

Supreme Court Reversals on Constitutional Issues

Charlotte C. Bernhardt

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Charlotte C. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 Cornell L. Rev. 55 (1948)
Available at: <http://scholarship.law.cornell.edu/clr/vol34/iss1/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

SUPREME COURT REVERSALS ON CONSTITUTIONAL ISSUES

CHARLOTTE C. BERNHARDT

The alleged tendency of the United States Supreme Court to disregard precedent and to overrule its own earlier decisions has aroused widespread concern among both the legal profession and the general public during the past decade. The agitation about this "unsettling practice" has been heightened by the circumstance that the majority of the Supreme Court, in some of these "overruling cases," has been sharply attacked by dissenting brethren for intolerance and for "assuming knowledge and wisdom which was denied to their predecessors." It is, of course, always an unusual and spectacular occurrence when justices of the highest court in the land are subjected to criticism from among their own midst.

Another criticism has been the contention that the Court, by reversing its former rules, usurps the function of the legislature and thereby threatens one of the fundamentals of our constitutional system, the separation of powers.

It would be only natural that there should be considerable uneasiness about a movement which appears to shake the security of our community life. There exists a deepseated desire for a certain stability in human relations, of which legal relations form an important part. However, it seems that the tendency of the Supreme Court to overthrow its earlier judgments is not as far-reaching as it may appear, and that the general concern over this alleged trend has been caused mainly by the fact that some of the reversals deal with questions of great significance which have been the subject of heated discussion through many years.

In order to throw some light on the facts which form the background of the above accusations, the author has compiled the following chart containing all the overruling and overruled decisions on constitutional questions which have come to her knowledge, and then has sought to analyze the charted information. From this factual presentation it appears, in the opinion of the author, that the Supreme Court has actually used its right and duty to change former interpretations in a very cautious and sparing manner only, showing an admirable synthesis of continuity and adaptability.

CHART OF OVERRULING AND OVERRULED DECISIONS

No.	Overruling decision		Overruled decision			Shep- ard valid	Time	Subject matter
	Title	Year	Vote	Title	Year			
1.	Louisville, Cincinnati & Charleston RR. Co. v. Letson, 2 How. 497	1844	un.	Commercial & RR. Bank v. Slocumb, 14 Pet. 60	1840	un. o	4 yrs.	Jurisdiction in controversies between citizens of different states—Art. III 2 (1)
2.	The Genesee Chief, 12 How. 443	1851	8:1	The Thomas Jefferson, 10 Wheat. 428 The Orleans v. Phoebus, 11 Pet. 175	1825	un. q	26 yrs.	Maritime jurisdiction—Art. III 2 (1)
3.	The Belfast, 7 Wall. 624	1868	un.	Allen v. Newberry 21 How. 244	1858	6:3 d	10 yrs.	Maritime jurisdiction—Art. III 2 (1)
4.	Legal Tender Cases, 12 Wall. 457	1871	5:4	Hepburn v. Griswold, 8 Wall. 603	1870	4:3 o	1 yr.	Impairment of contracts—Art. I 10 (1)
5.	Morgan v. U. S., 113 U. S. 476	1885	un.	Texas v. White, 7 Wall. 700	1868	5:3 o	17 yrs.	Statutory construction re-negotiability of bonds.
6.	Leloup v. Mobile, 127 U. S. 640	1888	un.	Osborne v. Mobile, 16 Wall. 479	1872	un. q	16 yrs.	State taxation of telegraph co.; commerce clause—Art. I 8 (3)
7.	Leisy v. Hardin, 135 U. S. 100	1890	6:3	Peirce v. New Hampshire, 5 How. 504	1847	un.	43 yrs.	"Original package" doctrine; commerce clause—Art. I 8 (3)
8.	Garland v. Washington, 232 U. S. 642	1914	un.	Crain v. U. S., 162 U. S. 625	1896	6:3 o	18 yrs.	Due process of law in criminal procedure—14th Amendment
9.	U. S. v. Nice, 241 U. S. 591	1916	un.	Matter of Heff, 197 U. S. 488	1905	8:1 o	11 yrs.	Commerce with the Indian tribes—Art. I 8 (3)
10.	Penna. RR. Co. v. Towers, 245 U. S. 6	1917	6:3	Lake Shore RR. Co. v. Smith, 173 U. S. 684	1899	6:3 o	18 yrs.	Rate fixing; due process of law—14th Amendment

CHART OF OVERRULING AND OVERRULED DECISIONS (Continued)

