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How the Supreme Court Is Dealing with Precedents in Constitutional Cases

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HOW THE SUPREME COURT IS DEALING WITH PRECEDENTS IN CONSTITUTIONAL CASES*

R. Randall Kelso & Charles D. Kelso†

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I. INTRODUCTION: THE EFFECT OF DECISIONMAKING STYLE ON THE TREATMENT OF PRECEDENT

During our nation's history, Supreme Court decisionmaking has evidenced four different styles: formal, Holmesian, instrumental and natural law.¹ One or the other of these styles has predominated during various eras. Initially, from 1789 to 1872, the Court predominantly followed a natural law decisionmaking style.² From 1872 to 1937, the Court predominantly followed a formalist style; from 1937 to 1954, a

¹ A full discussion of the four decisionmaking styles appears in R. Randall Kelso, *Separation of Powers Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 20 PEPP. L. REV. 531 (1993) [hereinafter Kelso, *Separation of Powers*]. A discussion of the styles in the specific context of constitutional law adjudication appears in R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994) [hereinafter Kelso, *Styles*]. An application of this analysis to criticism of recent constitutional decisions as unprincipled innovations appears in Charles D. Kelso & R. Randall Kelso, *Our Nine Tribunes: A Review of Professor Lusky's Call for Judicial Restraint*, 5 SETON HALL CONST. L.J. 1289 (1995) [hereinafter Kelso & Kelso, *Nine Tribunes*]. For further discussion of the four decisionmaking styles in the context of common law, statutory and constitutional adjudication, see R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRODUCTION* 101-23, 261-310, 388-423 (1984).

² See generally Kelso, *Styles*, *supra* note 1, at 150-84.

Holmesian style; and from 1954 to 1986, an instrumental style.³ Today, a modern natural law style appears to be emerging.⁴

In previous articles, we have discussed how these four judicial decisionmaking styles differ as they affect arguments addressed to constitutional text and purpose, constitutional structure, history surrounding adoption of constitutional provisions, legislative and executive action under constitutional provisions, and the social consequences of adopting a particular course of action.⁵ As might be expected, considerable variation also exists in constitutional interpretation with respect to the weight given precedent. These variations are explored in this Article, with a special focus on how today's post-instrumental Court has been dealing with instrumental-era precedents.

During the instrumental era—particularly during the years of the Warren Court (1953-69)—the Court creatively engaged in overruling or limiting many precedents and in creating many new rules, primarily to recognize new civil rights and otherwise to provide additional protections against government action. One might expect that the post-instrumental Court of today, a far more conservative institution, would conclude that a number of these instrumental cases were wrongly decided. As a result, the post-instrumental Court would engage in a substantial retraction of those precedents by way of overruling or limiting their impact. There has not, in fact, been a flood of such decisions. Perhaps the principal reason for this is that the modern natural law style of decisionmaking employed by many Justices on the Court today is associated with views on *stare decisis* that include numerous restraints on departing from precedent. Naturally, any attorney wishing to persuade a majority of the Supreme Court to

³ Kelso, *Styles*, *supra* note 1, at 184-225.

⁴ See generally Kelso, *Styles*, *supra* note 1, at 167-84, 227-28; Kelso & Kelso, *Nine Tribunes*, *supra* note 1, at 1306-23.

⁵ For discussion of how each of these factors affects constitutional interpretation generally, see Kelso, *Styles*, *supra* note 1; Kelso & Kelso, *Nine Tribunes*, *supra* note 1. For discussion of these factors in two specific constitutional contexts, see Kelso, *Separation of Powers*, *supra* note 1; Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. (forthcoming 1996) [hereinafter Kelso & Kelso, *Standing to Sue*].

adopt a particular view, or any attorney merely wishing to predict the outcome of a Supreme Court decision, must take into account the Justices' approaches toward *stare decisis*.⁶

This Article identifies the Justices' various views and restraints regarding departing from, or following, precedent. We then illustrate how these restraints are currently operating in practice, though we make no claim to undertake an exhaustive analysis of all recent cases. To preface this analysis, we begin by describing the four decisionmaking styles and how each one treats precedent.

A. *The Four Styles: Formal, Holmesian, Instrumental and Natural Law*

The decisionmaking style of a judge depends in large part on how the judge perceives two critical variables: the nature of judicial responsibility and the nature of law.⁷ Regarding judicial responsibility, a judge can attempt to produce decisions and opinions that are "good law" in the narrow sense of being clear, certain, predictable, and unquestionably within the legitimate power of the court. Such judges typically are described as following a "positivist" approach to judicial decisionmaking.⁸ In contrast, a judge could aim at producing law and applications of law that accord with certain moral principles embedded in society's legal and moral culture. Those who adopt this "normative" perspective give relatively more weight than do positivist judges to the moral insights and traditions which lie behind legal rules and which may develop over time.⁹

⁶ See generally Jeffrey Toobin, *Supreme Sacrifice: Laurence Tribe May Never Be on the Supreme Court, But Then He Doesn't Really Need To Be*, NEW YORKER, July 8, 1996, at 44 ("For his entire career, Tribe has studied the ideological predictions of the Justices, and, with dispassionate, almost cynical detachment, he designs his arguments to appeal to a majority. His briefs consist of messages aimed at those Justices whose votes he needs.").

⁷ The following paragraphs in this section are heavily based upon a similar summary of the four decisionmaking styles which appears in Kelso & Kelso, *Standing to Sue*, *supra* note 5.

⁸ See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

⁹ See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). A more complete treatment of this positivist/normative distinction appears in Kelso, *Separation of Powers*, *supra* note

The nature of law can be seen as a set of rules and principles whose application by courts is guided by an analytic methodology of logic and reason.¹⁰ In contrast, a judge can view law as the means to achieve certain goals through a pragmatic or functional treatment of rules and principles.¹¹ Combining these two views on the nature of judicial responsibility with the two views on the nature of law results in there being four decisionmaking styles. They are explained below.

1. Formal

There are "analytic positivist" judges who blend an insistence on logical or mechanical rule application with a focus on certain, predictable treatment of existing positive law. Such judges, who may be called formalists,¹² decide cases in accord with an underlying assumption that law is not the same thing as morality and that courts should produce law that is clear, certain and predictable. They give relatively little weight to whether a result is "just" in some moral sense. Instead, formalist judges view law as a set of rules and principles whose application by courts should be guided by an analytic methodology of logic and reason.¹³ When interpreting the Constitution, formalists give great weight to the literal meaning of terms and to evidence of the specific intent of the Framers and Rati-fiers regarding a particular constitutional provision. They give much less consideration to searching for the purpose behind the terms used or indications of any general intent the Fram-

1, at 535-38.

¹⁰ See generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

¹¹ See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); see also Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981). Fuller treatment of this analytic/functional distinction appears in Kelso, *Separation of Powers*, *supra* note 1, at 536-38.

¹² These judges have generally been called "formalists" because they concentrate on the formal aspects of law—technical rule manipulation in light of the words in a statute or constitution, and the narrow holdings of judicial precedents. They have also been called "conceptualists." See generally GRANT GILMORE, *THE AGES OF AMERICAN LAW* 11-12 (1977).

¹³ For a fuller description of formalism, see Kelso, *Separation of Powers*, *supra* note 1, at 532-38, and sources cited therein.

ers may have had in mind.¹⁴ The reason for this focus is that literal meaning and specific intent are thought best to reflect a certain, predictable and unbiased approach to the positive law adopted by the Framers and Ratifiers.¹⁵ Because of their concern with certainty and predictability, formalist judges prefer that doctrine be stated in terms of clear, bright-line rules.¹⁶ This "formalist" style of deciding can be observed in the work of the Supreme Court and other American courts from approximately 1872 to approximately 1937.¹⁷ The formalist style is well used today by Justices Scalia and Thomas.¹⁸

2. Holmesian

A second kind of judicial decisionmaking style is a "functional positivist" approach, combining a view that legal rules are always means to some ends with an emphasis on certain, predictable treatment of existing positive law. The focus on

¹⁴ See generally R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1058-60 (1995) [hereinafter Kelso, *Natural Law Tradition*]; Kelso & Kelso, *Nine Tribunes*, *supra* note 1, at 1301-02; see also Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J.) (in determining the meaning of liberty under the Fourteenth Amendment, judges should consider only legislative enactments at "the most specific level at which [the] relevant tradition" can be identified). For discussion of the differences between specific and general intent, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198-99 (1987) ("Specific intent involves the relatively precise intent of the framers to control the outcomes of particular types of cases Abstract [or general] intent refers to aims that are defined at a higher level of generality, sometimes entailing consequences that the drafters did not specifically consider and that they might even have disapproved. An example comes from equal protection jurisprudence. The authors of the fourteenth amendment apparently did not specifically intend to abolish segregation in the public schools. Yet they did intend generally to establish a regime in which whites and blacks received equal protection of the laws—an aspiration that can be conceived, abstractly, as reaching far more broadly than the framers themselves specifically had intended.") (footnotes omitted).

¹⁵ See generally Kelso, *Styles*, *supra* note 1, at 184-87.

¹⁶ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Thus, formalist judges typically reject legal doctrine which calls for a balancing of factors or consideration of the "totality of the circumstances." *Id.* at 1184-87.

¹⁷ See generally Kelso, *Styles*, *supra* note 1, at 184-95, and sources cited therein.

¹⁸ Kelso, *Styles*, *supra* note 1, at 186-95, and sources cited therein; see Kelso, *Separation of Powers*, *supra* note 1, at 587-88, 597-98.

certain, predictable rules means that Holmesians tend to prefer rules with fairly sharp corners rather than "balancing" tests.¹⁹ Since legal rules are always viewed as means to ends, however, purely logical or mechanical treatment of existing law will not be sufficient to carry out the purposes behind legal rules. Judges who adopt this view may be called "Holmesian," after Justice Oliver Wendell Holmes, whose famous statement reminds us that "[t]he life of the law has not been logic: it has been experience."²⁰ As pragmatic functionalists, Holmesian judges are sensitive to the purposes behind relevant legal texts, and any general intent the Framers may have had in mind when adopting those texts, in order to interpret the texts in a way best calculated to achieve their intended goals.²¹ As positivists, however, Holmesian judges believe that the judicial task is merely to interpret existing law, with changes in the law coming primarily from the legislative or executive branch.²²

This approach towards law has meant that Holmesian judges, more than any other kind of judge, tend to defer to the government in constitutional cases unless the unconstitutionality of governmental action is clear.²³ This deferential approach also means that Holmesian judges are quite sensitive to later legislative and executive action, which they may accept as a "gloss" on the meaning of the Constitution.²⁴

¹⁹ See, e.g., Pierre Schlag, *Rules and Standards*, 33 U.C.L.A. L. REV. 379, 379-80 (1985) (discussing Holmes's preference for the rigid rule of stop and look for drivers coming to unguarded railroad crossings, rather than a more flexible balancing test focused on whether the driver has exercised reasonable caution).

²⁰ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

²¹ See Kelso, *Styles*, *supra* note 1, at 196-99.

²² Kelso, *Styles*, *supra* note 1, at 199-200; see HOLMES, *supra* note 19, at 36 ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.").

²³ On this strong view of judicial deference to the political process implicit in the Holmesian approach, see Kelso, *Styles*, *supra* note 1, at 133-34, 167, 197, 200-01 (discussing the views concerning judicial restraint of Thayer, Justices Holmes and Frankfurter, and Professor Alexander Bickel, which typify this approach); see also MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 86-90 (1994) (discussing James Bradley Thayer's "minimalist" approach towards constitutional interpretation and its embrace by Justices Holmes and Frankfurter, among others).

²⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, en-

Holmes's views on the law and the role of courts had a strong following on the Supreme Court between the years 1937 and 1954. They are shared most strongly on the Court today by Chief Justice Rehnquist.²⁵

3. Instrumental

At the opposite extreme from formalists are judges who reject both the analytic and positivist aspects of formalism. These judges see law in functional terms as a means serving an end, and they reject a positivist approach to law in favor of an approach that places the judge more on center stage by ensuring that the law advances proper moral concepts.²⁶ Such judges can be called "instrumentalists" because they see the judicial role primarily as an instrument to achieve justice in society. Though agreeing with Holmesian judges that a functional, pragmatic or purposive approach towards rules is appropriate, instrumentalist judges are less willing to defer to legislative decisions than are the Holmesians because instrumentalists reject positivism in favor of a normative concern with the ultimate morality of legal decisions.²⁷ Instrumentalist judges tend to create balancing tests rather than narrow rules because balancing tests give courts the flexibility to do justice in light of the facts of individual cases.²⁸

gaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President . . ."). In contrast to this approach, a rigid formalist approach would reject reliance on such later legislative and executive action on the grounds that such action is not directly related to the literal text adopted by the Framers and Ratifiers or to the Framers' and Ratifiers' specific intent. *See generally* Kelso, *Styles*, *supra* note 1, at 186. However, in practice, most formalist judges will permit a continued and consistent legislative or executive practice which indicates a clear tradition on a specific issue to provide some gloss on meaning. For example, Justice Scalia is willing to permit a tradition of legislative enactments at "the most specific level at which [the] relevant tradition" can be identified to help determine the meaning of liberty under the Fourteenth Amendment. *See* Kelso, *Styles*, *supra* note 1, at 186-87 (citing, *inter alia*, *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J.)).

²⁵ *See generally* Kelso, *Separation of Powers*, *supra* note 1, at 583-85, 601 n.266; Kelso, *Styles*, *supra* note 1, at 208-13, and sources cited therein.

²⁶ *See generally* Kelso, *Separation of Powers*, *supra* note 1, at 532-38, and sources cited therein.

²⁷ Kelso, *Separation of Powers*, *supra* note 1, at 534, 537-38, 542-43.

²⁸ *See generally* Stephen E. Gottlieb, *The Paradox of Balancing Significant*

The instrumental style of decisionmaking prevailed on the Supreme Court, beginning around 1954, the year *Brown v. Board of Education* was decided.²⁹ By 1965, Chief Justice Warren was serving on the Court with four like-minded instrumentalists (Justices Douglas, Brennan, Marshall and Fortas).³⁰ The instrumental majority made vast changes in rules of criminal justice and recognized many new civil rights, particularly in the realm of privacy and equal protection.³¹ However, the retirement of Chief Justice Warren and Justice Fortas in 1969 changed the balance of power on the Court. By 1976, only four instrumentalists served on the Court (Justices Blackmun, Brennan, Marshall and Stevens).³² To carry the day they had to attract one of the three Holmesians (Justices Rehnquist, Stewart or White) or the lone formalist on the Court (Chief Justice Burger), or the lone adherent to a modern natural law style (Justice Powell).³³ With the recent retirement from the Court of Justices Brennan, Marshall and Blackmun, the only instrumentalist on the Court today is Justice Stevens, and his views are moderate when compared to the active instrumentalism of Justices Warren, Douglas, Brennan, Marshall and Fortas.

Interests, 45 HASTINGS L. REV. 825 (1994); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

²⁹ 347 U.S. 483 (1954). For a similar overview which tracks these same eras of constitutional history, see DANIEL FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 15-19 (1993) (describing the formalist *Lochner* era from 1873-1937); *id.* at 19-23 (discussing the New Deal Court up to the Warren Court); *id.* at 23-27 (discussing *Brown*, the Warren Court and beyond, 1953-present).

³⁰ See LAURENCE TRIBE, *MODERN CONSTITUTIONAL LAW* 1722 (2d ed. 1988). Justice Black, who basically followed a formalist judicial decisionmaking style, see Kelso, *Styles*, *supra* note 1, at 186 n.297, often voted with the instrumental group on civil rights and first amendment issues, giving the Court during the 1960s a reasonably predictable instrumentalist majority for its decisions.

³¹ Examples include *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by unmarried persons); *Miranda v. Arizona*, 384 U.S. 436 (1966) (required warning prior to police questioning of an accused); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married persons); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclude from criminal trials evidence illegally seized).

³² See generally Kelso, *Separation of Powers*, *supra* note 1, at 581-82, 593-99, 602; Kelso, *Styles*, *supra* note 1, at 213-25.

