolds	310 U.S. 141
overruling		38	E				
Connolly v. Union Sewer Pipe Co.	1902			7-1	Harlan (1st)	McKenna	184 U.S. 540
Tilghman v. Proctor	1880			9-0	Bradley	—	102 U.S. 707
overruling		7	E				
Mitchell v. Tilghman	1873			5-3	Clifford	Swayne, Strong, Bradley	19 Wall. (86 U.S.) 287
Toucey v. N. Y. Life Ins. Co.	1941			5-3	Frankfurter	Reed, Stone, Roberts	314 U.S. 118
overruling		20	D				
Supreme Tribe of Ben Hur v. Cauble	1921			9-0	Day	—	255 U.S. 356

Trebilcock v. Wilson	1871	8	D	7-2	Field	Bradley, Miller	12 Wall. (79 U.S.) 687
overruling							
Roosevelt v. Meyer	1863			9-1	Wayne	Nelson	1 Wall. (68 U.S.) 512
United States v. Chicago, M., St. P. & P. R. Co.	1941	38	E	9-0	Roberts	—	312 U.S. 592
overruling							
United States v. Lynah	1903			5-3	Brewer	White, Fuller, Harlan (1st)	188 U.S. 445
United States v. Heyward	1919			4-4	Per Curiam	(Not Recorded)	250 U.S. 633
United States v. Classic	1941	20	D	5-3	Stone	Douglas, Black, Murphy	313 U.S. 299
overruling							
Newberry v. United States	1921			4-4[4]	McReynolds	White, Pitney, Brandeis, Clarke	256 U.S. 232
United States v. Darby	1941	23	E	9-0	Stone	—	312 U.S. 100
overruling							
Hammer v. Dagenhart	1918			5-4	Day	Holmes, McKenna, Brandeis, Clarke	247 U.S. 251
United States v. Nice	1916	11	E	9-0	Van Devanter	—	241 U.S. 591
overruling							
Matter of Heff	1905			8-1	Brewer	Harlan (1st)	197 U.S. 488
United States v. Phelps	1882	16	E	9-0	Waite	—	107 U.S. 320
overruling							
Shelton v. The Collector	1866			9-0	Swayne	—	5 Wall. (72 U.S.) 113
United States v. Rabinowitz	1950	2	E	5-3	Minton	Black, Frankfurter, Jackson, R. H.	339 U.S. 56
overruling							
Trupiano v. United States	1948			5-4	Murphy	Vinson, Black, Reed, Burton	334 U.S. 699
United States v. South-Eastern Underwriters Assn.	1944	75	D	4-3	Black	Stone, Frankfurter, Jackson, R. H.	322 U.S. 533
overruling							
Paul v. Virginia	1869			8-0	Field	—	8 Wall. (75 U.S.) 168
Wabash, St. L. & P. Ry. Co. v. Illinois	1886	10	D	6-3	Miller	Bradley, Gray, Waite	118 U.S. 557
overruling							
Peik v. Chicago & N. Ry. Co.	1876			7-2	Waite	Field, Strong	94 U.S. 164

[4] The actual decision was unanimous (9-0) as to result. Justice McKenna reserved judgment on the constitutional question. The four dissenters dissented on the basis of the constitutional question only.

APPENDIX—*Continued*

Cases	*Dates*	*Age*	*Category**	*Vote*	*Opinion by*	*Dissenters*	*Citations*
West Coast Hotel Co. v. Parrish	1937			5-4	Hughes	Sutherland, Van Devanter, McReynolds, Butler	300 U.S. 379
overruling		14	E				
Adkins v. Children's Hospital	1923			5-3	Sutherland	Taft, Sanford, Holmes	261 U.S. 525
Morehead v. Tipaldo	1936			5-4	Butler	Hughes, Brandeis, Stone, Cardozo	298 U.S. 587
Williams v. North Carolina	1942			7-2	Douglas	Murphy, Jackson	317 U.S. 287
overruling		36	E				
Haddock v. Haddock	1906			5-4	White	Brown, Harlan, Brewer, Holmes	201 U.S. 562
Zap v. United States (Rehearing)	1947			7-0	Per Curiam	—	330 U.S. 800
overruling		9 mos.	E				
Zap v. United States	1946			5-3	Douglas	Frankfurter, Murphy, Rutledge	328 U.S. 624