No.	Overruling decision		Overruled decision			Step- and valid	Subject matter
	Title	Year	Vote	Title	Year		
11.	Terral v. Burke Construction Co., 257 U. S. 529	1922	un.	Doyle v. Cont. Ins. Co., 94 U. S. 535	1876	6:3 0	46 yrs. Right to resort to federal courts—Art. III
12.	Alpha Cement v. Mass. U. S. 268	1925	8:1	Secur. Mutual Life v. Pre-witt, 202 U. S. 246	1906	7:2 0	16 yrs. State taxation; commerce clause—Art. I 8 (3)
13.	Farmers' Loan & Trust v. Minn., 280 U. S. 204	1930	7:2	Baltic Mining Co. v. Mass., 231 U. S. 68	1913	6:3 0	12 yrs. State taxation; commerce clause—Art. I 8 (3)
14.	East Ohio Gas Co. v. Tax Comm., 283 U. S. 465	1931	un.	Blackstone v. Miller, 188 U. S. 189	1903	8:1 0	27 yrs. Inheritance tax; due process of law—14th Amendment.
15.	Fox Film Co. v. Doyal, 286 U. S. 123	1932	un.	Penna. Gas Co. v. Public Serv. Comm. 252 U. S. 23	1920	un. 0	11 yrs. State taxation; commerce clause—Art. I 8 (3)
16.	West Coast Hotel v. Parrish, 300 U. S. 379	1937	5:4	Long v. Rockwood, 277 U. S. 142	1928	5:4 0	4 yrs. Immunity from state taxation of federal instrumentalities.
17.	Helvering v. Mountain Producers Corp., 303 U. S. 376	1938	5:2	Adkins v. Children's Hospital, 261 U. S. 525	1923	5:3 0	14 yrs. Minimum wage law; due process of law—14th Amend.
18.	Erie RR. Co. v. Tompkins, 304 U. S. 64	1938	6:2	Burnet v. Coronado Oil Co., 285 U. S. 393	1932	5:4 0	6 yrs. Immunity of state instrumentality from federal tax
				Gillespie v. Oklahoma, 257 U. S. 501	1922	6:3 0	16 yrs.
				Swift v. Tyson, 16 Pet. 1	1842	un. 0	96 yrs. Construction of Sec. 34 of Judiciary Act of 1789; rights reserved to states—10th Amendment

CHART OF OVERRULING AND OVERRULED DECISIONS (Continued)

No.	Overruling decision		Overruled decision		Year	Vote	Shep- ard	Time valid	Subject matter
	Title	Title	Title	Title					
19.	Graves v. New York, 306 U. S. 466	1939	7:2	Collector v. Day, 11 Wall. 113; N. Y. ex. rel. Rogers v. Graves, 299 U. S. 401	1870	8:1	o	69 yrs.	Immunity of federal or state officers from income taxes
20.	O'Malley v. Woodrough, 307 U. S. 277	1939	7:1	Evans v. Gore, 253 U. S. 245 Miles v. Graham, 268 U. S. 501	1920 1925	7:2 8:1	q q	19 yrs. 14 yrs.	Diminution of judges' salaries by income tax—Art. III 1
21.	Madden v. Kentucky, 309 U. S. 83	1940	7:2	Colgate v. Harvey, 296 U. S. 404	1935	6:3	o	5 yrs.	Privileges and immunities—14th Amendment
22.	Helvering v. Hallock, 309 U. S. 106	1940	7:2	Helvering v. St. Louis Trust Co., 296 U. S. 39; Becker v. St. Louis Trust Co. 296 U. S. 48	1935	5:4	o	5 yrs.	Construction of Sec. 302 (c) of the Revenue Act of 1926
23.	U. S. v. Darby, 312 U. S. 100	1941	un.	Hammer v. Dagenhart, 247 U. S. 251	1918	5:4	o	23 yrs.	Fair Labor Standards Act of 1938 within commerce clause and 5th & 10th Amendments
24.	Nye v. U. S., 313 U. S. 33	1941	5:3	Toledo Newspaper v. U. S., 247 U. S. 402	1918	5:2	o	23 yrs.	Construction of Sec. 268 of the Judicial Code
25.	California v. Thompson, 313 U. S. 109	1941	un.	DiSanto v. Pennsylvania, 273 U. S. 34	1927	6:3	q	14 yrs.	License etc. requirements for bus agents; commerce clause—Art. I 8 (3)
26.	Olsen v. Nebraska, 313 U. S. 236	1941	un.	Ribnik v. McBride, 277 U. S. 350	1928	6:3	q	13 yrs.	Business affected with a public interest; due process of law—14th Amendment

CHART OF OVERRULING AND OVERRULED DECISIONS (Continued)

