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Lecture

Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*

HARRY W. JONES†

I

There is always a rush to judgment at the end of a Supreme Court term; decisions come down by the dozen during the final weeks as if the Justices were college students working frantically to meet the deadlines on their semester essays. Is it that the Justices, like the rest of us, tend to put things off until the very last minute? Or is it, as is so often asserted, that the Court has an impossibly heavy workload? Or could it be that the Court's collegial deliberations move more slowly than they would if the Justices got along better with each other? Whatever the explanation, it was rush hour again as the Court wound up its business at the close of October Term, 1981. The concluding installment (No. 18A) of Volume 102 of the *Supreme Court Reporter*, delivered to my rural mailbox late last summer, ran to approximately five hundred pages, exclusive of cumulative tables, key number digests, and memorandum decisions. The cases reported are all decisions handed down by the Court from June 28 through July 2. Most of them, as is usual nowadays, are constitutional cases.

I have had the subject of this Dyson Lecture in mind for a

* The inaugural Dyson Lecture was delivered March 21, 1983, at Pace University School of Law. The Dyson Distinguished Lecture Series is made possible by the gift of Charles H. Dyson through the Dyson Foundation. The purpose of the endowment is to encourage outstanding scholarly contributions and enrich the academic life of the faculty and students at the School of Law and Pace University.

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long time, so when Number 18A of the advance sheets came in, I decided that I would read this certainly fair sample of contemporary decisional literature to see what it had to tell us; not about the state of the substantive law on the particular constitutional issues involved in the reported cases but, more generally, about the sources and methods employed by the Supreme Court in constitutional adjudication. That, after all, is what matters most in the long view. Specific constitutional doctrines change drastically from era to era, often turning right-about-face from one direction to its opposite, but the essential modes of judicial reasoning and explanation do not change all that much, or at least have not in the past one hundred and fifty years of constitutional decision making by the Supreme Court of the United States. Suppose, then, that we put all our preconceptions aside for the moment and try to read the constitutional cases of last June 28 through July 2 with a fresh eye. What methodological phenomena strike us, or should strike us, as we proceed in our reading from case to case?

What is certainly most striking, or would be if familiarity had not made us take it for granted, is that two-thirds or more of the discussion in the opinions is about past Supreme Court cases that is, about what these past cases arguably "held" and what was said in the opinions of the Court justifying the results reached in them. The Supreme Court, it would appear, spends a very great part of its time and energy examining and reexamining its own past work and the work of Supreme Courts that have gone before. The applicable clauses of the Constitution itself are mentioned in the October Term, 1981 opinions, usually by such rubrics as "first amendment" or "equal protection clause," but the constitutional text is rarely set out, except perhaps in a footnote, and the constitutional issue in the case is practically never so stated as to include an exact quotation of the crucial words of the constitutional precept in point. The tests brought to bear in determining the validity or invalidity of challenged governmental action are, instead, formulated in terms that paraphrase or refine the simpler and usually more general words of the Constitution itself. A few examples should be enough to illustrate what I mean. The original Constitution and its amendments nowhere speak of "levels of scrutiny," "compelling state interest," or "right of access," as the Court's recent opinions do in discrimi-

nation cases, church-state cases, and press cases respectively. These terms, central as they are in the rhetoric of present-day constitutional adjudication, had their origin in what I shall call the constitutional *casé* law.

Is it heresy against conventional political theory to suggest that American constitutional decision making is not in any serious way the interpretation of a text, the Constitution itself, but the application of a body of decisional doctrine? The constitutional text is down there somewhere under this massive overlay of case law development and refinement, but the usual contest between advocates in the Supreme Court, and more often than not between or among the Justices, is the kind of contest that has characterized the common law judicial process at least since the days of Sir Edward Coke, a battle over *cases* and what they should be taken to stand for. When a dissenting or separately concurring Justice takes sharp issue with his prevailing colleagues, his — now, happily, his or her — usual reproach is that the opinion of the Court embodies a misreading or even a misrepresentation of some past Supreme Court decision or decisions. At some time during the October Term, 1981, every Justice of the Supreme Court accused one or more of his or her colleagues of this offense against the institution of judicial precedent. Every Justice, at some time during the Term, was also so accused.