³³ For discussion of the decisionmaking styles of these Justices, see Kelso, *Separation of Powers*, *supra* note 1, at 602 n.266, and sources cited therein.

4. Natural Law

A fourth group of judges adopt an "analytic, normative" approach towards law. Such judges view law as a set of principles implemented through logic and reason, as do formalists, but, like instrumentalists, evaluate law in terms of how it advances moral concepts. These are the judges in the natural law tradition.³⁴ While certain versions of natural law may be as willing as instrumentalism to impose moral notions on contemporary constitutional decisionmaking,³⁵ our natural law tradition (as espoused by Chief Justice John Marshall, Joseph Story and James Madison, for example), holds that judges should elaborate, in a reasoned fashion, the moral notions placed into the Constitution by the Framers and Ratifiers.³⁶ This theory flows from viewing the natural law philosophy of the Framers and Ratifiers as primarily influenced by Enlightenment natural law and the Enlightenment's "social contract" theory of the nature of our government. The proper role of the judiciary in such a society is to follow the "social contract" as set out in a written Constitution.³⁷ Because such judges operate out of the natural law respect for reasoned elaboration of the law over time, natural law judges are more respectful of later legislative and executive action as creating a "gloss" on the meaning of the Constitution than are judges in any of the other judicial decisionmaking traditions.³⁸ The natural law approach, grounded in traditional common-law principles, also has a great commitment to "deciding cases on narrow grounds when possible, deciding most cases only after full briefing and argument, applying the method of analogical reasoning where

³⁴ On natural law generally, see Kelso & Kelso, *supra* note 1, at 115-19, 514-21; Kelso, *Separation of Powers*, *supra* note 1, at 546-53. On a natural law approach to constitutional interpretation, see Kelso, *Styles*, *supra* note 1, at 150-84.

³⁵ See Kelso, *Styles*, *supra* note 1, at 159 (citing, *inter alia*, Mortimer Adler, *Robert Bork: The Lessons to Be Learned*, 84 NW. U. L. REV. 1121 (1990)). A well-known rejection of this approach appears in *LEARNED HAND, THE BILL OF RIGHTS* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

³⁶ See Kelso, *Styles*, *supra* note 1, at 160-63.

³⁷ See Kelso, *Natural Law Tradition*, *supra* note 14, at 1067-73.

³⁸ See Kelso, *Styles*, *supra* note 1, at 157-59.

appropriate, respecting the role of the courts in our constitutional system, reasoned elaboration of the law, and other elements of sound judicial craftsmanship."³⁹

The original natural law era extended from 1789 until about 1872.⁴⁰ It appears to have been revived on the Court today by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer.⁴¹ Thus, it may represent a majority approach towards judicial decisionmaking on the Supreme Court—even though, of course, the Justices may disagree on certain particulars.⁴²

B. *How Each Style Treats Precedent*

Because each style is grounded in the Anglo-American common law system, the starting point for all four has been the doctrine of *stare decisis*—follow precedent unless there is a good reason to depart from it. In view of this doctrine, it is not surprising that most of the time the Supreme Court follows precedent when deciding a new case. This means that the precedent is perceived to state or imply some rule of law as its major premise, and the current case, after stating that rule (and citing the precedent as authority), proceeds to characterize the current facts in terms of the rule and apply the rule to the facts.⁴³ There is, however, considerable variation from one style to the next with respect to how prior cases are treated. Four variables account for most of the difference.

³⁹ Kelso & Kelso, *Nine Tribunes*, *supra* note 1, at 1311-13, and sources cited therein.

⁴⁰ See Kelso, *Styles*, *supra* note 1, at 150-67; FARBER ET AL., *supra* note 31, at 1-15 (describing the pre-*Lochner* era from 1787-1873).

⁴¹ See generally Kelso, *Natural Law Tradition*, *supra* note 14, at 1080-85; Kelso, *Separation of Powers*, *supra* note 1, at 587-96, 602 n.266; Kelso, *Styles*, *supra* note 1, at 169-84, 227 n.604.

⁴² Such disagreement may be the result of a slight difference in interpretation style among these predominantly natural law Justices, with Justice Kennedy leaning slightly in a formalist direction, Justice O'Connor leaning slightly in a Holmesian direction, and Justices Ginsburg and Breyer leaning slightly in an instrumental direction. See generally Kelso, *Natural Law Tradition*, *supra* note 14, at 1082 n.106; Kelso, *Separation of Powers*, *supra* note 1, at 600-07; Kelso, *Styles*, *supra* note 1, at 227 n.604. Or it may be the result of specific case bias, discussed *infra* note 44. Or it may simply be the result of the Justices having different perceptions relating to what the facts really are in the case before the Court.

⁴³ See generally Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 449 (1975) ("Sensitivity to the factual similarities, and dissimilarities, in cases is, I suppose, the most striking characteristic of the common-law mind.").

The first significant variable affecting the treatment of a precedent is a judge's views on whether the precedent is rightly or wrongly decided. Because formalist, Holmesian, natural law and instrumentalist judges approach questions of constitutional interpretation differently, they often reach different conclusions about the extent to which some earlier precedent was rightly or wrongly decided. This general interpretive bias naturally affects whether the judge thinks certain precedents are rightly or wrongly decided, and thus whether there is reason on the merits for the precedent to be followed, extended, narrowed or overruled.⁴⁴ As discussed below, this consideration, without further tests or conditions, carries the greatest weight for instrumental judges.⁴⁵

The second significant variable affecting the treatment of precedent is how much weight a judge will give to whether the precedent has become an integral part of subsequent case law (i.e., whether the principle of the case has become "settled law"). Formalist and natural law judges, whose analytic approach to law makes highly relevant the logical elaboration of doctrine, tend to weigh heavily in their consideration of a precedent the extent to which it appears to represent "settled law."⁴⁶ Holmesians, because they take a positivist approach to

⁴⁴ A more complete discussion of the phenomenon of general interpretive bias appears in Kelso, *Styles*, *supra* note 1, at 149-50. Some specific examples of general interpretive bias appear in this Article *infra* notes 56-61 and accompanying text.

A phenomenon related to general interpretive bias, which occasionally affects how a judge treats precedent, is specific case bias. See generally Kelso, *Styles*, *supra* note 1, at 149-50. One aspect of specific case bias is doctrinal bias. This refers to the fact that some judicial decisionmaking appears to be influenced by strongly held views that the judge holds on certain topics, such as freedom of speech or the establishment of religion. In these areas, the judge may depart from the judge's usual approach to judicial interpretation in order to reach a desired result. Unusual pairings of Justices sometimes can best be explained in terms of specific doctrinal case bias. See Kelso, *Styles*, *supra* note 1, at 149-50. A second aspect of specific case bias is party bias. This refers to the fact that in some cases a judge may prefer a particular party, or that party's lawyer, as opposed to the other party, or that party's lawyer. Such personal bias is naturally inappropriate for the judge to consider, and rules regarding judicial recusal are meant to prevent such bias from affecting case resolution. Nonetheless, such party bias may occasionally affect the result in a particular case. See Kelso, *Styles*, *supra* note 1, at 149-50.

⁴⁵ See *infra* text accompanying notes 55-66.

⁴⁶ See *infra* text accompanying notes 67-82. Formalist and natural law judges differ, of course, on another aspect of precedent. Because of their focus on mechan-

the law and are concerned with certainty and predictability, also evidence a willingness to follow even an instrumental precedent with which they disagree if they view that precedent as representing settled law.⁴⁷

A third main variable in the treatment of precedent is the extent to which individuals have substantially relied upon a precedent as a means to advance important ends in their lives. Because of their focus on a functional understanding of rules as a means to individuals' and society's ends,⁴⁸ Holmesian judges tend to weigh this variable very heavily in their consideration of precedent.⁴⁹ Since this third variable is also linked to certainty and predictability in the law, as well as traditional notions of equity and protecting individuals' reasonable reliance, it is also given significant weight by formalist and natural law judges.⁵⁰

The fourth main variable in how judges treat precedent concerns their views on the traditional common-law commitment to reasoned elaboration of the law and respect for the work product of previous judges.⁵¹ Judges who believe very strongly in this traditional common-law commitment may choose to follow precedents they believe are wrongly decided even if those precedents do not represent settled law and there has been no substantial reliance upon them. Instead, under

ical rulemaking based upon following the literal holdings in prior specific cases, see *supra* text accompanying notes 12-16, formalist judges tend to approach the interpretation of judicial precedents in light of their particular specific facts. In contrast, natural law judges are more likely to see in precedents an embodiment of explicit or implicit principles which courts can use as a foundation for doctrinal development. See generally *supra* text accompanying notes 34-39 (discussing the natural law approach towards viewing law as a set of principles capable of reasoned elaboration). Thus, formalist judges generally follow the narrow rulings of precedent, while natural law judges are more willing to extend precedents in light of a general principle found therein.

⁴⁷ See generally Kelso, *Styles*, *supra* note 1, at 138 nn.72-73, 184-85, 195-96. Thus, formalist judges, such as Justices Scalia and Thomas, and Holmesian Justices, such as Chief Justice Rehnquist, have been willing to follow an instrumentalist precedent with which they disagree if they view that precedent as representing settled law. Examples of this phenomenon are discussed *infra* text accompanying notes 67-92.

⁴⁸ See *supra* text accompanying notes 19-20.

⁴⁹ See generally *infra* text accompanying notes 84-92.

⁵⁰ See generally *infra* text accompanying notes 84-92.

⁵¹ See generally RUPERT CROSS, *PRECEDENT IN ENGLISH LAW* (3d ed. 1977); Charles Fried, *The Artificial Reason of the Law: Or What Lawyers Know*, 60 TEX. L. REV. 35, 54-58 (1981).

this approach to precedent, one or more additional factors are needed before the court should depart from a prior judicial opinion.⁵² The judges who most often have this stronger commitment to precedent are judges in the natural law tradition.⁵³ On the current Supreme Court, this includes Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer.⁵⁴

II. STYLE-RELATED GUIDES FOR OVERRULING OR NARROWING PRECEDENTS

A. *The Instrumental Focus: Was a Precedent Wrongly Decided?*

The most dramatic relationship between a current opinion and a prior case occurs when the court either: (1) explicitly overrules the precedent; or (2) *sub silentio*, simply does not follow the precedent. Of course, if a precedent was itself a departure from prior case law, it is more vulnerable to being overruled.⁵⁵

Judges who follow different styles of decisionmaking naturally disagree about whether certain precedents are rightly or wrongly decided. The correctness of *Roe v. Wade* presents an obvious example of style related disagreement.⁵⁶ Disagree-

⁵² See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864 (1992) ("[A] decision to overrule should result on some special reason over and above a belief that a prior case was wrongly decided."). A list of these "special reasons" to overrule precedent is discussed *infra* text accompanying note 93.

⁵³ See generally Kelso & Kelso, *Nine Tribunes*, *supra* note 1, at 1321-23; Kelso, *Styles*, *supra* note 1, at 139-40, 157-59. The natural law approach's great respect for many aspects of the traditional common-law methodology, in addition to the natural law's great respect for precedent, is noted *supra* text accompanying note 39.

⁵⁴ See generally Kelso, *Separation of Powers*, *supra* note 1, at 587-97, 602 & n.266; Kelso, *Styles*, *supra* note 1, at 227 & n.604.

⁵⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2116 (1995), overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) ("*Metro Broadcasting* itself departed from our prior cases . . ."). As a less extreme option to overruling a case, sometimes new facts will lead a Court to distinguish a precedent by narrowing it to its facts or bypassing an opportunity to extend the case by applying its principle to a new fact situation which potentially could be seen as analogous. Distinguishing a case or even passing up an opportunity to extend the case has the practical effect of narrowing its scope as a precedent. A similar result occurs if the Court sets about characterizing the facts of a new case in an unusual way so as to avoid the application of a precedent, or slightly altering the statement of a rule so the precedent is qualified and, thus, narrowed in its application.

⁵⁶ A formalist approach to *Roe* would focus on literal constitutional text, and

ment on the constitutionality of school prayer in *Lee v. Weisman* provides another example.⁵⁷ In some instances a for-

the specific intent of the Framers and Ratifiers regarding abortion, and specific traditions regarding abortion since 1868. This formalist approach is best represented by Justice Scalia's dissent in *Casey*. See generally Kelso, *Styles*, *supra* note 1, at 193-94. A Holmesian approach would add to this inquiry a focus on legislative and executive traditions as part of the Holmesian deference to other branches of government. This approach is represented by Justice Rehnquist's dissents in *Roe* and *Casey*. Kelso, *Styles*, *supra* note 1, at 210-11. A natural law approach to *Roe* would add to the Holmesian analysis a broader inquiry into what the concept of "liberty" means in the Fourteenth Amendment, particularly, in our natural law tradition, the concept of liberty from an Enlightenment natural law perspective. From that perspective, *Roe* is not clearly wrong because, as noted by the joint opinion in *Casey* of Justices O'Connor, Kennedy and Souter, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851. The natural law commitment to precedent, see *supra* text accompanying notes 51-54, also counseled in *Casey* that the core holding of *Roe* should not be overruled. 505 U.S. at 861, 869; see generally Kelso, *Styles*, *supra* note 1, at 179-82. The instrumentalist approach, after considering these factors, would also add consideration of the unfortunate public policy consequences of not finding such a right. See generally Kelso, *Styles*, *supra* note 1, at 223-24.

Because of the instrumentalist willingness to engage in social policy calculations, at least where leeway exists in the law, it is not surprising that the instrumentalist approach to *Roe* counsels strict scrutiny for every kind of burden on reproductive rights, permitting the Court to police very carefully a whole range of legislative regulations of abortion, including provisions regarding informed consent, waiting periods and reporting requirements. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). In contrast, the natural law approach, which rejects such social policy argumentation in constitutional interpretation, reserved strict scrutiny in *Casey* for "undue burdens" on abortion rights. 505 U.S. at 876. Thus, the natural law approach protects the core right of choice regarding abortion, while removing the courts from the role of day-to-day strict supervision of regular legislation.

⁵⁷ 505 U.S. 577 (1992). As in *Roe*, a formalist approach to *Lee* would focus on literal constitutional text and the specific intent of the Framers and Ratifiers regarding prayer in schools. A Holmesian approach to *Lee* would add a slightly broader inquiry into the Framers' purposes in enacting the Establishment Clause, but would focus on legislative and executive traditions as part of the Holmesian deference to other branches of government. From both perspectives, prayer in schools should be constitutional. See *id.* at 631 (Scalia, J., dissenting, joined by Rehnquist, C.J., White, J., and Thomas, J.). A natural law approach would ask what the Framers' concept of "no establishment of religion" means, particularly from an Enlightenment natural law perspective. From that perspective, as reflected in the American context by Thomas Jefferson and James Madison, *Lee* is properly decided. See generally Kelso, *Natural Law Tradition*, *supra* note 14, at 1084-85. The instrumentalist approach would build on this analysis also to consider the social policy consequences of a decision either way. From the liberal instrumentalist perspective of Justices Brennan and Marshall, a strict separation of church and state is good social policy, and thus establishment clause law should be applied to enforce such a strict separation. On this issue, see generally Kelso, *Natural Law*

malist judge's opinion will stand alone, as in the independent prosecutor case, *Morrison v. Olson*.⁵⁸ Other times, instrumentalist judges may stand alone, as in *Bowers v. Hardwick*.⁵⁹ And even when judges agree about the result in a case, different decisionmaking styles may lead them to disagree about the rule laid down to justify the result, as in the substantive due process case of *Michael H. v. Gerald D.*,⁶⁰ or the minimum contacts case of *Burnham v. Superior Court*.⁶¹

Tradition, *supra* note 14, at 1084-85; Kelso, *Styles*, *supra* note 1, at 178-79, 193-94, 209-10, 223.

⁵⁸ 487 U.S. 654 (1988); see generally Kelso, *Separation of Powers*, *supra* note 1, at 621-26 (discussing Justice Scalia's formalist strict separation of powers approach and its rejection by Holmesian, natural law and instrumentalist judges, in favor of a sharing of powers approach to separation of powers questions).