No.	Overruling decision		Overruled decision			Shep- ard Vote	Time valid	Subject matter
	Title	Year	Title	Year	Vote			
27.	U. S. v. Classic, 313 U. S. 299	1941	4:3	Newberry v. U. S., 256 U. S. 232	1921	5:4	20 yrs.	Right to choose representatives at a primary election—Art. I 2 and 4
28.	Alabama v. King & Boozer, 314 U. S. 1	1941	8:0	Parhandle Oil v. Miss., 277 U. S. 218 Graves v. Texas Co., 298 U. S. 393	1928	5:4	q 13 yrs.	Immunity of federal government from state taxation
29.	State Tax Comm. of Utah v. Aldrich, 316 U. S. 174	1942	7:2	First Natl. Bank v. Maine, 284 U. S. 312	1932	6:3	o 10 yrs.	Death tax; due process of law—14th Amendment
30.	Williams v. North Carolina, 317 U. S. 287	1942	7:2	Haddock v. Haddock, 201 U. S. 562	1906	5:4	o 36 yrs.	Divorce decree; full faith and credit—Art. IV 1
31.	Jones v. Opelika; Murdock v. Pa., 319 U. S. 103, 105	1943	5:4	Jones v. Opelika, 316 U. S. 584	1942	5:4	r 1 yr.	Freedom of speech, press, and religion—1st and 14th Amendments
32.	W. Va. State Board of Education v. Barnette, 319 U. S. 624	1943	6:3	Minersville School District v. Gobitis, 310 U. S. 586	1940	8:1	o 3 yrs.	Freedom of religion; due process of law—1st & 14th Amendment
33.	Smith v. Allright, 321 U. S. 649	1944	8:1	Grovey v. Townsend, 295 U. S. 45	1935	un. o	o 9 yrs.	Right to vote—15th Amendment
34.	U. S. v. South-Eastern Underwriters, 322 U. S. 533	1944	4:3	Paul v. Virginia, 8 Wall. 168	1868	un. e, d	76 yrs.	Insurance business as interstate commerce—Art. I 8 (3)
35.	Girouard v. U. S., 328 U. S. 61	1946	5:3	U. S. v. Schwimmer, 279 U. S. 644 U. S. v. Macintosh; U. S. v. Bland, 283 U. S. 605, 636	1929	6:3	q 17 yrs.	Freedom of religion; construction of Naturalization Act—1st Amendment

I. Contents of the Chart

The question of whether or not to include a particular decision in the table arose in several instances. An attempt has been made to list only those rulings in which a former doctrine was actually reversed, not merely qualified, distinguished, or disapproved. Little doubt prevailed with reference to the cases where the headnotes mention the earlier decision as "overruled"; however, even here we sometimes find that Shepard does not use the abbreviation "o" (Ruling in cited case expressly rejected as no longer controlling), but "q" (Soundness of decision or reasoning in cited case questioned).¹

Some decisions have been omitted, even though, viewed superficially, they might be thought of as overruling decisions. For instance, *Colgate v. Harvey*² may be considered as overruling the sixty-two-year old doctrine of the *Slaughterhouse Cases*,³ referring to the scope of the "privileges and immunities clause" of the Fourteenth Amendment. However, neither the syllabus nor the opinion contain any indication of an intended reversal or even qualification; Shepard does not mark the decision with any symbol. Moreover, *Colgate v. Harvey* itself was overruled only five years later by the decision of *Madden v. Kentucky* (No. 21 on the chart). Thus a possible enlargement in the interpretation of the "privileges and immunities clause" was abandoned in favor of a return to the restrictive doctrine of the *Slaughterhouse Cases*.

It may well be suggested that the case of *Phelps Dodge Corp. v. N. L. R. B.*⁴ belongs in a list of overruling decisions, since this judgment wiped out the two decisions of *Adair v. United States*⁵ and *Coppage v. Kansas*.⁶ But this is one of the instances where the new opinion merely marks the end of a development which has taken place through a number of intervening decisions.⁷ In other words, it was not the *Phelps Dodge* case alone which brought about the reversal, but rather a long line of reasonings climaxed and expressed in that opinion. It could not, therefore, be considered a reversal in the strict sense of the present table.

II. Evaluation of the Chart

Time Element

It is of interest to observe the length of time for which a legal doctrine

¹Cf. Nos. 25, 26, 28 and 35 of the chart.

²296 U. S. 404, 56 Sup. Ct. 252 (1935).

³16 Wall. 36 (U. S. 1873).

⁴313 U. S. 177, 61 Sup. Ct. 845 (1941).

⁵208 U. S. 161, 28 Sup. Ct. 277 (1908).

⁶236 U. S. 1, 35 Sup. Ct. 240 (1915).