One of Sir Isaiah Berlin's great essays begins with this quotation from an ancient poet: "The fox knows many things, but the hedgehog knows one big thing."¹ I am determined to be a "hedgehog" in this inaugural Dyson Lecture. There are many mansions in the house of constitutional law, many things worth knowing about it. But my "one big thing," the single insight I consider more important for the understanding of American constitutional processes than anything else that might be said about them, is that American constitutional law is essentially *case law*, a system in which the decisions of the Supreme Court and other courts are guided and structured by precedent. The literal text of the Constitution, as formulated in Philadelphia in 1787 and formally amended from time to time, figures in con-

1. I. BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1 (1970).

temporary constitutional adjudication only at one remove, that is, as the words of the original text have been construed, expounded, and developed by successive generations of Supreme Court Justices.

In the two centuries of our life as a constitutional republic, a vast and intricate exegesis has been imposed on the lean text of the original constitutional document. In speaking of constitutional "text" and judicial "exegesis," I am of course borrowing from the vocabulary of theology, and it is there that we probably find our best analogy. The constitutional case law relates to the constitutional text, quantitatively and operationally, about as the *Halachah* — the voluminous body of commentaries and decisions deemed authoritative by religious Jews — relates to the *Torah*, the five books of Moses from which the *Halachah* remotely proceeds. The *Torah* is of the first rank in the hierarchy of authority, but it is to the *Halachah* one customarily looks for guidance on more specific issues of right conduct. Or, to put the analogy another way, the constitutional case law relates to the text of the Constitution, quantitatively and operationally, about as the vast literature of systematic theology and Christian ethics relates to the teachings of Jesus as recorded in the gospels of Matthew, Mark, Luke, and John. There is nothing far-fetched or in any way cynical about this theological analogy. It is simply the best way I know to drive home my point that the student or practitioner of constitutional law, or the constitutional judge, is working not just with a text but with an authoritative literature, authoritative because the doctrine of precedent makes it so. If the doctrine of precedent, or as I often shall call it, the "institution" of precedent, were not applicable in the universe of constitutional law, past decisions of the Supreme Court would not, of course, have that authoritative status. But, as we shall see, that bridge was crossed a long time ago.

II

It was not self-evident to the framers of the Constitution that judicial precedents would be of central importance in the determination of constitutional questions by the Supreme Court and other courts. Indeed, it was by no means self-evident that such issues were for the courts at all, at least not clear that questions of the meaning and effect of the generally worded clauses

of the Constitution were to be decided authoritatively and finally by appointed judges rather than by duly elected congressmen and presidents. This very great point, the authority of the courts to deny enforcement to federal and state legislation that the court considers unconstitutional, was settled in 1803 by the decision in *Marbury v. Madison*.² This was the first case in which the Supreme Court held a federal statute void as beyond the powers delegated to Congress by the Constitution. This is not the place for still another discussion of whether Chief Justice John Marshall and his Supreme Court colleagues were right or wrong, as a matter of history, in asserting this "hitherto unheard-of,"³ as Holmes called it, power of judicial review. The historical question is a close one, but for practical political purposes it is a dead issue. *Marbury v. Madison* settled the question and has become a given, an underlying assumption, of American governmental theory. Senators and congressmen disgruntled by particular Supreme Court decisions attempt from time to time to withdraw classes of controversial cases from the Court's appellate jurisdiction, but it has been a long time since anyone has seriously proposed that *Marbury v. Madison* be overruled by constitutional amendment.

Practically every student of law, history or political science knows *Marbury v. Madison* by name, and rightly so because of the momentous consequences the institution of judicial review has had in American political, economic, and social development. But something else of great importance, perhaps equal importance for the future of our legal institutions, happened more quietly as soon as the Marshall Court, by its decisions in such great first-impression cases as *McCulloch v. Maryland*⁴ and *Gibbons v. Ogden*,⁵ had provided the building blocks for what a civil lawyer would call a constitutional "jurisprudence." We now find the Justices deciding — or, better, taking it for granted — that the common law doctrine of precedent is to apply in constitutional cases.

This carrying-over of the method of precedent to constitu-

2. 5 U.S. (1 Cranch) 137 (1803).

3. O.W. HOLMES, *John Marshall*, in COLLECTED LEGAL PAPERS 270 (1920).

4. 17 U.S. (4 Wheat.) 316 (1819).