⁵⁹ See *Bowers v. Hardwick*, 478 U.S. 186, 205, 208 (1986) (Blackmun, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.) (explaining that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," and that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy") (citations omitted). The majority, per Justice White, noted that none of the rights announced in the privacy line of cases resembles the alleged right to engage in homosexual sodomy because there was no connection here, as in those cases, with family, marriage or procreation. *Id.* at 191. Nor did those cases provide constitutional insulation for any kind of private sexual conduct between consenting adults, whether in the home or elsewhere. *Id.* Justice White added:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Id. at 194.

⁶⁰ 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) (in determining what are our traditions for purposes of substantive due process analysis, the Court should consider "the most specific level" at which a relevant tradition protecting, or denying protection to, the asserted right can be identified); *id.* at 132 (O'Connor, J., concurring with Kennedy, J.) (noting that Justice Scalia's proposed mode of historical analysis, set forth in his footnote 6, may be somewhat inconsistent with past decisions because on occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be "the most specific level" available; thus, the Court should "not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.").

⁶¹ 495 U.S. 604 (1990). The Supreme Court unanimously held that due process does not bar a state from exercising personal jurisdiction in a divorce action based on service of process on a nonresident temporarily in the forum state. Justice Scalia, from a formalist perspective, said that the prevailing in-state service rule was validated by its specific historical pedigree, "as the phrase 'traditional notions of fair play and substantial justice' makes clear." *Id.* at 621. Justice Rehnquist's opinion contained the traditional Holmesian deference. He said that he "conducted

The single consideration of whether the prior precedent is rightly or wrongly decided carries the greatest weight with instrumentalist judges. Because of their concern with advancing correct social policies⁶² and the leeway that exists when doing so,⁶³ instrumentalist judges feel freer than judges in any of the other decisionmaking traditions to overrule prior decisions believed to be wrongly decided.⁶⁴ This is true even if the prior precedents appear to represent settled law, there has been substantial reliance on the precedents, or no additional reason is present which calls for the precedent to be overruled. The instrumentalist-era Warren Court proved this point. That majority of Justices was willing to recognize new constitutional rights and protections against governmental action in numerous areas of the law.⁶⁵ Indeed, perhaps apocryphally, it has been said of Justice Douglas that he preferred to make precedents rather than follow them.⁶⁶

no independent inquiry into the desirability of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it." *Id.* In contrast, Justice Brennan, concurring, stated that while "history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements," it is not the only factor. *Id.* at 629. Rather, to be considered also is the instrumentalist social policy concern of whether the rule of transient jurisdiction is "fair" under modern conceptions of due process. *Id.*

⁶² See Kelso, *Styles*, *supra* note 1, at 213-14.

⁶³ Kelso, *Styles*, *supra* note 1, at 215-16.

⁶⁴ See generally Kelso, *Styles*, *supra* note 1, at 217-18.

⁶⁵ This is with the exception of economic regulation. See, e.g., William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 441-42 (1986) (summarizing the changes in constitutional doctrine between 1961 and 1986 in terms of Bill of Rights, due process and equal protection clause doctrine); see generally JOHN DENTON CARTER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM* (1973); ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); LOUIS LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975). This perspective continued to have considerable influence during the years of the Burger Court (1969-1986), although it was tempered because only four instrumentalists remained on the bench (Justices Brennan, Marshall, Blackmun, and Douglas or, after 1975, Stevens).

⁶⁶ Of course, where the proper social policies would be advanced by maintaining an adherence to instrumental-era precedents, an instrumentalist judge may be as willing as any other judge to emphasize the importance of precedents. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). The true test of how strongly a judge adheres to precedent, however, is not how much a judge counsels following precedent with which the judge agrees, but whether the judge is willing to follow a precedent with which the judge disagrees.

B. Restraints Associated with Other Styles

1. Formal: Follow Precedent That Is Settled Law

As noted above, formalist and natural law judges typically refrain from overruling a case thought to be wrongly decided if the precedent has become "integrated into the fabric of the law."⁶⁷ However, as also noted above, formalist judges do not share the natural law belief that some additional special reason is required to overrule precedent.⁶⁸ Thus, for formalist judges, wrongly decided cases should be overruled *unless* they represent settled law. For this reason, this restraint on overruling precedent is especially significant for formalist judges. Justice Scalia phrased this point in his dissent in *Planned Parenthood v. Casey* as follows:

Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.⁶⁹

To decide whether a precedent represents settled law requires consideration of many factors. The age of the precedent is certainly one factor, but it is not the sole determining factor.⁷⁰ Judges may also ask whether the precedent case was

⁶⁷ See *supra* text accompanying notes 46-47. The phrase "fabric of the law" is taken from Justice O'Connor's opinion in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2116 (1995). In justifying the overruling of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), Justice O'Connor stated:

It is worth pointing out the difference between the application of stare decisis in this case and in *Planned Parenthood of Southeastern Pa. v. Casey*. *Casey* explained how considerations of stare decisis inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law" In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself But in this case . . . we do not face a precedent of that kind, because *Metro Broadcasting* itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.

Adarand, 115 S. Ct. at 2116 (citations omitted).

⁶⁸ See generally *supra* text accompanying notes 51-54.

⁶⁹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., dissenting).

⁷⁰ As Chief Justice Rehnquist observed in his *Casey* dissent, erroneous deci-

itself a departure from prior precedents and gave little weight to established traditions.⁷¹ A third factor concerning whether a precedent can succeed in producing a settled body of law is whether it is susceptible of principled application. Expressing his unwillingness to follow a case which did not meet that test, Justice Scalia recently stated:

When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so.⁷²

With respect to voting *not* to overrule a case because it represents settled law, four examples can be consulted from recent opinions by formalist Justices Scalia and Thomas. First, although Justices Scalia and Thomas do not themselves believe that the Framers and Ratifiers of the Fourteenth Amendment intended the Due Process Clause to incorporate selectively the Bill of Rights, they have indicated a willingness not to challenge the instrumental-era cases which have incorporated almost all of the Bill of Rights into the Fourteenth Amendment, because that is a matter of settled law.⁷³

sions in constitutional cases are uniquely durable because it is so difficult to amend the Constitution. Therefore, it is the Court's duty to reconsider interpretations that depart from a proper understanding of the Constitution, even if those interpretations are long-lasting. Chief Justice Rehnquist noted that the major decisions of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905), were overruled many decades after they had been decided. *Casey*, 505 U.S. at 954-57 (Rehnquist, C.J., dissenting).

⁷¹ See, e.g., *Adarand*, 115 S. Ct. at 2116, *overruling* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) ("*Metro Broadcasting* itself departed from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it.").

⁷² *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1610 (1996) (Scalia, J., dissenting, joined by Thomas, J.). This factor is obviously related to the natural law concern with overruling precedents which are unworkable in practice. For discussion of unworkability as a grounds to overrule precedents, see *infra* text accompanying notes 95-113.

⁷³ See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2726-27 (1993) (Scalia, J., concurring, joined by Thomas, J.) ("I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights . . ."). For a summary of the current state of selective incorporation after the instrumental era, see generally FARBER ET AL., *supra* note 31, at 399-400.

A second example comes from *Employment Division v. Smith*.⁷⁴ In that case, the Court, per Justice Scalia, held that strict scrutiny should not be applied when a neutral, generally applicable law is challenged by a free exercise claim unconnected with some other constitutional protection, such as freedom of speech or the press.⁷⁵ Nonetheless, the Court indicated in *Smith* a willingness to continue using strict scrutiny in the context of unemployment compensation cases, based solely on the 1963 instrumental-era precedent of *Sherbert v. Verner* and its progeny.⁷⁶

A third example appears in Justice Thomas's concurrence in *United States v. Lopez*.⁷⁷ Focusing on the literal meaning of commerce and on the specific intent of the Framers and Ratifiers of the Constitution, Justice Thomas concluded that the Court's recent commerce clause jurisprudence and the "substantial effects" test were wrong because the Court had drifted too far from the original understanding of the Commerce Clause.⁷⁸ However, Justice Thomas noted that it may be too late to undertake a fundamental reexamination of precedents written in the last sixty years. He said, "Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean."⁷⁹

⁷⁴ 494 U.S. 872 (1990).

⁷⁵ *Id.* at 881.

⁷⁶ *Id.* at 883-85 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny).

⁷⁷ 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring).

⁷⁸ *Id.* Justice Thomas stated that if Congress could regulate all matters that substantially affect interstate commerce, there would have been no need for many of the specific grants of power in Article I, § 8. *Id.* at 1644. However, as Professor Crosskey noted in his treatise on the Constitution, many of the items in the enumeration of powers in Article I, § 8 were included to make sure that powers which had formerly been in the King (the executive) were transferred explicitly to Congress and thus could not be understood as part of the President's power. WILLIAM CROSSKEY, 1 POLITICS AND THE CONSTITUTION 411-28 (1953).

⁷⁹ *Lopez*, 115 S. Ct. at 1650 n.8. It may nonetheless be possible, as Justice Thomas noted, for the Court to at least "temper" its commerce clause jurisprudence. *Id.* at 1650.

In their concurrence in *Lopez*, Justices Kennedy and O'Connor spoke even more forcefully about the need to follow settled law with respect to the Commerce Clause. They noted, "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our commerce clause jurisprudence as it has evolved to this point That fundamental restraint [stare decisis] on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy Congress can regulate in the

A fourth example comes from opinions in dormant commerce clause cases. Justice Scalia has indicated he would abandon traditional judicial scrutiny of state regulations under the dormant Commerce Clause unless the state statute involves "rank discrimination against citizens of other states."⁸⁰ Even so, he and Justice Thomas have stated that they will follow the result of traditional dormant commerce clause analysis for current cases involving state laws "indistinguishable from a type of law previously held unconstitutional by the Court."⁸¹ Justice Scalia explicitly based his conclusion "on *stare decisis* grounds."⁸²

2. Holmesian: Follow Precedent Substantially Relied Upon

It is a familiar notion in many branches of the law that where individuals have substantially relied to their detriment on some promise, or some represented state of affairs, other individuals may be estopped from changing or denying that state of affairs in order to protect reliance interests.⁸³ In a sense, this is also true of precedents. As Chief Justice Rehnquist observed in *Payne v. Tennessee*,⁸⁴ "Considerations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved"⁸⁵

commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.* at 1637.

⁸⁰ *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

⁸¹ *West Lynn Creamery v. Healy*, 114 S. Ct. 2205, 2220 (1994) (Scalia, J., concurring, joined by Thomas, J.).

⁸² *Id.*

⁸³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (promissory estoppel).

⁸⁴ 501 U.S. 808 (1991) (Rehnquist, C.J.).

⁸⁵ *Id.* at 928 (citations omitted). The joint opinion in *Casey* and Justice O'Connor's opinion for the Court in *Adarand* also make clear reference to the impact that reliance on prior precedents can have on whether a precedent should be overruled. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) (discussing the fact that for two decades people have organized intimate relationships in reliance on the availability of abortion in the event that contraception should fail); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2116 (1995) ("[S]uch precedent is likely to have engendered substantial reliance, as was true in *Casey* itself But in this case . . . , we do not face a precedent of that kind").

In *Payne*, Chief Justice Rehnquist noted that cases involving contract and property rights are the ones most likely to engender the kind of substantial reliance that is important from the perspective of stare decisis.⁸⁶ More broadly, cases where the principle of "not overruling cases which give rise to substantial reliance" is likely to have most force are those where overruling would upset "settled expectations" upon which people have justifiably relied by making serious financial, business, employment, or other similar kinds of important commitments. In contrast, according to Chief Justice Rehnquist, cases involving procedural or evidentiary rules are not as likely to involve such substantial reliance.⁸⁷

The extent to which a person's substantial reliance on prior cases is reversible is an important, though typically unstated, aspect of this analysis. In the classic case of substantial reliance, an individual has made a financial or employment decision based on the current state of the law. If the law changes, there is no practical way to restore the status quo. Time has passed and other financial or employment opportunities have gone by the board. In a practical sense, reliance is irreversible. Yet there are other cases where persons can modify their behavior with respect to a new law, and prior reliance is reversible. Such cases do not present compelling circumstances for the application of stare decisis based upon concern for substantial reliance.

In general, because Holmesian judges are more attuned than formalist or natural law judges to this functional inquiry into whether individuals have actually irreversibly relied, Holmesian judges will be more sensitive to whether there has actually been irreversible reliance when considering this restraint on overruling precedent. Thus, the analysis of this restraint is a special province of Holmesian judges. For example, the natural law opinion of Justices O'Connor, Kennedy and Souter in *Casey* noted that one reason not to overrule *Roe* was substantial reliance on *Roe*.⁸⁸ The joint opinion noted that for two decades people had organized intimate relationships in reliance on the availability of abortion in the event that contra-

⁸⁶ *Payne*, 501 U.S. at 828.

⁸⁷ *Id.*

⁸⁸ *Casey*, 505 U.S. at 856.

ception should fail.⁸⁹ However, while reliance certainly did exist between the time of *Roe* and *Casey*, that kind of reliance is not irreversible. If *Roe* were overruled, nothing would bar people in the future from organizing their intimate relationships on the basis of the fact that abortion might not be legally available in certain states should contraception fail.⁹⁰

In response, the *Casey* Court argued that women may have made many irreversible decisions regarding education, jobs, and social companions during the twenty years between *Roe* and *Casey*, based on an assumption that they would always have the reproductive freedom granted by *Roe*.⁹¹ These arguments, however, were only cursorily stated and quite undeveloped in *Casey*. Moreover, they were forcefully critiqued in Chief Justice Rehnquist's Holmesian dissent.⁹²

3. Natural Law: Follow Even Wrong Precedent Unless Special Circumstances Exist

The theory of precedent associated with the natural law style of decisionmaking suggests that judges may choose to follow precedents they believe are wrongly decided even if those precedents do not represent settled law and there has been no substantial reliance upon them. To overrule a prece-

⁸⁹ *Id.*

⁹⁰ *Id.* ("This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."); *id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part) ("[A]ny traditional notion of reliance is not applicable here.").

⁹¹ *Id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. . . . [W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.").

⁹² *Id.* at 956-57 (Rehnquist, C.J., dissenting):

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

dent, some additional factor is needed. Based upon recent cases, the additional factor can be grouped under five headings: (1) the precedent is unworkable in practice; (2) the precedent creates an inconsistency or incoherence in the law; (3) a changed understanding of facts has undermined the factual basis of the precedent; (4) the precedent represents a substantially wrong or substantially unjust interpretation of the Constitution; or (5) the precedent raises concerns about a commitment to the "Rule of Law."⁹³ Though sometimes cited by judges from other decisionmaking styles in their opinions, these factors are the special province of natural law judges.⁹⁴ Each will be discussed in turn below.

⁹³ See generally *infra* text accompanying notes 95-238. The Supreme Court has also discussed these same factors in the context of statutory interpretation. See *Neal v. United States*, 116 S. Ct. 763, 769 (1996) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 173 (1989) ("We have overruled our [statutory construction] precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.'") (citations omitted); *Patterson*, 491 U.S. at 173-74 (Kennedy, J.) (stating that the Court has overruled statutory construction precedents where "changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, [or the] precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws . . . , [or] the precedent becomes outdated and after 'being tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" (citations omitted).

Indeed, the Court has noted the even greater force of *stare decisis* in the area of statutory construction because of the easier resort to legislative amendment in such cases. *Id.* at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

⁹⁴ See generally *supra* text accompanying notes 51-54. Note that most of these factors were discussed in the joint opinion of Justices O'Connor, Kennedy and Souter in *Casey*, 505 U.S. at 855-69. In contrast, the formalist and Holmesian Justices on the Supreme Court voted in *Casey* to overrule *Roe* based upon their conclusions that *Roe* was wrongly decided, that *Roe* did not represent settled law, and that no substantial reliance argument existed which required *Roe* to be affirmed. See *supra* notes 56, 69, 88-92 and accompanying text. These judges did not engage in further analysis of identifying an additional special factor that would justify overruling *Roe*.