⁷"The course of decisions in this Court since *Adair v. U. S. . . .* and *Coppage v. Kansas . . .* have completely sapped those cases of their authority." 313 U. S. 177, 187, 61 Sup. Ct. 845, 849 (1941).

was valid before being rejected. Here the most striking figure is the interval of nearly one hundred years before *Swift v. Tyson* was overruled by *Erie R. R. Co. v. Tompkins* (No. 18). The *Insurance* case (No. 34) overthrew a seventy-six-year old doctrine which had been confirmed time and again throughout the years "by an unbroken line of decisions."⁸ This proves that the Supreme Court has not felt compelled to adhere to the rule of stare decisis, no matter how old the original precedent is.

The shortest lifetime of all overruled judgments—with the exception of the *Opelika* case, which cannot be considered in this connection because of its technical peculiarity⁹—was allotted to *Hepburn v. Griswold* (No. 4), which was reversed by the *Legal Tender* cases after it had been valid for only fifteen months. The situation on the Bench was unusual. The Supreme Court consisted of the Chief Justice and seven associate justices, one of whom was Mr. Justice Grier. On the date when the *Hepburn* decision was delivered, February 7, 1870, Mr. Justice Grier had already retired;¹⁰ however, the opinion states that he was a member of the Court "when this cause was decided in conference (November 27, 1869) and when this opinion was directed to be read (January 29, 1870)," and that "he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution."¹¹ The judgment was passed by a five-to-three vote.¹² On the day of the *Hepburn* decision the two vacancies on the Court were filled by President Grant, and four days later a reargument was ordered on the constitutional issues of the Legal Tender Act by a vote of five-to-four, the majority consisting of the three dissenting and the two new judges. In May, 1871, *Hepburn v. Griswold* was overruled by the same majority.¹³

Recent Developments

The year 1941 produced the largest number of reversing decisions; six out of the total of thirty-five (Nos. 23-28). However, the cases deal with different matters, and no particular trend seems apparent. On the whole, it is the writer's opinion that only guesswork would find judicial trends in this group of overruling decisions. In the first

⁸322 U. S. 533, 572, 64 Sup. Ct. 1162, 1183 (1944).

⁹In this case (No. 31), the earlier decision was not overruled by a later decision in a new case between different parties; the Court ordered a reargument of the original cases and, upon rehearing, wiped out its own earlier decision and replaced it with the opposite ruling. 319 U. S. 103, 63 Sup. Ct. 890 (1942).

¹⁰8 Wall. vii (U. S. 1870).

¹¹8 Wall. 603, 626 (U. S. 1869).

¹²SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 358 *et seq.* (1943).

¹³CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 243 (8th ed. 1943).

place, the number of cases is much too small, as compared with the entire output of the Supreme Court, to support any far-reaching generalizations. It is true that overruling opinions tend to emphasize possible new tendencies in judicial interpretation. They should not, however, be examined separately in order to discover such trends, but in connection with all other rulings of the Supreme Court bearing on the subject under consideration. Secondly, as pointed out by Carl B. Swisher,¹⁴ the development of constitutional law experienced an "epoch-making" shift at the 1936-37 term of the Supreme Court.¹⁵ This statement is clearly evidenced by the fact, apparent from the chart, that more than one-half of all the reversals listed, namely, twenty out of thirty-five, occurred since 1937, while the remaining fifteen cases are spread out over nearly a century, 1844 to 1932. It is significant in this connection, too, that no cases were overruled during the five years prior to that "shift," between 1932 and 1937. As only ten years have passed since that important term, it seems premature to offer any definite conclusions about the direction in which the judicature of our highest tribunal appears to be moving.

Majorities

The majorities by which the decisions listed in the table were rendered present an interesting study, and it is possible to draw conclusions not only from the number but also from the meaning of the dissenting opinions. The most striking fact shown is that the goal of unanimity was seldom reached. Of the overruled decisions, only nine out of forty-four, or about one-fifth of the total, were rendered unanimously. Seven of these nine opinions were handed down in the nineteenth century, a fact which points clearly to the growing complication of constitutional interpretation. Agreement in the Court was more common in the case of the overruling decisions. Here we find twelve unanimous decisions among the thirty-five listed, to which two more may be added: 1) The *Classic* case (No. 27), where all seven justices taking part in the decision agreed on the constitutional issue that Congress is entitled to control primary elections, and split only on the question of the applicability of Section 19 of the Criminal Code;¹⁶ and 2) the *Insurance* case (No. 34), where only seven members of the Supreme Court were sitting, and all were unanimous in holding the insurance business subject to congressional regulation under the commerce clause, overruling

¹⁴SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 955 (1943).

¹⁵See also SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 227 *et seq.* (1946).