5. 22 U.S. (9 Wheat.) 1 (1824).

tional law was not logically foreordained. The "Supreme Law" of the Constitution is qualitatively different from ordinary law, more like the "higher law" of the natural law theorists than like ordinary legislation. It might certainly have been contended that the constitutional text was the compact to which the people and the states had agreed and that the text alone, and not the past rulings of courts, should be looked to in constitutional adjudication. And what about John Marshall's admonition in *McCulloch v. Maryland* that "we must never forget, that it is a constitution we are expounding"?⁶ Since the Constitution is designed not as a short run measure but as a charter for the ages, why should past rulings be given weight in the ongoing construction of its provisions? Before the doctrine of precedent had taken hold in constitutional cases, could it not have been argued strongly that the Justices should interpret the general mandates of the Constitution in the way that best meets the conditions and needs of a present time — and not be deferential to decisions that may have been handed down when political and social problems were quite different?

The arguments against the use of precedent in constitutional cases were surely there, or so hindsight tells us, but they seem never to have been raised or seriously considered by early Supreme Court Justices or by any of the lawyers who appeared before them. Without the slightest fanfare, the principle of *stare decisis* makes its appearance in constitutional law; Supreme Court decisions interpreting the Constitution are to be authoritative, are to be precedents that must be taken account of when a once-interpreted constitutional clause comes before the Court again.

This taken-for-granted extension of the theory of precedent to the then-new area of constitutional adjudication is best accounted for by looking at it in the context of early American legal history. The War of Independence severed the political ties between the former colonies and the British Crown, but the American patriots had had no quarrel with the English common law; indeed, it was their sturdy claim in the Declaration and Resolves of the First Continental Congress that "the respective col-

6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 407.

onies are entitled to the common law of England”⁷ and were being deprived of it by the ministers of George III. So, after independence, American judges and lawyers did not renounce their English legal inheritance. What occurred instead was the great and formative development, largely completed by the second decade of the nineteenth century, known to us as the “reception” of the common law in the United States.⁸ One of the things “received,” and unquestionably the most important, was that distinctive common law policy, the doctrine or institution of precedent. American lawyers of the time — like George Wythe, John Marshall’s law teacher at William and Mary — were used to reasoning by reference to precedent. Common law ways of thinking were ingrained in them by their training and experience, and they would have thought of other methods of legal analysis and justification as arbitrary and outlandish. If someone had asked John Marshall or Joseph Story *why* the doctrine of precedent should be applied in constitutional adjudication, the almost certain reply would have been: “Why not?” The Constitution is, of course, legislative in form, but it was well established by this time in common law courts that the doctrine of precedent applies fully to judicial decisions interpreting the language of statutes; if a court has interpreted a statute as having a certain meaning, it is generally bound to give it that same meaning when like cases arise in the future. Now, in the United States, this policy is to apply to decisions interpreting the Constitution. No one jumped up to say: “Look what the Supreme Court is doing!” Everybody took it for granted that that was the only way to do it. And virtually everybody still does.

III

We move now to consider how the mode of reasoning by reference to precedent conditions the exercise of judicial power and the development of constitutional doctrine. Here, unavoid-

7. *Declaration and Resolves of the First Continental Congress October 14, 1774*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES I (Libr. of Congress 1927).

8. See generally Jones, *The Common Law in the United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 91 (H. Jones ed. 1976).

ably, I have to begin by refreshing your recollection about the status of precedents as sources of law in the "common law family" of countries, which includes our country, England, and most of the nations of the Commonwealth. What are the traditional and accepted norms for the use of precedents, not just in constitutional cases but in cases generally? The theory of precedent, I make bold to suggest, is in one respect like Roscoe Pound's great theory of social interests; everybody knows about it and talks with assurance about it, but hardly anyone has given much thought to it or has more than a hazy and incomplete idea of what it is. So I shall not apologize at all for getting back to basics for the next few minutes. Reasoning with and from precedents is the distinctive mode in which lawyers think in common law countries; a lawyer who is not knowledgeable about and comfortable with precedent is like a musician who has never quite learned to read music. If I were running a law school, I would insist that a refresher course on the doctrines of precedent be offered and required in each of the six law school semesters — and in every program of continuing legal education.