With regard to statutory interpretation, it has also been natural law Justices who have taken the lead in elaborating the "special reason" analysis to justify overruling statutory interpretation precedents. See *supra* note 93.

a. *The Precedent Is Unworkable in Practice*

If a doctrine has the practical result of immersing the courts in resource squandering activity, it will be considered unworkable. A recent case demonstrating such a situation was the prisoners rights' case of *Sandin v. Conner*.⁹⁵ In 1983, the Court held in *Hewitt v. Helm*⁹⁶ that in determining whether prison regulations created a protected liberty interest, the courts should ask whether the state had issued merely procedural guidelines, which would not create a liberty interest, or had used language of mandatory character, which would create a liberty interest.⁹⁷ In *Sandin*, the Court abandoned the *Hewitt* methodology, noting that it had produced two undesirable effects: (1) it had led to the involvement of federal courts in the resource squandering activity of day-to-day management of prisons; and (2) it had created disincentives for states to codify prison management procedures.⁹⁸

Another kind of unworkable situation occurs where applying a test articulated by the Supreme Court leads to the specter of continuing splits in lower court decisions. In 1976, in a 5-4 opinion, the Court held in *National League of Cities v. Usery*⁹⁹ that the Tenth Amendment prevents Congress from applying its commerce clause power in a manner which direct-

⁹⁵ 115 S. Ct. 2293 (1995).

⁹⁶ 459 U.S. 460 (1983).

⁹⁷ An example of a liberty interest occurred in *Wolff v. McDonnell*, 418 U.S. 539 (1974). There, a prisoner had been given a constitutionally protected liberty interest by a state statute that bestowed mandatory sentence reduction for good behavior (subject to change for serious misconduct). The Court stated that the interest conferred by the law was one of "real substance." *Id.* at 557.

⁹⁸ 115 S. Ct. at 2299-2300. The new methodology will be to ask whether the prison regulation represents a dramatic departure from the basic conditions of the sentence. *Id.* at 2301. In the case at bar, disciplining a prisoner by 30 days of segregated confinement, which did not inevitably affect the duration of the sentence, and which was under conditions mirroring those imposed by administrative and protective custody, did not present the typical, significant deprivation in which a state might conceivably have created a liberty interest. *Id.*

Another clear example of this kind of juridical situation occurred in first amendment obscenity doctrine during the 1960s. At that time, appellate courts had to determine for themselves whether various books or movies were obscene. *See, e.g.,* *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and its progeny. That approach was overruled in *Miller v. California*, 413 U.S. 15 (1973), which placed the burden of those findings on juries.

⁹⁹ 426 U.S. 833 (1976).

ly displaces the freedom of states to "structure integral operations in areas of traditional government functions."¹⁰⁰ This holding was limited, as stated in Justice Blackmun's concurrence, if the federal interest is very strong and state compliance would be essential.¹⁰¹ As a result, Congress could not apply the Fair Labor Standards Act's minimum hour and minimum wage provisions to employees of the states and their political subdivisions.¹⁰²

Nine years later, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁰³ Justice Blackmun's principal justification for changing his mind and voting to overrule the case in which he had concurred nine years earlier was that *National League of Cities* proved to be unworkable in practice.¹⁰⁴ In particular, Justice Blackmun explained that *National League of Cities* required courts to determine what are "traditional governmental functions" as opposed to "non-traditional governmental functions" or "non-governmental functions." Nine years of experience with *National League of Cities* showed the difficulty of drawing this distinction.¹⁰⁵ Furthermore, Justice Blackmun did not en-

¹⁰⁰ *Id.* at 852.

¹⁰¹ This additional limitation in *National League of Cities* derives from Justice Blackmun's concurrence in the case as the critical fifth vote to make up the majority in favor of state's rights. *Id.* at 856 (Blackmun, J., concurring).

¹⁰² *Id.* at 852.

¹⁰³ 469 U.S. 528 (1985).

¹⁰⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Note that although Justice Blackmun became more of a liberal instrumentalist during his years on the Court, Justice Blackmun always had some fondness for the natural law decisionmaking style. See Kelso, *Separation of Powers*, *supra* note 1, at 602 n.266. The more pure instrumental approach to *National League of Cities*—that it should be overruled just because its doctrine is wrong—appeared in Justice Stevens's concurrence in *EEOC v. Wyoming*, 460 U.S. 226, 248-50 (1983).

¹⁰⁵ As Justice Blackmun stated in *Garcia*,

[j]ust how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority are functions *protected* under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped, are *not* entitled to immunity. We find it difficult, if not impossible, to identi-

vision a way that the Court could ever develop a principled approach to this issue.¹⁰⁶ Thus, said Justice Blackmun, it was appropriate to overrule *National League of Cities*.¹⁰⁷

Another example of a doctrine being limited in practice because of its apparent doctrinal unworkability is *Lemon v. Kurtzman*.¹⁰⁸ Between 1971 and 1992, the "*Lemon* test" was applied in a large number of cases dealing with the meaning of the Establishment Clause.¹⁰⁹ Court decisions drawing the distinction called for by the *Lemon* test—between what is a "principal or primary" advancement of religion versus merely "incidentally" advancing religion—have proven difficult to explain on any principled basis.¹¹⁰ Similar confused results have

fy an organizing principle [in these decisions]. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

469 U.S. at 538-39 (citations omitted).

¹⁰⁶ *Id.* at 540-47 (rejecting the possibility of developing workable guidelines based upon distinctions between governmental and proprietary activities, or a pure historical approach to traditional governmental functions, or determination of what is "uniquely" a governmental function, or an "essential" governmental function). Justice Blackmun also noted that in any event it was "unsound in principle" for the Court to try to determine what are "essential" governmental functions because that improperly but "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.* at 546.

¹⁰⁷ There is, of course, a real debate on the Court over whether the general principle announced in *National League of Cities* is rightly or wrongly decided. Indeed, the proper division of authority between the federal government and the states has been a perennial issue in constitutional law. In general, instrumental judges have found in the circumstances of drafting and ratifying the Constitution and its text an intention to create a very substantial federal government, with powers to deal effectively with all kinds of national problems, unhampered by concerns about state autonomy. See generally Kelso, *Styles*, *supra* note 1, at 219-20. Noninstrumental judges, to differing extents, have found in the same background an intent to give more weight to state autonomy as a factor in the balance. Kelso, *Styles*, *supra* note 1, at 201-03.

¹⁰⁸ 403 U.S. 602 (1971).

¹⁰⁹ Under *Lemon*, when a law is challenged under the Establishment Clause, on its face or as applied, the government must establish that:

1. the law has a secular legislative purpose;
2. its principal or primary effect is not to advance religion, though it may incidentally advance religion; and
3. it doesn't further excessive governmental entanglement with religion.

Id. at 612-13.

¹¹⁰ For example, merely looking at the results of the *Lemon* test in the context of government aid to private schools, the Court found a primary effect to advance religion in providing funds to repair physical facilities at a private religious school,

come from trying to determine under *Lemon* whether "excessive entanglement" exists.¹¹¹ And even court decisions under the first prong of *Lemon* concerning governmental purpose have not been particularly predictable.¹¹² Thus, from 1992 on, the Court has increasingly been ignoring *Lemon* when rendering its decisions.¹¹³ *Lemon* has not been officially overruled,

Nyquist v. Mauclet, 432 U.S. 1 (1977), but only an incidental effect where funds were provided to build "secular" buildings on a religious campus, *Tilton v. Richardson*, 403 U.S. 672 (1971); a primary effect to advance religion by providing loans of instructional equipment and materials to private schools, *Wolman v. Walter*, 433 U.S. 229 (1977), but only an incidental effect to provide "secular" textbooks to students, *Allen v. McCurry*, 449 U.S. 90 (1980); a primary effect to advance religion of a "released time" program where public schools are turned over to religious instruction, *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), but only incidental effect where students on a "released time" program leave public school grounds to get religious instruction; and a primary effect to advance religion to provide tuition grants to parents of children attending private schools, *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), but only incidental effect where tax benefits for textbooks, tuition and transportation granted to parents for children in public or private schools, despite the fact that parents of children in private schools will get most of the benefit, since private tuition is the main part of the expense, and 96% of children attending private school in the state attended religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983).

¹¹¹ Compare *Aguilar v. Felton*, 473 U.S. 402 (1985) (attempt to police the risk that religious messages will be conveyed in a school program funded by public funds constitutes excessive entanglement of religion) with *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976) (no excessive entanglement in annual state grants to private colleges, including religiously affiliated institutions, although four judges dissenting would have found excessive entanglement from dependency on grant money).

¹¹² See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.) ("Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.").

¹¹³ See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring) (citation of *Lemon* was unsettling and unnecessary); *id.* at 2149-50 (Scalia, J., concurring, joined by Thomas, J.) (declining to apply *Lemon* and noting, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

In *Kiryas Joel*, Justice O'Connor phrased the unworkability aspect of *Lemon* in terms of *Lemon's* unsuccessful attempt to create a unitary analysis of establish-

however, because there is no clear majority on the Court in favor of a different test.¹¹⁴

b. *The Precedent Creates Inconsistency or Incoherence in the Law*

If a prior case is perceived to be "out-of-sync" with related law, judges are more likely to overrule it.¹¹⁵ A recent series of cases dealing with this issue involved race based affirmative action. In the fountainhead case, *Regents of the University of California v. Bakke*,¹¹⁶ five Justices struggled to determine what level of review should apply to governmental affirmative action programs based upon race. Justice Brennan, on behalf of four Justices, held that only intermediate scrutiny should be applied to race based affirmative action, although strict scrutiny is applied to discrimination against racial minorities.¹¹⁷ Justice Powell, whose vote was decisive, concluded that strict scrutiny should be applied to affirmative action, just as strict scrutiny is applied to laws which discriminate against minority groups based upon race.¹¹⁸

With regard to state affirmative action programs, Justice Powell's approach triumphed over Justice Brennan's approach in *Richmond v. Croson*.¹¹⁹ In *Croson*, a majority of the Court applied strict scrutiny to a state affirmative action program, over a dissent by Justice Marshall, in which Justices Brennan and Blackmun joined.¹²⁰ The majority's conclusion was based

ment clause doctrine, an attempt which had clearly proven unworkable in the context of free speech doctrine. 114 S. Ct. at 2498-99.

¹¹⁴ Instead, the Justices have become quite diverse in their understanding of the Establishment Clause. See generally *supra* note 57; Kelso, *Natural Law Tradition*, *supra* note 14, at 1084-85; Kelso, *Styles*, *supra* note 1, at 178-79, 193-94, 209-10, 223.

¹¹⁵ This is particularly true for formalist or natural law judges, whose analytic perspective on the nature of law, see *supra* text accompanying notes 12-13, 34, makes them quite sensitive to logical anomalies in legal doctrine.

¹¹⁶ 438 U.S. 265 (1978).

¹¹⁷ *Id.* at 356-59.

¹¹⁸ *Id.* at 291.

¹¹⁹ 488 U.S. 469 (1989).

¹²⁰ *Id.* at 493-98; *id.* at 528 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.).

in part on the logical consistency of applying the same standard of review to discrimination against individuals, no matter what their race.¹²¹

Regarding federal affirmative action programs, however, Justice Brennan assembled a five-Justice majority for application of the intermediate standard of review in *Metro Broadcasting, Inc. v. FCC*.¹²² Justice Brennan based his reasoning in part on *Fullilove v. Klutznick*,¹²³ a case concerning a federal affirmative action program where the Court did not clearly choose between applying intermediate or strict scrutiny.¹²⁴ By

¹²¹ *Id.* at 494. Instrumental Justices have disagreed with this premise. Perceiving that our nation has experienced and continues to experience various forms of racism, they have consistently called for no more than intermediate or mid-level scrutiny for equal protection review of affirmative action programs. As stated by Justice Marshall, dissenting in *City of Richmond v. Croson*, 488 U.S. 469, 535 (1989), and quoting from *Bakke*, 438 U.S. at 359, "My view has long been that race-conscious classifications designed to further remedial goals 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand constitutional scrutiny." This requirement of a substantial government interest is readily met by an intent to remedy the effects of past discrimination, *Croson*, 488 U.S. at 536-37, or to create diversity where that can produce significant benefits. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 306 (1986) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting). Applying mid-level review, instrumentalist Justices Brennan, Marshall and Blackmun did not find that any affirmative action program reviewed by the Court during their service on the bench failed substantially to relate to the achievement of goals that were substantial.

¹²² *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563-66 (1990). *Metro Broadcasting* involved a congressional program which gave racial preferences in proceedings for new broadcast licenses and in certain proceedings for the sale of existing radio and television stations. *Id.* at 552-58.

¹²³ 448 U.S. 448 (1980).

¹²⁴ See generally *id.* at 491-92 (Burger, C.J., joined by Powell and White, JJ.); *id.* at 495-96 (Powell, J., concurring); *id.* at 517-23 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment). The majority in *Metro Broadcasting* was made up of the four instrumentalist Justices who typically argue for intermediate scrutiny, and Justice White, whose Holmesian deference, particularly to the federal government, apparently led him to distinguish between the state affirmative action program in *Croson* and federal affirmative action programs. See *Metro Broadcasting*, 497 U.S. at 563 ("It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."). It must be noted also that Justice White joined Justice Brennan's opinion in *Bakke*, which applied intermediate scrutiny to a state affirmative action program. 438 U.S. at 324. This suggests some support by Justice White for affirmative action, though Justice White also joined Justice Powell's opinion in *Bakke* which applied strict scrutiny, *id.* at 387 n.7, and though Justice White voted in *Croson* for strict scrutiny of state affirmative action. 488 U.S. at 475.

1995, however, four of the five Justices in the majority in *Metro Broadcasting* retired from the Court (Justices Brennan, Marshall, Blackmun and White). In *Adarand Constructors v. Pena*,¹²⁵ the Court overruled *Metro Broadcasting*, and held that to the extent (if any) that *Fullilove* held federal racial classifications subject to less than strict scrutiny, it was no longer controlling. Justice O'Connor's majority opinion noted that the justification for strict scrutiny was initially explained by Justice Powell in *Bakke*.¹²⁶ She stated that the principle of strict scrutiny was not abandoned in *Fullilove*, was put in place by *Croson*, erroneously abandoned in *Metro Broadcasting*, and, now, in *Adarand* was being restored. Focusing on *Metro Broadcasting* as a precedent, Justice O'Connor first noted that because the Equal Protection Clause protects individuals of all races equally, *Metro Broadcasting* wrongly applied a different level of scrutiny to federal affirmative action programs.¹²⁷ Second, she noted that *Metro Broadcasting* had not become part of the fabric of the law, and, because it was such a recent decision, it had not given rise to substantial reliance.¹²⁸ Thus, it was ripe for overruling. Turning to consideration of an additional factor, which is usually necessary for natural law jurists to overrule precedent, Justice O'Connor noted that *Metro Broadcasting* was inconsistent with the rest of equal protection and due process jurisprudence that treats individuals as individuals, and applies the same level of scrutiny to discrimination, for or against a respective group.¹²⁹

¹²⁵ 115 S. Ct. 2097 (1995).

¹²⁶ *Id.* at 2108-09 (citing *Bakke*, 438 U.S. at 289-90).

¹²⁷ *Id.* at 2112-13.

¹²⁸ *Id.* at 2116.

¹²⁹ For example, in the case of gender-based discrimination, discrimination for or against women or men, based upon gender, triggers the same level of scrutiny. *Id.* at 2114-15. The Court also cited in *Adarand* a number of other cases where the Supreme Court had overruled prior precedents based on "inconsistency" with "accepted and established doctrine." *Id.* at 2115-16.

Four Justices dissented in *Adarand*. Justice Souter, who had joined with Justices O'Connor and Kennedy in *Casey*, was joined in dissent by Justices Ginsburg and Breyer. Justice Souter noted that since the challengers in this case had not identified any factual premises on which *Fullilove* rested as having disappeared since the case was decided, *stare decisis* compelled its application, and that gave *Metro Broadcasting* an adequate foundation. *Id.* at 2131 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). However, despite the fact that no factual circumstances had changed between *Fullilove* and *Adarand*, that is just one of the possible additional reasons which can be used to justify overruling a precedent.