¹⁶13 U. S. 299, 329, 61 Sup. Ct. 1031, 1044 (1941).

the doctrine of *Paul v. Virginia*, but then disagreed on the question of whether or not to apply the Sherman Act.¹⁷

A very interesting aspect of several dissenting opinions is the influence they exerted on later majority opinions of the Court, thus blazing the trail for subsequent reversals. Very frequently an overruling opinion refers to a former dissent and adopts its reasoning.¹⁸ Two of the most vigorous dissenters of all times, Justices Brandeis and Holmes, are to be credited with an especially large number of dissents which ultimately resulted in opinions overruling the case of which they disapproved. Some instances may be mentioned: Holmes dissenting in *Hammer v. Dagenhart* (No. 23), in which opinion he was joined by McKenna, Brandeis, and Clarke; Holmes and Brandeis dissenting in *Evans v. Gore* (No. 20); Brandeis alone in *Miles v. Graham* (No. 20); Brandeis, Stone, Roberts, and Cardozo dissenting in *Burnet v. Coronado Oil* (No. 17); Holmes, joined by Brandeis and Sanford, dissenting in the *Schwimmer* case (No. 35); and Hughes, joined by Holmes, Brandeis and Stone, dissenting in the *Macintosh* and *Bland* cases (No. 35).

However, it seems clear that it was not alone the ardor or cogency of the dissenting arguments which finally won over a majority of the Court to the views of the dissenters. In all the cases cited above, the personnel of the Court changed considerably in the interval between the dates of the overruled and overruling decisions. The solid block of the original majority had been broken by death or retirement, and the vacancies had been filled by appointees with different backgrounds and viewpoints.¹⁹ One of the cases in which a combination of changed views and changed personnel brought about a reversal within a period of only three years was the *Flag Salute* decision (No. 32): Stone's dissent in *Minersville School District v. Gobitis* and the vigorous public criticism of the decision had evidently influenced Justices Black, Douglas and Murphy to such an extent that they stated in *Jones v. Opelika*²⁰ that they had become convinced that the *Gobitis* case was "wrongly decided." Mr. Justice Byrnes was replaced by Mr. Justice Rutledge in February, 1943, and in June, 1943, the *Gobitis* case was overruled.²¹ The importance of the sweeping alterations in the membership of the Supreme Court in the late thirties becomes strikingly apparent in the reversal

¹⁷In addition to the dissenting opinions, 322 U. S. 533, 562, 583, 584, 64 Sup. Ct. 1162, 1178, 1189 (1944), see Cushman, *Constitutional Law in 1943-44*, 39 AM. POL. SCI. REV. 301 (1943); Lewis Wood, *New York Times*, June 11, 1944; note, 44 COL. L. REV. 772 (1944).

¹⁸257 N. Y. 529, 533, 42 Sup. Ct. 188, 189 (1921).

¹⁹For an analysis of the changing alignments of the Supreme Court, see SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 210, 223 *et seq.* (1946).

²⁰316 U. S. 584, 623, 62 Sup. Ct. 1231, 1251 (1942).

²¹See CUSHMAN, *LEADING CONSTITUTIONAL DECISIONS* 123 (8th ed. 1946).

of *Ribnik v. McBride* (No. 26): Holmes, Brandeis and Stone had dissented in that case, and when the reasoning of the *Ribnik* case was abandoned in 1941 by the decision of *Olsen v. Nebraska*, the reversal was unanimous, since no member of the old group of majority justices remained on the Bench.²²

The fact that a unanimous decision is a rare occurrence has been mentioned above. On the other hand, overruling decisions by a bare majority of the Court are not as frequent as we are sometimes led to believe. Only three cases among the thirty-five overruling decisions were rendered by a five-to-four majority (Nos. 4, 16 and 31), and the four-to-three decisions in the *Classic* and *Insurance* cases (Nos. 27 and 34) should be considered separately in this connection since the Supreme Court, in both cases, was unanimous on the constitutional issue and split only on the question of statutory application. Two different lines of thought are suggested by these five rulings: 1) Is it advisable for the Supreme Court to be able to overrule a previously expressed legal doctrine involving constitutional interpretation by a bare majority of the Court, i.e. by a five-to-four decision? 2) Should it be possible for the Supreme Court to pass judgment on a constitutional question by a minority of the full Court, i.e. by a majority of the quorum of the Court?

The discussion of the first problem usually hinges on the argument whether a bare majority of the Supreme Court should be allowed to declare legislative acts unconstitutional and void. The debate is nearly as old as the Supreme Court itself; it started in 1823 when a Kentucky statute was held unconstitutional in a decision which was believed to have been rendered by only three judges out of seven.²³ Since then there have been many legislative proposals to establish a rule that laws may be invalidated only unanimously or by an extraordinary majority of the Court.²⁴ No such law has ever been passed. As pointed out by Charles Warren in discussing a bill introduced by Senator Borah in 1923 which required that seven out of nine judges concur in pronouncing an act of Congress unconstitutional, such a rule would really mean that a small minority of the Court—three judges in the extreme case—would be able to impose their view upon their brethren by preventing them from nullifying the law under consideration.²⁵

²²SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 978 (1943).