The precedent idea is easy to state in a very general way: past judicial decisions are generally binding for the disposition of similar present controversies. That sounds, at first impression, like a simple prescription for staying put, for doing over and over again what a court has once done. The rule of precedent is usually understood as being essentially this, and nothing could be farther from the truth than that simplistic impression. I have come to think that great confusion is caused by the incautious use of "*stare decisis*" as if that phrase were a synonym for, interchangeable with, "doctrine(s) of precedent." It embarrasses me gravely that I have been making this terminological mistake all my life, in fact up until tonight. *Stare decisis* is, of course, shorthand for *stare decisis et non quieta movere* — stand by the past decisions, and do not disturb settled things — which is sensible enough, even though it is a kind of doggerel Latin hexameter⁹ of uncertain origin. But *stare decisis*, the notion of staying with what has once been decided, is only one aspect of a far more complex idea; in the observable work of the courts, there is much more to precedent-thinking than forbearance from upset-

9. M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 355 (1936).

ting the apple cart.

The institution of precedent is not a single doctrine but a whole cluster of doctrines which, taken together, leaves far more room than is commonly supposed for development and change in the ongoing case law, and so for the infusion of policy considerations into the decisional mix. Here, briefly put, are the inter-related propositions that together constitute the precedent-cluster:

(1) Precedents are generally binding for the decision of future cases.

(2) But a decision is a full-fledged precedent only for future "like" cases, that is, for future cases involving the same material facts.

(3) It is the court's decision, not the court's opinion, that is the precedent for the future; anything said in the opinion that is not necessary to the decision of the case then before the court is a "dictum," which may be "persuasive authority" in a future case but is in no way binding. (Analytically, I suppose, this is a corollary of Proposition 2, but judicial usage is such that it is better to state it separately.)

(4) Even a full-fledged precedent is only "generally" binding, not absolutely binding, for future cases.

That is the best I can do by way of a systematic breakdown of the essential ingredients of the precedent-cluster. If the analysis is not as elegant or airtight as it might be, it is probably because nobody else has ever tried to do anything quite like it. I think the analysis is essentially right, and I am reasonably sure that it does not leave out anything of significance.

The four propositions of my precedent-cluster set the ground rules for the interplay of precedent and policy in constitutional adjudication. When and how do considerations of public policy enter into the constitutional decisions of the Supreme Court, and how is the influence of these policy considerations to be discerned in cases which purport to be mere "followings" of what the Court has decided or said before?

We begin with Proposition 1, the *stare decisis* proposition of my precedent-cluster, and take as our illustrative precedent the great case of *Brown v. Board of Education*,¹⁰ which is un-

10. 347 U.S. 483 (1954).

doubtedly familiar to everybody. In *Brown v. Board of Education*, handed down in 1954, the Supreme Court ruled that racial segregation in a state's public schools is unconstitutional as an abridgement of "equal protection of the law" guaranteed to all persons by the fourteenth amendment. If another case of racial segregation in the public schools should reach the Supreme Court next year, *Brown v. Board of Education* would be an authoritative precedent; the Court would be bound — or "generally bound" as the phrase goes — to decide the new case the same way. This is so clear under the theory of precedent that it is altogether unlikely that pro-school segregation forces, if such still exist, would even bother to appeal their case to the Supreme Court. And, of course, no lower court would think of disputing the principle established by *Brown v. Board of Education*.

This is the aspect of precedent that everybody knows. No occasion for policy arguments in this following of a clear precedent, you would say, and you would be almost right, "almost" because *stare decisis*, fidelity to past decisions, is itself a public policy, one that ranks high in the hierarchy of legal values because of the importance of equality and predictability of decisions. Our illustrative case is otherwise a simple one. Yet it is appropriate to begin with this case to make it plain that there are constitutional cases, plenty of them, in which the regular application of precedent, without more, rules the day and accomplishes a substantial saving of judicial time and energy. Why then, it is sometimes asked, are there so few "clear," precedent-controlled constitutional cases in the *United States Reports* and the *Supreme Court Reporter*? If there are such clear cases, why is it that the Supreme Court never seems to get one, but instead decides most of its controversies by votes of 5-4, 6-3, or 4-2-2-1? The answer, of course, is that the truly precedent-controlled cases, or potential cases, are disposed of finally in the lower courts or brushed off by *per curiam* decisions of the Supreme Court or — and this is incomparably the biggest category — never brought at all. The great effect of the policy of *stare decisis* is to deter litigation that might otherwise be brought. Federal judges, and particularly Supreme Court Justices, regularly tell us that they are being swamped by constitutional litigation. They would have been drowned long before now if adherence to

precedent were the exception rather than the general rule.