A second recent example of the Court overruling a prior case thought to be inconsistent with developed doctrine can be found in 44 *Liquormart, Inc. v. Rhode Island*.¹³⁰ The question in *Liquormart* was whether to follow what had become the standard application of the "*Central Hudson*" test for commercial speech,¹³¹ or whether to follow an earlier case, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.¹³² In *Posadas*, the Court, in an opinion by Justice Rehnquist, deferred to the government's view that the statute was sufficiently narrowly tailored.¹³³ The Court said in *Liquormart* that *Posadas* was wrongly decided in terms of the level of protection given under standard commercial speech doctrine.¹³⁴ The Court noted that *Posadas* had in no sense become settled law and was inconsistent with the rest of the commercial speech cases.¹³⁵ For these reasons, *Posadas* was overruled.¹³⁶

The reason cited by Justice O'Connor, inconsistency with related doctrine, is an independent reason which can justify a precedent being overruled.

Justice Stevens, also dissenting, with Justice Ginsburg, reiterated the usual instrumental position that a number of reasons support using a standard of review which gives some deference to congressional efforts to create affirmative action programs. Governing impartially, he said, does not require that courts ignore the moral and constitutional difference between a policy designed to perpetuate a caste system and one that seeks to eradicate racial subordination. *Id.* at 2120-23 (Stevens, J., joined by Ginsburg, J., dissenting).

¹³⁰ 116 S. Ct. 1495 (1996).

¹³¹ This test requires a mid-level analysis into whether the regulation at issue was sufficiently narrowly tailored to achieve substantial government ends.

¹³² 478 U.S. 328 (1986).

¹³³ The issue was so articulated in *Liquormart*. 116 S. Ct. at 1511.

¹³⁴ *Id.* ("Given our long-standing hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy.").

¹³⁵ *Id.* ("The *Posadas* majority's conclusion . . . cannot be reconciled with the unbroken line of prior cases Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, . . . we decline to give force to its highly deferential approach.").

¹³⁶ *Id.* at 1510-14. It is perhaps interesting to note that even Chief Justice Rehnquist, author of the *Posadas* opinion, joined in a concurring opinion which agreed that *Posadas* should be overruled, though Chief Justice Rehnquist did not join in Justice Stevens's plurality opinion which explained in full the reasons for its overruling. *Id.* at 1520-22.

The Court also overruled *Posadas* with respect to its discussion of whether the "greater" government power to ban an activity includes the "lesser" power to regulate the activity any way the government wants. The Court explained why it was wrong to think that the power to ban entirely "an activity" means that any regulation of "speech" is permissible, since regulating "speech" triggers the First

Another area where the Court has altered precedents to promote greater consistency or coherence in the law involves the Takings Clause doctrine. Precedents from the instrumental era made it more difficult to prove a taking, unless a clear physical occupation of property occurred.¹³⁷ For example, in *Penn Central Transportation Co. v. New York City*,¹³⁸ Justice Brennan, for a 6-3 Court, tested whether New York's Landmarks Preservation Law, as applied, was a regulatory taking. The Court did so by asking whether the property owner proved that the effects on its rights in a parcel, considered as a whole, were not substantially related to the general welfare or were unduly harsh. Applying this test, the Court held that denying permission to build a fifty-story building atop Grand Central Terminal was not a taking where the terminal's air rights were transferred to nearby parcels and the owner could continue to have reasonable beneficial uses on the site.¹³⁹

The force of *Penn Central* as a precedent was extended in 1987 when, in *Keystone v. DeBenedictis*,¹⁴⁰ the Court found no taking caused by a requirement that coal companies keep in place fifty percent of the coal beneath certain structures. The Court, in a 5-4 opinion by Justice Stevens, said the coal companies had not shown that the law failed to substantially advance a legitimate state interest or that it denied them economically viable use of their land.¹⁴¹

Amendment, where banning activity does not. The Court also in earlier cases had pointed out that this "greater" necessarily includes the "lesser" argument had been rejected in first amendment cases outside the commercial speech area. Thus, this aspect of *Posadas* was also "inconsistent with both logic and well-settled doctrine." *Id.* at 1512.

¹³⁷ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40 (1980). The Court has also agreed that complete deprivations of property rights trigger the takings clause. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894-95 (1992).

¹³⁸ 438 U.S. 104 (1978).

¹³⁹ *Id.* at 128-38. The dissent pointed out that the taking of air rights, which should be treated separately, was not offset by increases in value attributable to similar restrictions on neighboring properties. *Id.* at 138-41 (Rehnquist, J., joined by Burger, C.J., and Stevens, J., dissenting). Thus, property rights had been taken. *Id.* at 142-44.

¹⁴⁰ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

¹⁴¹ *Id.* at 502-06. The dissent stated that *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), dictated the finding of a taking. For the dissenters, Chief Justice Rehnquist further complained that the Court refused to treat the tons of coal that must remain in the ground as a separate segment of property for taking purposes.

These opinions, by limiting takings clause protections for property, basically reduced constitutional analysis of this kind of economic regulation to minimum rationality review under the Due Process and Equal Protection Clauses. However, more recently, the Court has begun, by incremental steps, to restore a higher level of review. For example, in *Nollan v. California*,¹⁴² the Court held there was a taking where a building permit was conditioned on the owner granting a lateral easement across his beach. The easement did not substantially advance visual access of the beach from a roadway, although that was the state's stated rationale for imposing the condition.¹⁴³ Seven years later, a property protective corollary of the "substantially" advance rule was created in *Dolan v. City of Tigard*.¹⁴⁴ There the Court held that where a city makes an adjudicative decision to condition the approval of a building permit for an individual parcel on the owner giving up some property rights, the city must show not only that there is a nexus between a legitimate state interest and the permit condition, as called for in *Nollan*, but also that the degree of the exaction demanded by the city bears a "rough proportionality" to the projected impact of the proposed development.¹⁴⁵

The Court justified its *Dolan* decision in terms of consistency with related constitutional law doctrines.¹⁴⁶ The Court noted that when the government singles out an individual for a search and seizure under the Fourth Amendment, or singles out a government worker for discipline because of speaking on a matter of public concern under the First Amendment, the Court does not apply a deferential minimum rationality review standard.¹⁴⁷ Instead, it applies a real, rational review balancing of individual versus governmental interests, and the bur-

Keystone, 480 U.S. at 506-09 (Rehnquist, C.J., joined by Powell, O'Connor and Scalia, JJ., dissenting).

¹⁴² 483 U.S. 825 (1987).

¹⁴³ *Id.* at 834-42. Justice Brennan, joined by Justice Marshall, dissenting, stated that it should be enough that the state's action was rational. *Id.* at 842-48.

¹⁴⁴ 114 S. Ct. 2309 (1994).

¹⁴⁵ *Id.* at 2318-20. Chief Justice Rehnquist, for the Court, explained: "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

¹⁴⁶ *Id.* at 2320.

¹⁴⁷ *Id.*

den is on the government to show that its action, in this balance, is constitutional.¹⁴⁸ Noting that the Takings Clause is "as much as part of the Bill of Rights as the First Amendment or Fourth Amendment," the Court held that a similar standard of rational review balancing, with the burden on the government, should be applied where an individual property owner is singled out for a permit condition.¹⁴⁹

c. *A Changed Understanding of Facts
Undermines the Precedent*

A third reason for overruling or limiting a precedent is that new information casts doubt on its factual assumptions. In one of the most famous examples, the Court stated in *Brown v. Board of Education* that although public education was scant when the Civil War Amendments were drafted and ratified, public education by 1954 had come to be the most important function of state governments and a vital opportunity if persons were to be readied for participation in society.¹⁵⁰ Furthermore, by 1954 the Court had developed the conviction that legally enforced segregation had deleterious effects on minority students.¹⁵¹ As a result, a unanimous Court held that anything to the contrary in *Plessy v. Ferguson*¹⁵² was overruled.¹⁵³

¹⁴⁸ See, e.g., *Rankin v. MacPherson*, 483 U.S. 378 (1987) (first amendment case dealing with the rights of government workers to speak on matters of public concern); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (fourth amendment search and seizure case).

¹⁴⁹ *Dolan*, 114 S. Ct. at 2320. In previous articles discussing the various standards of review, we have called this standard of review "third-order" rational review. See, e.g., R. Randall Kelso, *Three Years Hence: An Update on Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation*, 36 S. TEX. L.J. 1, 12-15 (1995).

¹⁵⁰ 347 U.S. 483, 492-93 (1954).

¹⁵¹ *Id.* at 494-95.

¹⁵² 163 U.S. 537 (1896).

¹⁵³ See generally *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 863 (1992) ("While we think *Plessy* was wrong the day it was decided, see *Plessy*, 163 U.S. at 552-64 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.").

A second famous example of a critical change in factual perception can be seen in the overruling of *Lochner v. New York* by *West Coast Hotel v. Parrish*.¹⁵⁴ As the Court stated in *Casey*, "[i]n the meantime the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, [was] that the interpretation of contractual freedom protected [by *Lochner*] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."¹⁵⁵

d. *The Precedent Is Substantially Wrongly Decided or Represents a Substantial Injustice*

A fourth condition that may justify to a natural law judge an overruling of wrongly decided precedent is when the prior opinion is "inconsistent with [a] sense of justice"¹⁵⁶ or is "so clearly a[n] error that its enforcement [is] for that very reason doomed."¹⁵⁷ The post-instrumental Supreme Court has applied this doctrine most forcefully in cases raising structural issues of constitutional law. As Justice Kennedy has noted, structural issues are those involving "separation of powers, checks and balances, judicial review, and federalism."¹⁵⁸ Thus, instrumental-era precedents which reflect a different vision of separation of powers, checks and balances, judicial

¹⁵⁴ 300 U.S. 379 (1937), overruling *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁵⁵ 505 U.S. at 861-62. The Court continued, "The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle" *Id.* at 862.

In contrast to this view, Chief Justice Rehnquist stated in his dissent that the joint opinion's approval of the overruling of *Plessy* and *Lochner*, on grounds that the nation and the Court had learned new lessons in the interim, was "at best a feebly supported, post hoc rationalization for those decisions." *Id.* at 960. The opinions in those cases, stated Chief Justice Rehnquist, both rested simply on a judgment that the Court had been mistaken in the earlier cases on a matter of constitutional law—not whether the public had changed its beliefs. *Id.* at 960-63. Thus, without regard to whether any additional special circumstance existed, Chief Justice Rehnquist, a Holmesian judge, supported the overruling of *Plessy* and *Lochner*. This is consistent with the thesis of this Article that the "special reason" justification for overruling precedent is the special province of natural law judges.

¹⁵⁶ *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989).

¹⁵⁷ *Casey*, 505 U.S. at 854.

¹⁵⁸ *United States v. Lopez*, 115 S. Ct. 1624, 1637-38 (1995) (Kennedy, J., concurring).

review or federalism than held by post-instrumental Justices, are among the cases ripe for narrowing or overruling because they appear to many non-instrumental Justices to be substantially wrong.

One example of this process at work involves the narrowing of federal governmental power under the Commerce Clause that occurred in *United States v. Lopez*.¹⁵⁹ Chief Justice Rehnquist, for the 5-4 majority, held it beyond Congress' commerce clause power to bar the possession of a gun in a school yard because that kind of non-economic activity did not substantially affect interstate commerce.¹⁶⁰ Justice Kennedy, concurring with Justice O'Connor, brought federalism concerns clearly to the surface in his opinion. Justice Kennedy noted that he saw the case in terms of broad principles reflecting the role of the Court and the significance of federalism in the whole structure of the Constitution. Kennedy noted that of the various structural elements in the Constitution, the Framers had made a unique contribution to political science and political theory by their insight that freedom was enhanced by the creation of two governments, rather than one.¹⁶¹ However, if the federal government could take over the regulation of entire areas of traditional state concern, such as education, the

¹⁵⁹ 115 S. Ct. 1624 (1995).

¹⁶⁰ *Id.* at 1634. Prior to *Lopez*, there had been an unbroken line of unsuccessful challenges to exercises of congressional commerce clause power, extending all the way back to 1937. See, e.g., *Russell v. United States*, 471 U.S. 858 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Chief Justice Rehnquist distinguished these cases from *Lopez* on the ground that they had sustained regulations of activities that arose out of or were connected with commercial transactions that, viewed in the aggregate, substantially affected interstate commerce. Here, in contrast, the criminal statute by its terms had nothing to do with "commerce" or any sort of economic enterprise. 115 S. Ct. at 1628-33. As indicated above, Justice Thomas also concurred in the case based upon even a more limited understanding of federal power under the Commerce Clause. See *supra* notes 77-79 and accompanying text.

¹⁶¹ Justice Kennedy continued that among "the various structural elements in the Constitution—separation of powers, checks and balances, judicial review, and federalism—only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers." *Lopez*, 115 S. Ct. at 1637-38.

boundaries between the spheres of federal and state authority would blur, and political responsibility would become illusory. Also, local programs for the prohibition of guns would be in danger of displacement by federal authority.¹⁶²

Justice Souter's dissent in *Lopez* picked up on faithfulness to another aspect of structural concerns: the role of the court in a case involving minimum rationality review. Under standard minimum rationality review, the Court should defer to legislative judgments about whether a rational connection exists between means and ends, unless the congressional judgment is wholly irrational, which it was not in this case.¹⁶³ Justice Breyer, in his dissent, also noted that it was rational for Congress to think that such a connection exists.¹⁶⁴ Justice Souter agreed, and stated that he was thus not convinced that following the sixty years of precedent supporting exercises of federal authority would represent a substantial error in this case.¹⁶⁵

¹⁶² *Id.* at 1638-39 (Kennedy, J., joined by O'Connor, J., concurring).

¹⁶³ *Id.* at 1651-52 (Souter, J., dissenting).

¹⁶⁴ Justice Breyer stated there was a substantial connection between gun-related school violence and interstate commerce. *Id.* at 1659 (Breyer, J., joined by Stevens, Souter and Ginsburg, JJ., dissenting). Reports and hearings had made clear that the problem of guns around schools is widespread and dangerous; it significantly interferes with the quality of education in schools; and education today is intertwined with the nation's economy because more jobs now demand greater educational skills, and many firms base location decisions on the presence, or absence, of a workforce with a basic education. *Id.*

In his opinion Chief Justice Rehnquist replied to Justice Breyer's dissent by stating that under Justice Breyer's approach Congress could regulate not only all violent crimes but also all activities that might lead to violent crime, including marriage, divorce and custody. Also, Congress could regulate the educational process directly because its quality could be regulated as a fact having a substantial effect on interstate commerce. *Id.* at 1632. Justice Breyer denied that this was a necessary consequence of his view. He explained that the law at issue here was aimed at curbing a particularly acute threat to the educational process. He added that "the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions." *Id.* at 1662.

¹⁶⁵ *Id.* at 1654. Justice Souter stated that in determining whether there has been a rationally based legislative judgment that a subject substantially affects interstate commerce, the Court should not consider whether the subject relates to customary state concerns or the statute contains explicit factual findings. To consider findings would be to imply a judicial authority to review which does not exist or would impose on Congress a duty to act with some high degree of deliberateness, and that would be a review for congressional wisdom which the Court properly abandoned in 1937. Souter hoped this case did not "portend a return to [that] untenable jurisprudence." *Id.*

In addition to Justice Souter's and Justice Breyer's dissents, discussed above,

Another example of a post-instrumental majority on the Court overruling a "federalism" precedent felt to be substantially wrong is *Seminole Tribe of Florida v. Florida*,¹⁶⁵ which overruled *Pennsylvania v. Union Gas Co.*¹⁶⁷ In *Seminole Tribe*, both the majority and dissenting opinions stated that cases which present a substantially wrong understanding of the Eleventh Amendment should be overruled or limited. A 5-4 Court had held earlier in *Union Gas* that Congress, when exercising its commerce clause power, could authorize law suits in federal court against states on federal question grounds—even though that seems literally to be barred by the Eleventh Amendment.¹⁶⁸ Justice Brennan's reasoning was that when the states ratified the Constitution they consented to suits against them in federal courts based on congressionally created causes of action.¹⁶⁹ In *Seminole Tribe*, Chief Justice Rehnquist adopted the reasoning of the *Union Gas* dissent to claim that this understanding of the Eleventh Amendment was wrong.¹⁷⁰ As Chief Justice Rehnquist noted, the result and

see *supra* text accompanying notes 158-160, a separate dissent was filed by Justice Stevens. Justice Stevens stated that the possession of guns is the result of commercial activity, that Congress can prohibit the possession of guns at any location, and that, therefore, Congress can prohibit gun possession in particular markets. *Id.* at 1651 (Stevens, J., dissenting).