²³Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771 (1921).

²⁴Summarized by Charles Warren in *Legislative and Judicial Attacks on the Supreme Court of the United States*, 47 AM. L. REV. 1, 161 (1913), and CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 218 *et seq.* (rev. ed. 1935).

²⁵WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 178 *et seq.* (rev. ed. 1935).

In addition to this difficulty, there remains always the possibility that a constitutional amendment would be required for a law thus curbing the power of the Supreme Court, since it is doubtful that the provisions of the Constitution, Art. III, Sec. 2²⁶ are to be interpreted as including legislation of this particular kind. Bar associations and other organizations, at the time of the Borah proposal, openly expressed their opposition to interference with the manner in which the Supreme Court decides its cases.²⁷

Two cases contained in the chart were rendered by four-to-three majorities—although not on the constitutional issue. One of them, the *Insurance* case (No. 34) gave rise to a vigorous attack on the Supreme Court by Charles Warren²⁸ who berated the deciding justices for disregarding a wise practice of 110 years' standing. He referred to the ruling delivered by Chief Justice Marshall (for a court consisting of seven justices, two of whom were absent) in the cases of *Briscoe v. Commonwealth's Bank of Kentucky* and *New York v. Miln*,²⁹ where the following order was rendered:

"The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases four judges do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be re-argued at the next term, under the expectation that a larger number of judges may then be present."³⁰

This rule of self-discipline arose in 1825, after a Kentucky court refused to follow a judgment of the Supreme Court on the ground that the ruling had not been passed by a majority of the entire Court.³¹ The Supreme Court faithfully adhered to this "cautionary consideration"³² for about a century, and abandoned the practice only recently.³³ How-

²⁶" . . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

²⁷SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 774 (1943).

²⁸The New York Times, June 9, 1944.

²⁹8 Pet. 118, (U. S. 1834).

³⁰*Ibid* at 121.

³¹WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 34 (2d ed. 1929).

³²"Among the rules which the Supreme Court has recognized as governing judicial review are the following: I. A decision disallowing a legislative act, either national or state, must be concurred in by a majority of the entire membership of the Bench. This is a cautionary rule—originally a concession to state pride—for other kinds of decisions are binding when concurred in by a majority of a quorum of the Court." Corwin, *Judicial Review in Action*, 74 U. OF PA. L. REV. 639, 642 (1926).

It may be noted, however, that the wording of the Marshall opinion is much more sweeping: Marshall did not confine his rule to decisions invalidating legislative acts but spoke generally of "cases where constitutional questions are involved."

³³See Warren quoted in The New York Times, June 9, 1944.

ever, in a strict sense, the two cases listed in the chart (Nos. 27 and 34) do not violate the rule set down by Chief Justice Marshall in 1834; in both opinions all of the justices present and taking part in the decision agreed as to the constitutional question involved. Hence it appears that Mr. Warren was not completely justified in reproaching the Court for rejecting a wise, century-old practice.

III. *Stare Decisis and Its Scope in Constitutional Law*

In view of the fact that the Supreme Court has been in operation for more than 150 years, the number of actual reversals in cases involving constitutional issues appears to have been very modest indeed. However, it must be borne in mind that the Court, in an effort to adhere to the "thralldom of stare decisis,"³⁴ has handed down a considerable number of decisions in which it has declared, "with varying degrees of candor,"³⁵ that the former judgment has been "distinguished," or "qualified," or otherwise whittled down. In the earlier days, the doctrine of "stare decisis and *quieta non movere*" played an all-important part in the reaching of a judicial decision; the whole system of legal learning, the case system, is based upon this principle. Its justification, of course, is to be found in the natural demand for certainty and steadiness in the interpretation and application of the law; but it has always been acknowledged that the doctrine of stare decisis, like most other rules, is subject to exceptions.³⁶ As early as 1889, D. H. Chamberlain wrote that ". . . the degree of authority belonging to such precedent depends, of necessity, on its agreement with the spirit of the times."³⁷ This remark represents a premature indication of the development which was to take its course later on. More and more, the conviction spread that legal adjudication has to keep pace with social and economic changes. Especially in the field of constitutional law, where the provisions of the same old document are still the basis for judicial decision, the need for flexibility became obvious. It is now widely admitted that the rule of stare decisis has only a limited application to constitutional interpretation.³⁸ Where the Court has erred in the inter-

³⁴Corwin, *Judicial Review in Action*, 74 U. OF PA. L. REV. 639, 650 (1926).