We have just been talking about clear precedents. Now we turn to past decisions that are less than that. Proposition 2: A judicial decision is generally binding only in future "like" cases, that is, in future cases involving the same material facts. If a later controversy involves what the court considers materially different facts from those of the past case, the past decision is not controlling authority. The cases, the court will say — or may say — are "distinguishable on their facts." We use the same great decision as our illustration. *Brown v. Board of Education* was decided in 1954. Soon thereafter, other racial segregation cases reached the Supreme Court, including one in which the challenged city ordinance provided, not for school segregation, but for the maintenance by the city of racially segregated bathing beaches. Manifestly, by just about any imaginable standard, *Brown v. Board of Education* was not a full-fledged "precedent" in that case; the material facts — schools in one case and beaches and bath houses in the other — are not the same, and the Supreme Court could have ruled, without in any way violating the norms of precedent-theory, that *Brown v. Board of Education* was distinguishable on its facts and that segregation of purely recreational facilities was still constitutionally permissible. Actually the Court did nothing of the sort. It struck down the beach segregation ordinance, too,¹¹ but this, you will readily see, was not a mere "following" or application of precedent but a significant extension of the formerly limited rule against racial segregation to a new and "materially" different social area. Mind you, I am not talking about the result in the case, of which I warmly approved, but about the reality of what the Court did as a matter of elementary legal analysis.

What we have here is one of the characteristic and most important ways in which judicial judgments of public policy operate, often decisively, not opposed to but *within* a precedent system. *Brown v. Board of Education* was somewhat analogous to the beach case, in that the two cases had one material fact, racial segregation, in common. And the existence of the *Brown v. Board of Education* decision on the books narrowed the policy issue to something like: "Is there any reason, in fairness and

11. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam).

constitutional equity, to treat schools and bathing beaches differently for purposes of the equal protection clause?" Counsel for the challengers of the discriminatory ordinance had a far better case than they would have had if *Brown v. Board of Education* had never been decided. But *Brown v. Board of Education* did not *control* the decision in the bathing beach case, and it would be disingenuous for the Court or anyone else to pretend that it did. If, as we postulate, the Court's decision in a case like this is not controlled by the formal legal sources, it must be controlled or strongly influenced by the Court's policy judgment, that is, by the views of the Justices, or a majority of them, as to which of the possible decisions in the new case is more just and socially desirable. And in such a case, the traditions of our legal system require that the Court, in its opinion, tell us *why* — that is, for what reasons of justice or social policy — the Court considers one of the possible decisions a sounder solution of the new problem than the other. There is no place for the hidden ball trick in the common law judicial process, and certainly not in constitutional adjudication. If policy considerations have been influential, as they so often are, in the decision of a constitutional case, the Court has a political and moral obligation to tell us what these considerations were.

My guru, Karl Llewellyn, had a saying: "Dictum is in the eye of the beholder, meaning the court later on." This brings us to the third norm in my precedent-cluster. Proposition 3: It is the court's *decision* that is the precedent, not what the court says in the judicial *opinion* justifying that decision. If the court's published opinion contains language that was not necessary to dispose of the factual controversy that was then before it, that language is not binding in any sense; it is, as we lawyers say, mere "dictum," something said by the way, and can, if the court in a later case so chooses, be disregarded. We recur to our racial segregation illustration. Suppose for the moment that the opinion of the Court in *Brown v. Board of Education* had included, as it did *not*, this sentence: "The equal protection clause of the fourteenth amendment requires that all students in the public schools be treated equally and forbids any segregation of students in separate schools or separate classes by reason of race, gender or scholarly aptitude." Analytically, that imagined sentence would have been dictum in *Brown v. Board of Education*,

going as it does far beyond the issue then before the Court, and the Court, in a later case challenging separate schools for boys and girls or separate "tracks" for fast and slow learners, would be entirely free, if it so chose, to disregard the dictum altogether. Free to disregard the old dictum, yes, and yet free, if the Court now considered it a sound statement of constitutional policy, to reaffirm it, even to quote it in full in support of its decision in the new case.