For the future it seems clear, as stated by Justice Souter in his dissent, that *Lopez* is not an "epochal" case. *Id.* at 1657. But it does send a message to Congress that it should consider federalism concerns when legislating near the outer reaches of its commerce clause power, and it should do something to make clear how Congress perceives a connection between its regulation and interstate commerce.

¹⁶⁵ 116 S. Ct. 1114 (1996).

¹⁶⁷ 491 U.S. 1 (1989).

¹⁶⁸ *Id.* at 17-20. The result in this case was supported by the four instrumental Justices on the Court at the time (Justices Brennan, Marshall, Blackmun and Stevens), with the critical fifth vote provided by Justice White, who wrote a concurring opinion which stated he disagreed with much of Justice Brennan's reasoning. *Id.* at 57 (White, J., concurring). So while this 1989 case was not within the usual time frame for an instrumental decision, the holding and the reasoning of the Brennan plurality were very much instrumental.

¹⁶⁹ *Id.* at 17-20.

¹⁷⁰ 116 S. Ct. at 1127-28. Chief Justice Rehnquist's opinion tracked the four-Justice dissent in *Union Gas*. In *Union Gas*, the dissent had stated that *Hans v. Louisiana*, 134 U.S. 1 (1890), had declared that federal jurisdiction over unconsenting states "was not contemplated by the Constitution when establishing the judicial power of the United States." 491 U.S. at 32 (Scalia, J., dissenting in part and concurring in part, joined in part by Rehnquist, C.J., O'Connor and Kennedy, JJ.) (quoting *Hans*, 134 U.S. at 15). Justice Brennan disagreed with this position in

rationale departed from established understanding of the Eleventh Amendment and undermined the accepted function of Article III—since never before had the Court suggested that the bounds of Article III could be expanded by Congress operating under any constitutional provision except the Fourteenth Amendment.¹⁷¹

Justice Souter, dissenting with Justices Ginsburg and Breyer, took issue with Chief Justice Rehnquist's conclusion that the Court's decision in *Union Gas* was substantially wrong. Instead, Justice Souter concluded that, based upon constitutional history and text, the famous Eleventh Amendment case, *Hans v. Louisiana*,¹⁷² was substantially wrong in holding that a state could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and, for that reason, a state must enjoy the same protection in a suit by one of its own citizens.¹⁷³ Beyond that, Justice Souter con-

Union Gas, stating that *Hans* considered only the federal jurisdiction granted by Article III and given effect by the Judiciary Act, an act designed to implement Article III grants of jurisdiction. Article III did not automatically eliminate sovereign immunity, stated Justice Brennan, and so neither did the Judiciary Act. And *Hans* did not deal with Congress' authority under other clauses. *Id.* at 17-20.

¹⁷¹ *Seminole Tribe*, 116 S. Ct. at 1128. Chief Justice Rehnquist also noted that *Union Gas* was always of questionable precedential value, largely because a majority had expressed disagreement with the rationale of the plurality. On this point, see *infra* text accompanying notes 250-252.

Chief Justice Rehnquist went on to hold that the Governor of Florida could not be sued for prospective injunctive relief under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), because Congress here had prescribed a detailed remedial scheme for enforcement of a statutorily created right. It would be inappropriate for the Court to supplement that scheme with one created by the judiciary, stated Chief Justice Rehnquist, citing *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

¹⁷² 134 U.S. 1 (1890).

¹⁷³ *Seminole Tribe*, 116 S. Ct. at 1153-60. Justice Stevens, dissenting, also supported this conclusion that *Hans*, as read by Chief Justice Rehnquist, was wrongly decided. Justice Stevens stated that the Eleventh Amendment applies only to suits premised on diversity jurisdiction. He read *Hans* more narrowly than did Chief Justice Rehnquist, to hold only that as a matter of federal common law, federal courts should decline to entertain suits against unconsenting states. He was especially concerned that the majority's opinion would prevent Congress from providing a federal forum for a broad range of actions against states. He stated that the sovereignty of the states is subordinate both to the citizenry of each state and the supreme law of the sovereign. He added that no one had identified any acceptable reason for concluding that the absence of a state's consent to be sued in federal court should affect the power of Congress to authorize federal courts to remedy violations of federal law by states or their officials in actions not covered by the Eleventh Amendment's explicit text. *Id.* at 1133-45. It must be noted that the arguments of Justice Stevens are instrumental in nature. Although he undertakes

tended that the Court in *Hans* had misread statements in *The Federalist Papers* and that *Hans* wrongly did not even consider whether Congress could abrogate the state's sovereign immunity by statute. Souter then explored historical materials to show that even those Framers who expected common-law immunity to survive ratification were talking about diversity jurisdiction, and that American political thought at the time of framing had so revolutionized the concept of sovereignty that it would have been illogical to call for the immunity of a state against the jurisdiction of the national courts.¹⁷⁴ Thus, although Justice Souter disagreed with Chief Justice Rehnquist and the majority opinion over which prior Eleventh Amendment case was wrongly decided, they both agreed that a precedent regarding an Eleventh Amendment federalism issue was wrongly decided and should not be followed.¹⁷⁵

A third recent example where a majority of the current post-instrumental Court has concluded that federalism concerns require a modest change in doctrine occurred in the Tenth Amendment case of *New York v. United States*.¹⁷⁶ Following *Garcia's* overruling of *National League of Cities*, dis-

an analysis of the precedents, he puts more weight on considerations of justice in terms of limiting the power of Congress to create private federal causes of action against a state, or its governor, for the violation of a federal right.

The arguments of the other dissenters, voiced by Justice Souter, are not instrumental in nature. Justice Souter relied on his interpretation of cases but even more on history and general principles of constitutionalism, including the concept that express provisions of the Constitution should not be trumped by "judicially discoverable principles untethered to any written provision." *Id.* at 1177. On this last point, Justice Souter is unquestionably right. The natural law tradition of our constitutional history rejects judges imposing natural law principles on constitutional decisionmaking that were not placed into the Constitution by the Framers and Ratifiers. See *id.* at 1177-78; *supra* notes 35-36 and accompanying text, and sources cited therein.

¹⁷⁴ *Seminole Tribe*, 116 S. Ct. at 1149-52.

¹⁷⁵ In *Seminole Tribe*, Justice Souter did not call for *Hans* to be completely overruled. With regard to special factors that might call for *Hans* to be overruled, Justice Souter noted that *Hans* had not proven unworkable in practice, did not conflict with later doctrine, and that facts had not changed to undermine its premises. *Id.* at 1184. However, Justice Souter concluded that *Hans* was sufficiently wrongly decided that, at least, Congress should be permitted "to abrogate" the *Hans* principle if Congress so wished. *Id.* at 1169-60, 1184-85.

¹⁷⁶ 505 U.S. 144 (1992).

cussed above,¹⁷⁷ it was unclear what role remained for the Tenth Amendment as a matter of constitutional law. *New York* revived the Tenth Amendment, to a limited extent.

From the perspective of this Article, the most important observation is that Justice O'Connor did not call in *New York* for *Garcia* to be overruled, despite having dissented in that case.¹⁷⁸ Instead, Justice O'Connor seemed to be reconciled in *New York* to the expansion of federal power allowed by a line of cases which culminated in *Garcia*, particularly as those precedents were decided against a background of legislative and executive action also supporting broad federal governmental power.¹⁷⁹ However, Justice O'Connor noted in *New York* that despite this expansion, any federal action that "commandeers" a state legislative process was simply too wrong to stand as a precedent.¹⁸⁰

The central question in *New York* was whether Congress, consistent with the Tenth Amendment, could encourage states to deal with low-level radioactive waste, by requiring them either to accept ownership of waste generated within their borders or to provide regulations according to instructions by Congress.¹⁸¹ Justice O'Connor artfully distinguished *Garcia* by noting that *Garcia* involved the authority of Congress to subject state governments to generally applicable laws, i.e., situations where Congress sought to subject states to the same legislation that applied to private parties. Here, however, Congress was seeking to use the states as implements of federal

¹⁷⁷ See *supra* text accompanying notes 99-107.

¹⁷⁸ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

¹⁷⁹ See *New York*, 505 U.S. at 157:

The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.

On the role within the natural law approach of post-ratification legislative and executive action creating a gloss on meaning to the Constitution, which in this context would support a broad view of congressional power under the Constitution, see Kelso, *Styles*, *supra* note 1, at 157-59.

¹⁸⁰ 505 U.S. at 177-78.

¹⁸¹ *Id.* at 174-77.

regulation by directing or coercing them to regulate in a particular field or in a particular way.¹⁸² Justice O'Connor's opinion pointed to statements in several cases, actions in the Constitutional Convention, and statements in *The Federalist Papers* and the ratification campaign—all of which, in her judgment, showed an intent by the Framers that Congress should have power to regulate individuals, not states. These statements were preceded by the quote from *Hodel* that "Congress may not simply 'commandeer' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹⁸³ To hold otherwise would not be merely wrong, but substantially wrong. Thus, this aspect of the federal regulation involved in the case needed to be ruled unconstitutional.¹⁸⁴

A fourth area of governmental structure where the post-instrumental Court has tinkered with instrumental doctrine when it found such doctrine to be substantially in error in-

¹⁸² *Id.* at 178.

¹⁸³ *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Justice O'Connor also noted that in *The Federalist Papers*, Hamilton spoke only about extending the authority of the federal government to citizens, "the only proper objects of government." The Constitutional Convention had rejected the New Jersey Plan for the reason, among others, that it might require the federal government to coerce the states into implementing legislation. And during the ratification campaign there were a number of statements that the laws of Congress will now be binding on individuals rather than on the states. Justice O'Connor extracted from these sources a general Tenth Amendment principle she thought the Framers had embodied into the structure of the Constitution regarding state autonomy as a value. *Id.* at 177-80.

¹⁸⁴ *Id.* at 177-80. Justice White, dissenting with Justices Blackmun and Stevens, questioned this mode of distinguishing *Garcia*. He pointed out that in no previous case had the Court rested its holding on a distinction between a federal statute's regulation of states and private parties for general purposes, as opposed to a regulation solely on the activities of states. *Id.* at 201 (White, J., dissenting). He continued:

An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.

Id. at 201-02. During the 1996 term, the Supreme Court will have occasion to revisit the limits of the *New York* principle in *Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 2521 (1996). *Printz* involves a challenge to the constitutionality of the Brady Bill's provisions requiring local law enforcement officials to make "reasonable efforts" to do the background checks required by the Brady Bill before a gun may be purchased.

volves the power of Congress to enforce the Civil War Amendments—Amendments Thirteen, Fourteen and Fifteen.

The instrumental era saw substantial changes in thirteenth amendment jurisprudence. These changes were based mostly on the instrumental Court's perception that the prior cases were wrongly decided from the perspective of instrumental social policy. For example, in 1968, the Court overruled prior doctrine to hold in *Jones v. Alfred H. Mayer Co.*,¹⁸⁵ that 42 U.S.C. § 1982 bars all race discrimination, private as well as public, in the sale or rental of property, and that it was within Congress' power to enforce the Thirteenth Amendment.¹⁸⁶ In 1971, the Court overruled prior doctrine in *Griffin v. Breckenridge*,¹⁸⁷ and held that Section 1985(3), an exercise of power under Section 2 of the Thirteenth Amendment, extended validly to private conspiratorial violence based on "racial, or perhaps otherwise class-based, invidious discriminatory animus."¹⁸⁸ In 1976, the Court extended *Jones* in *Runyon v. McCrary* to Section 1981 and the right to make contracts.¹⁸⁹

The post-instrumental Court has not reversed or limited this line of instrumental precedents. However, it also has not used them to expand federal protections.¹⁹⁰ In part, this is

¹⁸⁵ 392 U.S. 409 (1968).

¹⁸⁶ Dissenting in *Jones*, Justice Harlan stated that the statute's words suggested a right to equal status under law and, thus, a right enforceable only against state-sanctioned discrimination. *Id.* at 473-76 (Harlan, J., dissenting).

The Court in *Jones* also abandoned its apparently exclusive claim in the *Civil Rights Cases* to define the "badges and incidents of slavery." The Court stated that Congress has the power rationally to determine what are the badges and incidents of slavery, limited only by the "necessary and proper" clause test of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and to translate its understanding into effective legislation. *Jones*, 392 U.S. at 437-44.

¹⁸⁷ 403 U.S. 88 (1971).

¹⁸⁸ *Id.* at 102.

¹⁸⁹ 427 U.S. 160 (1976) (a private school violates 42 U.S.C. § 1981 if it discriminates in admissions on the basis of race); see *McDonald v. Santa Fe Transp.*, 427 U.S. 273 (1976) (race discrimination in employment violates 42 U.S.C. § 1981). Proof of intent to discriminate, however, has continued to be required. *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375 (1982).

¹⁹⁰ In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Court passed up a chance to apply or expand the *Griffin* concept of recovery for a "class-based invidious discriminatory animus." Instead, the Court held that § 1985(3) did not provide a federal action for conspiracy to obstruct access to abortion clinics. The Court stated that the opposition to abortion was not "class-based invidiously discriminatory animus" because it did not focus on women by reason of their sex. *Id.* at 270-74. The Court did not decide whether § 1985(3) is limited to

because the Court does not view these results as substantially wrong or unjust. For example, in 1989, the Court unanimously reaffirmed *Runyon v. McCrary*.¹⁹¹ Justice Kennedy's opinion stressed *stare decisis*, stating that the case had not been undermined by subsequent decisions or legislation, had not proved unworkable, and did not frustrate the objectives of Title VII of the Civil Rights Act of 1964.¹⁹² Focusing on whether the case represented a substantially unjust result, Justice Kennedy stated:

Whether *Runyon's* interpretation of Section 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.¹⁹³

The instrumental line of cases involving congressional power under the Fourteenth amendment have been more vigorously questioned by the post-instrumental Court. In 1966, the Court, per Justice Brennan, held in *Katzbach v. Morgan*¹⁹⁴ that laws enacted under Section 5 of the Fourteenth Amendment would be upheld so long as they met the "Necessary and Proper Clause" test of *McCulloch v. Maryland*.¹⁹⁵ The Court then applied that approach to uphold a provision in the Voting Rights Act of 1965, which abolished state literacy

cases involving racial animus. But there is no evidence that the present Court will exceed that limit.

In addition, the Court has confined § 1981 and § 1982 to "racial" discrimination and has not extended them to discrimination for national origin or religion. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). The Court has held, however, that "race" is not limited by modern scientific understanding, so claims for racial discrimination can be stated by an Arab or Jew under § 1981 and § 1982. The Court stated: "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 613.

¹⁹¹ *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

¹⁹² *Id.* at 173-74.

¹⁹³ *Id.* at 174. The opinion went on to hold that while § 1981 bans discrimination in hiring and promotion, it does not apply to acts of racial harassment committed in connection with employment. *Id.* at 175-82. Thus, once again, the post-instrumental Court refused to expand federal remedies for discrimination.

¹⁹⁴ 384 U.S. 641 (1966).

¹⁹⁵ 17 U.S. (4 Wheat.) 316, 421 (1819).

tests for persons who had completed the sixth grade in a Puerto Rican school which instructed in other than English.¹⁹⁶ Justice Brennan's opinion stated that it was enough that the Court perceive a basis on which Congress could have concluded that abolishing a literacy test in these circumstances would be helpful in gaining nondiscriminatory treatment in public services or could have found that the literacy test was an invidious discrimination against Puerto Ricans.¹⁹⁷ The opinion thus seemed to give Congress the power, when seeking to enforce the Fourteenth Amendment, to address conditions that the Court would not consider to have been violations of the Constitution.¹⁹⁸

The principle that Congress can determine for itself constitutional violations strikes at the very heart of *Marbury v. Madison*, where the Court held that the Supreme Court is the authoritative interpreter of the Constitution.¹⁹⁹ Thus, it appears substantially wrong. It is thus not surprising that the *Katzenbach v. Morgan* theory of congressional power has been cut back since the demise of the Warren Court instrumental majority in 1969.²⁰⁰

¹⁹⁶ *Katzenbach*, 384 U.S. at 652-58.