³⁵*Ibid.*

³⁶Jackson, *Decline of Stare Decisis Due to Volume of Opinions*, 28 J. AM. JUD. Soc'y. 6 (1944).

³⁷Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125 (1889).

³⁸As early as 1849, Chief Justice Taney, in the *Passenger Cases*, 7 How. 283, 470 (U. S. 1849), remarked: ". . . I had supposed that question to be settled, so far as any question on the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error."

pretation of a statute, correction may be had by new legislative action, if Congress deems such action necessary in the public interest.³⁹ This is theoretically true where a constitutional provision is concerned,⁴⁰ but the process of amending the Federal Constitution is so difficult and takes so much time⁴¹ that it is generally believed that constitutional misconstruction can be corrected only by the Court's repudiating its former opinion.⁴² This is a technical consideration, and although it is decisive, there are other reasons for drawing the distinction which probe still deeper. In the field of private law, property rights and titles arising out of contractual obligations may be created by adjudication *inter partes*. Relying on such adjudication as precedent, other parties may enter into similar contracts or agreements, and it is desirable that changing judicial interpretations do not disturb these relations. Chief Justice Taney gave expression to this line of thought when he justified his reversal of *The Thomas Jefferson* (No. 2) with the following words:

"The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it."⁴³

The same point of view was voiced by Mr. Justice Brandeis in his dissent

³⁹*Cf.* Roberts, J., dissenting in *Helvering v. Hallock*, 309 U. S. 106, 129, 60 Sup. Ct. 444, 456 (1939).

⁴⁰It has actually been done twice. The decision of *Chisholm v. Georgia*, 2 Dall. 419 (U. S. 1793), was "recalled" by the enactment of the Eleventh Amendment, and the decision of *Pollack v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912 (1895), by the enactment of the Sixteenth Amendment. It may be pointed out in this connection that the first sentence of the Fourteenth Amendment "recalled" the famous *Dred Scott* doctrine laid down in *Dred Scott v. Sandford*, 19 How. 393 (U. S. 1857), with regard to United States citizenship. However, the Fourteenth Amendment was not enacted for this particular purpose.

⁴¹"The period of gestation of a constitutional amendment . . . is reckoned in decades usually; in years, at least." JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 297 (1941).

⁴²Mr. Justice Brandeis dissenting in *Burnet v. Coronado Oil Co.*, 285 U. S. 393, 406, 52 Sup. Ct. 443, 447 (1932); *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 94, 56 Sup. Ct. 720, 744 (1936); *Smith v. Allwright*, 321 U. S. 649, 665, 646 Sup. Ct. 757, 765 (1944); Mr. Justice Stone dissenting in *U. S. v. South Eastern Underwriters Ass'n*, 322 U. S. 533, 579, 64 Sup. Ct. 1162, 1187 (1944). *Cf.* 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 74 (2d ed. 1929); MATHEWS, *AMERICAN CONSTITUTIONAL SYSTEM* 193 (2d ed. 1940); COLLINS, *Stare Decisis and the Fourteenth Amendment*, 12 COL. L. REV. 603 (1912). See also Note, 12 COL. L. REV. 110 (1912).

⁴³The *Genesee Chief*, 12 How. 443, 458 (U. S. 1851).

in *State of Washington v. Dawson*,⁴⁴ and by Mr. Justice Frankfurter in *Helvering v. Hallock*.⁴⁵ All these citations show that the desire for stability and certainty is most urgent where private rights are concerned; the more so because judicial decision has a peculiar retroactive effect.⁴⁶ Where, however, public interests and the general welfare are involved, it is more important that the law be settled right than that it merely be settled. In his "Nature of the Judicial Process," Mr. Justice Cardozo distinguishes between "static" and "dynamic" precedents. Into the first group fall those cases where the controversy does not turn upon the rule of law but merely upon its application to the facts. They make up the bulk of the business of the courts, but "jurisprudence remains untouched . . . regardless of the outcome." On the other hand, there "remains a percentage, not large indeed, but not so small as to be negligible, where a decision one way or the other will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power."⁴⁷ It seems that this distinction coincides, on the whole, with the difference between private and constitutional law; judgments in the field of private law are mostly "static" while constitutional decisions more often belong to the "dynamic" kind, thus giving greater opportunity to the judiciary to display their creative power, independent of precedent. In the last analysis, the decision whether to adhere to the policy of stare decisis or not is based upon the effort to reconcile the need for certainty and uniformity with the requirement that justice be done. The latter consideration should predominate where the supreme law of the land, the Constitution of the United States, is to be expounded.⁴⁸

The desirability of a restricted use of the stare decisis rule in this

⁴⁴"The doctrine of stare decisis should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. . . . Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command." 264 U. S. 219, 238, 44 Sup. Ct. 302, 309 (1924).