Inevitably there is something elusive, even tricky, about the status of dicta and its use by lawyers and judges, particularly in constitutional cases. A court is in no way bound to "follow" mere dicta, but it may, and often will, treat an old dictum as "persuasive," often very persuasive, authority. (If I ever write a book on the subject, I shall be tempted to dedicate it to Mr. Nixon and call it "Tricky Dicta.") When will the Supreme Court dismiss an overbroad statement in one of its past decisions as dictum or "mere dictum"? Only one answer seems possible: whenever the Court in a new case is persuaded that the old statement, if brought to bear now, would lead to an unsound disposition of the constitutional problem now squarely presented to the Court. And when will the Supreme Court quote the old dictum and give it weight as persuasive authority? Whenever the Court, in its new case, believes that the old statement, although analytically dictum when first announced, expresses sound constitutional policy and should now be raised to the status of authoritative constitutional law. Either way — brushing off the old dictum or drawing on it for support — the Court is exercising a policy judgment as to what is best for society and for the sound development of constitutional law. We note again how misleading it is to see the issue, as so many do, as an issue of precedent *versus* policy. In constitutional litigation, as everywhere else in American case law, policy considerations operate, as they must operate, *within* the precedent system.

Last but not least in our inventory of the norms of precedent comes Proposition 4: Even a full-fledged precedent is only generally binding, not absolutely binding, for the decision of future cases. "Generally binding," you will say, "can't you do better than that?" I wish that I could formulate Proposition 4 more precisely, but the actual cases intractably resist anything more definite. "Generally," let it be conceded, is a weasel word, an

imprecise way of saying that an American court will follow clear precedent almost all the time, that is, except when it is persuaded, in unusual and quite undefinable circumstances, that it should overrule the precedent and declare a new principle for the future. (The system has been somewhat different in England, but we will not get into that.) The doctrine of precedent, in short, is not what a philosopher would call a categorical imperative but a rule of imperfect obligation.

We have to be careful not to overstate this long-established escape hatch from the general policy of *stare decisis*. Courts, by and large, hate to overrule their past decisions. They prefer, when they can with some appearance of reasonableness, to put inconvenient old rulings aside as factually distinguishable or, as we have just seen, as dicta that were not necessary to the actual decision of the earlier case. But if today's controversy is not honestly distinguishable from the decision of, say, ten years ago, a modern court, if convinced that the old rule is seriously disadvantageous as law for today, will bite the bullet and overrule the precedents.

When a court explicitly amends the case law by a flat overruling of theretofore authoritative precedents, it acts much as Alexander the Great did in Phrygia where, instead of trying to untie the intricate Gordian knot, he drew his sword and severed it with one blow. Such abrupt cuttings of the Gordian knot of precedent are memorable; anyone can see that pragmatic considerations have overpowered the policy of *stare decisis* in this dramatic instance. Perhaps this is why literal-minded commentators often make the mistake of trying to quantify the change a court has wrought in the case law during a year or an era by tabulating the number of its explicit overrulings. This is a misleading and simple minded exercise, because it misses the point that most changes in the decisional law, as we have seen, are accomplished in less dramatic ways, such as the extension of precedents by the method of analogy to situations beyond the material facts of the older cases, and the discounting as "dictum" — or acceptance as strongly persuasive authority — of broadly worded statements in past judicial opinions. A direct overruling of precedent is improbable in any case; there is a heavy burden of persuasion on the advocate who urges the court to overrule its clear precedents and break a wholly new path.

But the possibility of an overruling is always there and it is not to be forgotten as an element in the precedent-cluster, not to be forgotten, particularly, when we are looking at the constitutional case law.