¹⁹⁷ *Id.* at 656.

¹⁹⁸ *Id.* at 657-58. Dissenting in *Katzenbach*, Justice Harlan stated that there was no factual record by which Congress could have found that Spanish-speaking citizens are as capable of making informed decisions as English-speaking citizens, and there was no legislative record supporting the Court's hypothesized possibility of discrimination. *Id.* at 669 (Harlan, J., dissenting, joined by Stewart, J.). Thus, the Court improperly allowed Congress to decide what was a violation of the Equal Protection Clause. If Congress had such a power, it might be used to dilute equal protection and due process. *Id.* at 670-71. Justice Brennan replied that Congress' power was limited to adopting measures that enforce the amendment. Congress could not restrict or dilute its guarantees. *Id.* at 657-58.

On this last point, there seems to be little disagreement. As the Court, per Justice O'Connor, stated in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), § 5 of the Fourteenth Amendment gives Congress a broad power but Congress' power is "limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the 14th Amendment." *Id.* at 732-33 (quoting *Morgan*, 384 U.S. at 651 n.10).

¹⁹⁹ See generally *TRIBE*, *supra* note 32, at 342-50.

²⁰⁰ On the demise of the Warren Court majority in 1969, see *supra* text accompanying note 33.

For example, in *Oregon v. Mitchell*,²⁰¹ a 5-4 Court held that Congress had no power to establish a minimum age of eighteen for voters in state and local elections. Justice Stewart, with Justices Burger and Blackmun, stated that they interpreted *Katzenbach v. Morgan* as approving a remedy for past discriminatory treatment in public services or for the impermissible purpose of denying the right to vote to Puerto Ricans. Justice Stewart did not read the case as giving Congress the right to nullify a state law whenever Congress could rationally conclude that the law was not supported by a compelling state interest. He stated that Congress has power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of [equal protection]," but not to "determine as a matter of substantive constitutional law that situations fall within the ambit of the clause."²⁰² Justice Harlan also repeated his view that only the Court has the authority to determine when states have exceeded constitutional limits on their powers.²⁰³ Concerning the stare decisis aspect of *Morgan*, Justice Harlan noted his "deep conviction" that it was wrongly decided, and also noted the evident malaise among the other members of the Court with those decisions.²⁰⁴

Later cases have also limited *Morgan*. In 1981, Justice Rehnquist, writing for the Court in *Pennhurst State School v.*

²⁰¹ 400 U.S. 112 (1970).

²⁰² *Id.* at 296.

²⁰³ *Id.* at 152-54.

²⁰⁴ *Id.* at 217-18 (Harlan, J., concurring). Justice Black, providing the critical fifth vote in the case, stated that the 18-year old vote provision was not related to discrimination by race, and Congress had thus invaded an area reserved to the states. *Id.* at 130 (Black, J., concurring).

Dissenting from the majority's conclusion on this point, Justice Brennan stated that Congress can make its own determination on questions of fact, and here could have found that excluding citizens age 18 to 21 from voting was wholly unnecessary to promote any legitimate interest in assuring intelligent and responsible voting. *Id.* at 278-81 (Brennan, J., concurring in part and dissenting in part, joined by White and Marshall, JJ.). Justice Douglas also dissented from the Court's conclusion that Congress could not prescribe that 18-year olds could vote in state and local elections. *Id.* at 135 (Douglas, J., concurring in part and dissenting in part).

Halderman,²⁰⁵ stated that because legislation enforcing the Fourteenth Amendment intrudes on traditional state authority,

we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.²⁰⁶

Justice Rehnquist's remarks were strengthened by Justice O'Connor's majority opinion in *Gregory v. Ashcroft*.²⁰⁷ She wrote that in determining whether Congress has intended to restrict state political functions, the Court, in accord with *Pennhurst*, will apply a "plain statement" rule.²⁰⁸

The instrumental line of cases under the Fifteenth Amendment are also under serious post-instrumental Court scrutiny. The Voting Rights Act of 1965 created several devices to remedy race discrimination in voting and to prevent its

²⁰⁵ 451 U.S. 1 (1981).

²⁰⁶ *Id.* at 16-17.

²⁰⁷ 501 U.S. 452 (1991).

²⁰⁸ *Id.* at 460-61. Justice O'Connor stated, "[We] will not attribute to Congress [without a plain statement] an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its commerce clause powers or Section 5 of the Fourteenth Amendment." *Id.* at 470.

In 1983, Justice Brennan had sought to cabin the interpretation theory of Justices Rehnquist and O'Connor in his majority opinion in *EEOC v. Wyoming*, 460 U.S. 226 (1983). Justice Brennan stated that Congress need not recite the words "section 5" or "14th Amendment" or "equal protection." The question is one of discerning legislative purpose. *Id.* at 243 n.18. Chief Justice Burger dissented in *EEOC v. Wyoming* with Justices Powell, O'Connor and Rehnquist.

In his dissent, Chief Justice Burger wrote that Congress can invalidate state laws by using its power to enforce the Civil War Amendments, but only if Congress considers it necessary to remedy past constitutional violations (in the sense of what the Court says are violations), or to guard against future violations. *Id.* at 259-63. He stated that Congress could not impose restrictions on the mandatory retirement laws of the states where Congress did not find it necessary to guard against encroachment of guaranteed rights or to rectify past discrimination. He noted that there had been no finding that a state law infringed on rights identified by the Court. The Chief Justice also stated that "allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government." *Id.* at 262. In light of *Gregory v. Ashcroft*, it seems likely that today's Court will adhere to these concepts since the views of Justices Rehnquist and O'Connor are likely to be shared, at the least, by Justices Scalia, Thomas and Kennedy.

reoccurrence. In *South Carolina v. Katzenbach*,²⁰⁹ an instrumental Court upheld the law as appropriate under Section 2 of the Fifteenth Amendment, including the law's ban on literacy tests and a requirement that new voting rules need preclearance and must lack both discriminatory purpose and effect. In 1980, a 6-3 Court upheld application of preclearance provisions and denied relief to a city which sought to create several at-large districts although it had not, for at least seventeen years, engaged in voter discrimination.²¹⁰ The majority opinion by Justice Marshall relied on *Morgan* by giving it a broad but remedial interpretation.²¹¹

Recent Supreme Court cases dealing with redistricting have cut back on this interpretation of the Fifteenth Amendment. As with the Fourteenth Amendment, where a majority of the Justices have responded to fundamental separation of powers concerns, the Court has reasserted its primary role in determining constitutional violations. It now seems unwilling to allow Congress, through the Voting Rights Act, to determine the constitutional limits of discrimination or affirmative action with respect to voting rights.²¹²

²⁰⁹ 383 U.S. 301, 326-37 (1966).

²¹⁰ *City of Rome v. United States*, 446 U.S. 156, *reh'g denied*, 447 U.S. 916 (1980).

²¹¹ Justice Marshall, for the Court, stated that when exercising authority under § 2 of the Fifteenth Amendment, as when acting under the Necessary and Proper Clause, Congress can do whatever tends to enforce submission to the prohibitions they contain. *Id.* at 174-77. Thus, Congress may prohibit state action that, though not itself a violation of the Fifteenth Amendment, perpetuates the effects of prior discrimination in voting or, in jurisdictions that have intentionally discriminated, creates a risk of purposeful discrimination in the future. *Id.* at 177-78.

Justice Powell, dissenting, stated that Congress could abridge the voting rights of citizens only if remedying violations of voting rights. Since the City of Rome had not violated any voting rights, Congress had no authority to continue preclearance requirements until the entire state satisfied bailout standards. *Id.* at 196-205.

Justice Rehnquist, dissenting with Justice Stewart, would narrow *Morgan* even further. Justice Rehnquist stated that Congress can act remedially only to enforce judicially established substantive prohibitions. *Id.* at 209-11. Here, however, the congressional bar to local action could not genuinely be characterized as a remedial exercise of congressional enforcement powers because the proposed electoral changes, unlike literacy bans, do not have a disparate effect traceable to discrimination by government bodies. *Id.* at 211-15. Rehnquist added that in view of *Oregon v. Mitchell*, *Morgan* should be construed as "consonant with" a remedial-only view of the power that Congress has under the Fourteenth Amendment. *Id.* at 220-21.

²¹² See generally *Bush v. Vera*, 116 S. Ct. 1941 (1996) (strict scrutiny applied to

A fifth area of structural concerns where the modern Court has been willing to cut back significantly on instrumental-era precedents involves the law of taxpayer and citizen standing. Regarding what facts are sufficient to give a party standing to sue in the federal courts, and the extent of Congress' power to legislate standing in situations where it would not otherwise be found by the Court, the leading instrumental precedents have been distinguished almost to the point of being overruled.

Prior to the 1960s, the plaintiff had to suffer a distinct injury personal to him or her in order for the federal courts to have constitutional authority to hear plaintiffs claim.²¹³ During the instrumental years, however, beginning with *Baker v. Carr*²¹⁴ in 1962, Justice Brennan stated for the Court that earlier cases contained overgeneralized language and that standing was merely a prudential matter.²¹⁵ Six years later,

test constitutionality of racial gerrymandering); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) (same); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (same); *Shaw v. Reno*, 509 U.S. 630 (1993) (same). The precise contours of current Supreme Court doctrine remain unclear, however, as only five Justices have consistently held that use of race as a predominant factor in drawing congressional districts violates the Equal Protection Clause. See, e.g., *Bush*, 116 S. Ct. at 1941. Of these five, Justice O'Connor appears to have left open some room for a congressional role in this area. *Id.* at 1968 (O'Connor, J., concurring) ("I write separately to express my view on two points. First, compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest [that would satisfy the first element of a strict scrutiny test]. Second, that test can co-exist in principle and in practice with *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, as elaborated in today's opinions.").

²¹³ *Stark v. Wickard*, 321 U.S. 288 (1944). Justice Reed there stated for the Court:

It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

Id. at 304.

The need for injury was made even clearer in *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952) ("Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute is equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'") (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

²¹⁴ 369 U.S. 186 (1962).

²¹⁵ Justice Brennan stated: "Have the appellants alleged such a personal stake

Chief Justice Warren cited this language with approval in *Flast v. Cohen*,²¹⁶ where the Court found standing for federal taxpayers to raise an establishment clause challenge to government spending that reached some parochial schools.²¹⁷ *Flast* thus suggested a wide expansion in the concept of standing.

Since the demise of the Warren Court instrumental majority in 1969, however, that has not been the impact of *Flast* as a precedent. Instead, the desire by noninstrumental Justices to preserve the separation of powers by enforcing traditional limitations on standing has outweighed the instrumental policy of seeking to accomplish justice by keeping the judicial system open to any claimant who has a cause of action. In 1982, Justice Rehnquist wrote for the Court in *Valley Forge Christian College v. Americans United*²¹⁸ that in order to obtain Article III standing, the plaintiff must show that "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision."²¹⁹

in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." *Id.* at 204.

²¹⁶ 392 U.S. 83 (1968).

²¹⁷ Chief Justice Warren stated: "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101.

²¹⁸ 454 U.S. 464 (1982).

²¹⁹ *Id.* at 472.

While Congress has some role to play in enlarging standing by creating new causes of action, this role is limited.²²⁰ Thus, the requirement of personal injury continues.²²¹ However, the specific holding of *Flast* remains.²²²

A sixth area where serious concern about the correctness of prior precedent has led the Court to overrule a case deals with checks against official misconduct under the Due Process Clause. In 1981, the Court held in *Parratt v. Taylor*²²³ that a

²²⁰ Justice Kennedy observed the following in a concurring opinion that provided the controlling votes in *Lujan v. Defenders of Wildlife*:

In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

504 U.S. 555 (1992) (Kennedy, J., concurring in part, joined by Souter, J.). Justice Scalia adopted an even stricter view of standing in *Lujan*. He stated that there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Id. at 576 (Scalia, J.).

This subject will receive additional attention during the 1996 Term as the Court granted certiorari in the case of *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996). That case presents the question of whether the Endangered Species Act has effectively granted standing to persons who challenge governmental compliance with mandated procedures because of their economic interests, and who do not plead any interest in preserving endangered species. *Id.*

²²¹ See *United States v. Hays*, 115 S. Ct. 2431 (1995) (voters lack standing to challenge an alleged racist gerrymander unless they personally have been subject to race discrimination). However, in equal protection cases the denial of equal treatment imposed by a barrier to a benefit is the injury in fact. *Northeastern Florida Chapter of Assoc. Gen. Contractors v. Jacksonville*, 508 U.S. 656 (1993) (it was not necessary that plaintiffs allege or prove that they would have been awarded contracts but for the challenged affirmative action program).

²²² As a matter of settled law, it is still true that standing exists for litigants relying, as taxpayers, on the Establishment Clause to curb federal spending programs. Chief Justice Rehnquist, writing for the Court in *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988), stated, "We have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham v. Mellon*, 262 U.S. 447 (1923)." For an in-depth discussion of the law of standing, organized according to the natural law, formalist, Holmesian, instrumental and post-instrumental periods, see *KELSO & KELSO, supra* note 1.

²²³ 451 U.S. 527, 543 (1981), *overruled in part*, 474 U.S. 344 (1986) (the Court

loss negligently caused by a state official was an actionable deprivation within the meaning of the Due Process Clause. Five years later, at the beginning of the post-instrumental era, the Court held in *Daniels v. Williams*²²⁴ that the word "deprive" in the Due Process Clause connotes more than a negligent act. It proceeded to overrule *Parratt* to the extent it said that lack of due care by a state official may "deprive" an individual of life, liberty, or property under the Fourteenth Amendment.²²⁵

Chief Justice Rehnquist, writing for the Court in *Daniels*, gave two main reasons for concluding that *Parratt* was substantially wrong. First, he stated that historically the guarantee of due process was applied to deliberate decisions of government officials.²²⁶ No case before *Parratt* had held otherwise. He stated that this reflects the fact that the Due Process Clause, like the Magna Carta, was intended to secure individuals from the arbitrary power of government—from the use of power for oppression.²²⁷ In contrast, lack of due care "suggests no more than a failure to measure up to the conduct of a reasonable person."²²⁸ Second, although the Constitution deals with large concerns of governors and governed, it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that occur by living together in society, which includes lack of due care by prison officials. Chief Justice Rehnquist cited two cases to analogize this point: (1) *Estelle v. Gamble*,²²⁹ where it was stated that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner"; and (2) *Baker v. McCollan*,²³⁰ which stated the same about false imprisonment due to state action.²³¹

held that the state's post-deprivation tort remedy provided the process that was due).

²²⁴ 474 U.S. 327, 330-31 (1986) (prisoner injured by falling on a prison stairway due to official negligence in leaving a pillow there).

²²⁵ *Id.* at 331-32.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 332. The Court added, "To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Id.*

²²⁹ 429 U.S. 97, 106 (1976), *reh'g denied*, 429 U.S. 1066 (1977).

²³⁰ 443 U.S. 137, 146 (1979).

²³¹ *Daniels*, 474 U.S. at 333. In a companion case, *Davidson v. Cannon*, 474

e. *The Precedent Raises Concerns About the Rule of Law*

The last "special reason" to overrule a precedent includes a number of loosely related principles, all deeply rooted in the traditional common-law method of decisionmaking. We discuss four of these principles here to help provide some content to the concern about "the rule of law."