⁴⁵309 U. S. 106, 119, 60 Sup. Ct. 444, 451 (1940). *But cf.*, Mr. Justice Robert's dissent, *id.* at 129.

⁴⁶"The court works out a legal precept or finds one in order to apply it to a set of facts occurring in the past." Roscoe Pound, *What of Stare Decisis?* 10 *FORD. L. REV.* 1, 10 (1941).

⁴⁷CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921). *Cf.* the distinction made by Mr. Justice Brandeis in his dissent in *Burnet v. Coronado Oil Co.*, 285 U. S. 393, 410, 52 Sup. Ct. 443, 449 (1932), between decisions involving the *application* and those involving the *interpretation* of the Constitution.

⁴⁸"However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court. . . . (I)t is of the highest importance that the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes." 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 748 (rev. ed. 1937).

connection has found forceful expression by Mr. Justice Jackson, who sees grave danger in the strict adherence to precedent:

"Precedents largely govern the conclusions and surround the reasoning of lawyers and judges; . . . in constitutional law, they are the most powerful influence in forming and supporting reactionary opinions."⁴⁹

Very often the question of the applicability of the *stare decisis* rule will be decided by the caliber of the men who administer the law at the given time.

In many cases, the members of the Supreme Court have not even achieved agreement among themselves as to the classification of the modification of an earlier decision; the majority opinion sometimes will not show any indication of an intended reversal, but the dissent considers the earlier case in question as overruled.⁵⁰ This uncertainty becomes especially apparent in the interpretation of the Fourteenth Amendment; the phrasing of the first paragraph is so vague and elastic that "the lines of legal distinctions can be so finely drawn that even the most experienced jurists cannot agree on the relationship of one case to the other in the line of precedents."⁵¹

Only recently, in 1944, members of the Supreme Court have voiced severe criticism of their brethren for an alleged tendency to reject former rulings. It is mainly Mr. Justice Roberts who has decried this attitude;⁵² in *Smith v. Allwright* (No. 33), he censured the majority as follows:

"This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors."⁵³

And he was joined by Mr. Justice Frankfurter, who expressed his apprehension for the good reputation of the Supreme Court:

⁴⁹JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 295 (1941).

⁵⁰*Cf.* Nos. 27 and 34 of the chart.

⁵¹Collins, *Stare Decisis and the Fourteenth Amendment*, 12 *COL. L. REV.* 603, 611 (1908).

⁵²Mr. Justice Roberts voted with the majority in eleven out of the twenty overruling decisions in which he took part (Nos. 14-33 incl.). In seven cases he dissented, but two of the opinions did not expressly overrule the earlier judgment (Nos. 20 and 27, and in both these cases Mr. Justice Roberts was with the majority. In this connection, it is interesting to note that the important reversal of the *Minimum Wage* cases (No. 16) was made possible only by the fact that Mr. Justice Roberts "abandoned the conservatives with whom he had voted in a similar case the previous year." See SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 946 (1943), who even goes so far as to remark: ". . . the feeling of the public, and probably of the bar as well, was that Justice Roberts had deemed it expedient to change his position because of the movement to reorganize the Court." *Cf. also* MATHEWS, *AMERICAN CONSTITUTIONAL SYSTEM* 475 (2d ed. 1940); Cushman, *Constitutional Law in 1936-37*, 32 *AM. POL. SCI. REV.* 278, 299 (1938).

⁵³321 U. S. 649, 666, 64 Sup. Ct. 757, 766 (1944).

"Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has forced in a current controversy."⁵⁴

It seems to this writer that these fears and reproaches are not quite justified. In the first place, the comparatively small number of overruling decisions serves as proof of the fact that members of the Supreme Court do not exercise their power of reversal lightly. Secondly, if this high tribunal should refuse to go with the changing times, mechanically deciding case after case by the use of century-old doctrines, it would lose all contact with actual life and fall into public disrespect. A reversal of an earlier judgment should not be labeled as an assumption of greater wisdom on the part of the judges, but as an effort to adapt the provisions of our Constitution to the social and economic conditions prevailing at the time of the decision. This does not entail a complete disregard of precedent, however; in the interest of certainty and stability in adjudication, as well as out of a feeling of pride in its work, the Supreme Court will always adhere to precedent as long as possible. "Stare decisis retains its legitimate function, but no longer blocks progress."⁵⁵

⁵⁴Mahnich v. Southern Steamship Co., 321 U. S. 96, 113, 64 Sup. Ct. 455, 463 (1944).

⁵⁵Cushman, *What's Happening to Our Constitution?*, PUB. AFFAIRS PAMPH. No. 70, p. 9 (1942).