Justice Brandeis wrote years ago that "*stare decisis* . . . is not a universal, inexorable command"¹² in constitutional cases, and the late Justice Douglas, in 1949, listed no fewer than forty-eight explicit overrulings of constitutional precedents by the Supreme Court during two periods adding up to fifty-two years, eighteen between 1869 and 1890 and thirty between 1937 and 1949.¹³ Does this mean that adherence to — and reformulation of — precedent is less the norm, and explicit overruling less the exception, in constitutional law than elsewhere in the American case law system? This is commonly said to be the case, and an intellectually attractive theory has even been developed to explain the supposed difference: bolder use of the method of overruling is necessary in constitutional matters because unsound or outmoded constitutional case law cannot be corrected by ordinary legislation, as other judicial errors can, but only by the cumbersome process of constitutional amendment. The Supreme Court, so the theory goes, must take responsibility for the overruling of its socially disadvantageous constitutional precedents because they are likely to stand uncorrected if the Court itself does not strike them down. I find the theory entirely persuasive, but I am not at all sure of the existence of the phenomenon the theory purports to explain. *Stare decisis* is not an "inexorable command" in constitutional cases. But is it an inexorable command in any other field of American law? It does not appear to be so in property and contract cases where there is a probability that the parties, at the time of their transaction, really knew of and relied on the case law rule under challenge. If we examine, however, the areas of private law that do not involve this element of probable reliance — manufacturers' liability, for example, or the law of torts generally — my guess is that we would find the incidence of explicit overrulings of precedent about the same as in constitutional law. But, on any showing, *stare decisis* is not a more inexorable command in constitutional law than it

12. *Washington v. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).

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

is elsewhere in our legal order; overrulings of precedent occur *at least* as often in constitutional adjudication as anywhere else. Proposition 4 of our precedent-cluster fully holds, and has exceptional and perhaps unique importance, in the development of constitutional law.

IV

In Number LXXVIII of the *Federalist Papers*, Alexander Hamilton sought to quiet apprehensions that the proposed new federal judiciary might exercise “an arbitrary discretion” by assuring his readers that the judges would be “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”¹⁴ His contemporary, Lord Chief Justice Mansfield would have told Hamilton not to be silly, that a precedent system does not and cannot work that way. The norms of case law reasoning may at times conceal the influence of policy considerations, but policy judgments are not, and cannot be, excluded from the decisional process. In a Supreme Court opinion, you will never find a paragraph that begins: “Read this carefully now, because we are talking about policy for the next few sentences.” But anyone who knows where and how to look will see policy — which inevitably means the Justices’ considered views of what is best for society and for the efficacious development of constitutional law — everywhere at work in the difficult decisions that come to that virtually final tribunal. For, as we have seen, it is considerations of public policy, not of formal logic, that must determine in any case whether the principle established or pointed to by the past decisions is to be broadened or narrowed, reaffirmed or overruled. These can be fighting issues when there has been a substantial recent reconstitution of the membership of the Supreme Court, as when a “Taney Court” succeeds a “Marshall Court” or a “Burger Court” succeeds a “Warren Court.”

Once it was decided, a century and a half ago, that the doctrine(s) of precedent apply in constitutional law, the traditional precedent norms became the rules by which the great game of constitutional adjudication is to be played. It is absurd for any-

14. THE FEDERALIST No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961).

one, particularly for scholars, to expect that the constitutional case law can ever attain the conceptual unity and perfectly consistent logical structure of a scientific system like mathematics or physics. No such structure can be built up case by case in the mode of precedent, and I am not at all sure that we would like a perfectly "scientific" constitutional case law if it were within the power of any Supreme Court to bring one into being.

It does not trouble me that considerations of policy, and so the public policy views of individual Supreme Court Justices, influence and must influence the decision of constitutional cases and the development of constitutional doctrine. To be sure, the policy preferences of a majority of the Justices at any given time may not be my policy preferences, as they happen not to be at the moment. But then, in constitutional law as elsewhere in life, "you lose a few, and then you win a few." All you and I, or any critic, can fairly demand of any set of Supreme Court Justices is that they adhere in good faith to the decisional norms of our precedent system and give us in their opinions a full and genuine *explanation* of the reasons, and the line of reasoning, that brought the Court to its decisions. When a Supreme Court fails to do that, it deserves criticism, and the more scathing the better.

Would we have had a better constitutional world if the doctrine(s) of precedent had never been extended to the universe of constitutional law? That is a nice abstract question and might be a good subject for a lecture even longer than this one. I, for my part, am happier with our system of reasoning from precedent than I would be with any other I can think of. In any event, our precedent-centered system of constitutional adjudication is the only one we have, or are ever likely to have, and the urgent thing is that we understand the dynamics of its operation. That is what I have tried to deal with in this inaugural Dyson Lecture.