First, today's post-instrumental Court has disagreed with the holdings of several instrumental precedents relating to whether newly announced rules of constitutional law should be applied to all pending cases or only prospectively to conduct in the future. The theory of judicial review from the original natural law period through the formalist and Holmesian eras was, as stated in *Marbury v. Madison*,²³² that it is the "duty of the judicial department to say what that law is."²³³ That principle has been taken to imply that any rule of law stated in a case, even a newly discovered rule, should be applied not only in the future, but also to conduct and cases that preceded the decision—at least all cases not fully resolved.²³⁴

Despite this long tradition, in 1965 an instrumentally oriented Supreme Court treated the matter as one of policy and held in *Linkletter v. Walker*²³⁵ that the Constitution nei-

U.S. 344, 345-48 (1986), the Court held that there was no deprivation where prison officials forgot a prisoner's note reporting a threat from another prisoner, who later assaulted the writer. The instrumental Justices wanted the rule on deprivation to be more protective of individual rights. *Id.* at 349-50. Justice Brennan, dissenting, would find a deprivation if official conduct that causes personal injury is due to recklessness or deliberate indifference. He thought that issue should be remanded for review. *Id.* at 349. Justice Blackmun, dissenting with Justice Marshall, stated that governmental negligence is an abuse of power and a deprivation where a state assumes sole responsibility for physical security and then ignores a call for help. *Id.* at 349-50. Justice Stevens, concurring in both cases, stated that "deprivation" identifies the victim's loss, not the actor's state of mind, but the state had provided adequate procedures. *Id.* at 340-41.

²³² 5 U.S. (1 Cranch) 137 (1803).

²³³ *Id.* at 177.

²³⁴ This rule was based on the belief "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965) (citing 1 BLACKSTONE, COMMENTARIES 69 (15th ed. 1809)). Before the instrumental era the common law and the Court had recognized "a general rule of retrospective effect for the constitutional decisions of [the] Court . . . subject to [certain] limited exceptions." *Robinson v. Neil*, 409 U.S. 505, 507, *reh'g denied*, 410 U.S. 959 (1973).

²³⁵ *Linkletter*, 381 U.S. at 629.

ther prohibits nor requires retrospective effect. Exercising its newly discovered freedom, the Court decided that newly imposed constitutional rules regarding criminal procedure should be applied only prospectively when criminal proceedings were challenged in a collateral review.²³⁶ This precedent was extended in 1969, when the Court held in *Desist v. United States*²³⁷ that it would not apply new constitutional criminal rules to events that preceded the decision, even in cases on direct appeal. Commenting on *Desist* two years later in *Mackey v. United States*, Justice Harlan stated: "[T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."²³⁸

Despite Justice Harlan's concerns, the *Desist* approach was extended to civil cases in 1971, when the Court decided *Chevron Oil v. Hudson*.²³⁹ It there held that whether a new principle of law should be applied only prospectively depends on whether retrospective operation would further or retard the purpose of the rule, and whether retrospective application would produce substantially inequitable results.²⁴⁰

The post-instrumental Court, on the other hand, has echoed Justice Harlan's dissents in *Desist* and *Mackey*. Reverting to traditional theory, the Court reversed *Desist* and *Chevron Oil* in *Griffith v. Kentucky*.²⁴¹ Decided in 1987, *Griffith* held that all new rules for criminal prosecutions would be applied to all cases on direct review, with no exceptions. The Court's opinion said that the integrity of judicial review requires the

²³⁶ *Id.* at 629-40. The Court later elaborated upon *Linkletter* to hold that the "criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

²³⁷ 394 U.S. 244, *reh'g denied*, 395 U.S. 931 (1969).

²³⁸ 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part).

²³⁹ 404 U.S. 97 (1971).

²⁴⁰ *Id.* at 105-09.

²⁴¹ 479 U.S. 314 (1987).

Court, after declaring a new rule in adjudicating a specific case, "to apply that rule to all similar cases pending on direct review."²⁴²

The *Griffith* holding was extended in *Harper v. Virginia Department of Taxation*,²⁴³ decided in 1993. There, the Court stated: "Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."²⁴⁴

This extension of *Griffith* was locked solidly into place when in *Reynoldsville Casket Co. v. Hyde*,²⁴⁵ the Court summarized *Harper* as holding:

[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events.²⁴⁶

Another affront to the rule of law would occur if the Court's decision in a case were perceived as not based upon proper legal argumentation, but as a response to political pressure. This reason was explicitly used in the joint opinion in *Casey* as one reason for *not* overruling *Roe v. Wade*.²⁴⁷ The joint opinion in *Casey* stated:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.²⁴⁸

Taking a slightly different stance regarding this issue, but acknowledging how important it is that the Court not be perceived as giving in to political pressure, Chief Justice Rehnquist noted in *Casey* that the Court in *West Coast Hotel v.*

²⁴² *Id.* at 323.

²⁴³ 509 U.S. 86 (1993).

²⁴⁴ *Id.* at 97 (quoting *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting)).

²⁴⁵ 115 S. Ct. 1745 (1995).

²⁴⁶ *Id.* at 1748.

²⁴⁷ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865-69 (1992).

²⁴⁸ *Id.* at 865-66.

*Parrish*²⁴⁹ and *Brown v. Board of Education*²⁵⁰ had acknowledged and corrected its previous errors in *Lochner* and *Plessy*, even though there was great pressure to overrule those cases.²⁵¹ Further, public protests should not alter the normal application of stare decisis, "lest perfectly lawful protest activity be penalized by the Court itself."²⁵² Chief Justice Rehnquist also stated that the Court should never make its decisions with a view toward speculative public perceptions. Rather, the Court's legitimacy is enhanced by faithful interpretation of the Constitution.²⁵³ Justice Scalia agreed with Chief Justice Rehnquist, but found the joint opinion even more unsatisfactory. He stated he was "appalled" by the Court's suggestion that the decision whether to overrule an erroneous constitutional decision must be strongly influenced against overruling by the substantial and continuous public opposition it has generated.²⁵⁴

A third concern about the rule of law is whether the original precedent was decided only after full briefing and argument on the issue, or without the benefit of brief and argumentation. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,²⁵⁵ Justice Souter noted that Justice Scalia's conclusions in *Employment Division v. Smith*,²⁵⁶ which altered the free exercise clause doctrine, were not the product of full briefing and argument on the issue of changing standards in free exercise clause cases.²⁵⁷ Thus, Justice Souter indicated in *Hialeah* less reluctance to overrule *Smith* since it did not have the imprimatur of consideration after full briefing and argument.²⁵⁸

²⁴⁹ 300 U.S. 379 (1937).

²⁵⁰ 347 U.S. 483 (1954).

²⁵¹ *Casey*, 505 U.S. at 960.

²⁵² *Id.*

²⁵³ *Id.* at 959-60 (Rehnquist, C.J., concurring in part and dissenting in part).

²⁵⁴ *Id.* at 998-1001 (Scalia, J., concurring in part and dissenting in part).

²⁵⁵ 113 S. Ct. 2217 (1993).

²⁵⁶ 494 U.S. 872 (1990).

²⁵⁷ *Hialeah*, 113 S. Ct. at 2247 (Souter, J., concurring in part and concurring in the judgment).

²⁵⁸ *Id.* ("[A] constitutional principle announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.").

A fourth consideration regarding concerns about the rule of law is whether the reasoning in a precedent commanded the support of five or more members of the Supreme Court, or whether it was only a plurality opinion. Naturally, a plurality opinion is entitled to less weight than a majority opinion.²⁵⁹ If the majority opinion is accompanied by one or more concurrences, that can also weaken a precedent's force, particularly if the concurrences suggest different rationales.²⁶⁰ Indeed, occasionally members of the Court have implicitly seemed to state that a precedent that is the product of a 5-4 vote, with the four in dissent vigorously contesting the rightness of the majority opinion, may be entitled to less weight than a 6-3, 7-2, 8-1 or 9-0 case.²⁶¹

III. STYLE-RELATED TECHNIQUES FOR FOLLOWING OR EXTENDING PRECEDENTS

The most common result when a court considers a factually analogous precedent is that the court follows the precedent without extending it. Of course, every new fact situation to which a rule is applied is in some sense an extension of the rule.²⁶² However, in common usage, if the facts in the new case are closely analogous to the facts of a prior case, normal legal terminology states that the precedent has been followed, not extended.

²⁵⁹ See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127 (1996) (noting that Justice Brennan's opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989), *overruled*, *Seminole Tribe*, 116 S. Ct. at 1118, was a four-justice plurality, and thus entitled to lesser precedential weight than if it had been a majority opinion).

²⁶⁰ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where Justice Black's more formalist opinion for the Court on the extent of presidential power, *id.* at 587-88, was substantially undercut by the more functional understanding of presidential power adopted in concurring opinions. *Id.* at 610-14 (Frankfurter, J., concurring); *id.* at 635-38 (Jackson, J., concurring).

²⁶¹ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 559-60 (1985) (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.) (questioning the vitality of *Garcia's* overruling of *National League of Cities v. Usery*, 426 U.S. 833 (1976), as a precedent); *id.* at 580 (Rehnquist, J., dissenting) (same); *id.* at 589 (O'Connor, J., dissenting) (same).

²⁶² See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2-3 (1949) (discussing how rules change as they are applied in new fact situations).

If the facts of a current case are perceived to be only somewhat similar to those of a precedent, however, instead of being closely analogous, then "following" the precedent may really be "extending" it, at least slightly. This way of treating a precedent involves building on a precedent with which the judge agrees.

A second way to "follow or extend" a precedent involves targeting an aspect of the prior precedent with which the judge agrees, and then emphasizing that part of the precedent. This can occur when the later court focuses on some aspect of the reasoning in the prior opinion, and resolves the case according to that aspect without considering other things that the prior court said in its opinion.

A third way to "follow or extend" a precedent is to elevate some general statement, that may have been dictum, into the status of a holding, or to find implicit in the precedent a broader principle than anything stated in the case, and use it as a premise in the case at hand. When a court does this, the court is really manipulating the prior precedent to claim that today's court is merely following or extending prior law.

In a number of its constitutional law cases, the post-instrumental Court has followed or extended instrumental-era precedents using one of the above techniques. This has most frequently occurred when the instrumental-era precedent dealt with a structural issue in a manner consistent with perspectives generated by formalist, Holmesian or natural law styles of decisionmaking. Some examples follow.

A. *Building on Precedents*

One example of building on a welcome precedent occurred in 1995 as part of the term limits case. In 1969, the Court held in *Powell v. McCormack* that Congress has no power to exclude by a simple majority vote any person, duly elected by constituents, who is qualified for membership in accordance with the text of the Constitution.²⁶³ In 1995, the Court extended

²⁶³ 395 U.S. 486, 550 (1969). Of course, Congress may expel a member from Congress by a two-thirds vote. *Id.* at 506-07. The vote to exclude Representative Powell, however, was not taken pursuant to this clause of the Constitution. *Id.* at 507-12.

Powell to the states by holding in *U.S. Term Limits, Inc. v. Thornton*²⁶⁴ that states, like Congress, lack the power to add to the qualifications of age, citizenship and residency that are prescribed for members of Congress by the Constitution. Justice Stevens's opinion, for the majority (comprised of himself and Justices Breyer, Ginsburg, Kennedy and Souter), found that the qualifications in the Constitution are fixed and exclusive.²⁶⁵ Justice Stevens cited Justice Story, who stated in his treatise on the Constitution that "the [S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them No [s]tate can say, that it has reserved, what it never possessed."²⁶⁶ Justice Stevens added that recognizing a power in the states to add qualifications would violate a fundamental principle of representative democracy, that the people should choose whom they please to govern them. In support, he also cited to *McCulloch v. Maryland*, wherein Justice Marshall stated that the government of the Union is a government that emanates from the people.²⁶⁷

²⁶⁴ 115 S. Ct. 1842 (1995).

²⁶⁵ *Id.* at 1848-54, 1856-60. Justice Stevens also noted that congressional and state practice since the Constitution was ratified also support this view. *Id.* at 1861-66. On such later legislative and executive action being an appropriate source of constitutional adjudication, possibly creating a "gloss" on meaning to the Constitution, see Kelso, *Styles*, *supra* note 1, at 140-42.

²⁶⁶ *U.S. Term Limits*, 115 S. Ct. at 1854 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (1833)).

²⁶⁷ *Id.* (citing 17 U.S. (4 Wheat.) 316, 430-36 (1819)). Justice Kennedy, concurring, elaborated on this theme, stating that there

can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.

Id. at 1875. Justice Thomas dissented, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Thomas argued that where the Constitution is silent about the exercise of a particular power, the federal government lacks that power and the states enjoy it. *Id.* Justice Thomas stated the ultimate source of constitutional authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the nation as a whole. *Id.* With respect to reserved state powers, *McCulloch* did not indicate that the question depended on whether the states had enjoyed the power before the framing. *Id.* at 1879-80.

A second example of building on welcome precedents involves abstention doctrine. The Anti-Injunction Act²⁶³ bars federal courts from enjoining most proceedings in state courts. There are several exceptions to this ban, including express authorization by Congress. Suits under 42 U.S.C. § 1983, the primary vehicle to enjoin enforcement of unconstitutional state actions, were held in 1972 to be expressly authorized exceptions to the Anti-Injunction Act.²⁶⁹ However, the Court later held in *Younger v. Harris*,²⁷⁰ that because of respect for "Our Federalism," the federal courts, as a matter of comity, should not enjoin a state criminal action if prosecution was begun before proceedings of substance on the merits had occurred in the federal action. *Younger* was extended in 1977 by *Juidice v. Vail*,²⁷¹ where the Court required abstention from adjudicating a challenge to a state's contempt process in an on-going state action, because the Court perceived that maintaining its judicial system was a sufficiently great interest for the state.

In 1987, the Court extended *Younger* to civil actions in *Pennzoil v. Texaco, Inc.*²⁷² It was there held that a federal court may not enjoin a plaintiff who has prevailed in a state trial court from executing the judgment in plaintiff's favor pending an appeal to a state appellate court. Justice Powell, with Justices Rehnquist, White, Scalia and O'Connor, said that a state has an important interest in the enforcement of its orders and judgments in its courts.²⁷³

²⁶³ 28 U.S.C. § 2283 (1958).

²⁶⁹ *Mitchum v. Foster*, 407 U.S. 225 (1972).

²⁷⁰ 401 U.S. 37, 44 (1971).

²⁷¹ 430 U.S. 327, 335-39 (1977).

²⁷² 481 U.S. 1 (1987).

²⁷³ *Id.* at 13-14. Justices Brennan and Marshall disagreed with this conclusion, and argued that *Younger* should, in general, not apply to civil proceedings, especially when plaintiff brings a § 1983 action. *Id.* at 19 (Brennan and Marshall, JJ., concurring in the judgment). The opinion went on to interpret the majority opinion as based on all of the unique factual circumstances of the case, including the "open courts" provision of the Texas Constitution. *Id.* at 21 n.*.

B. *Emphasizing Aspects of a Precedent with Which the Judge Agrees*

A good example of the technique of emphasizing only that part of the prior precedent with which one agrees occurred in a recent political question case, *Nixon v. United States*.²⁷⁴ In *Nixon*, the Court unanimously held that a challenge to the Senate's vote in the trial of an impeachment case where the Senate had acted on the basis of a report from a special Senate Committee, together with a transcript of its proceedings was a nonjusticiable political question. The proceedings were challenged as violating the Impeachment Trial Clause, Article I, Section 3, Clause 6, stating that the "Senate shall have the sole power to try all Impeachments."²⁷⁵ Citing language from *Baker v. Carr*,²⁷⁶ Justice Rehnquist noted that use of the word "sole" suggests that the Senate alone was intended to determine whether an individual should be acquitted or convicted.²⁷⁷ He also noted that historical sources supported this conclusion.²⁷⁸ In addition, Justice Rehnquist said that the word "try" lacks sufficient precision to afford any judicially manageable standard. The opinion was very much in accord with the formalist and Holmesian tendency to prefer certain and predictable doctrine, and to focus on constitutional text and historical intent. It did not, however, fully embrace the broad six-factor balancing approach of Justice Brennan's *Baker v. Carr* opinion despite the fact that it purportedly relied on *Baker*.²⁷⁹

²⁷⁴ 113 S. Ct. 732 (1993).

²⁷⁵ *Id.* at 735 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁷⁶ *Baker*, 369 U.S. at 217. These factors are whether there is: a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; an initial policy decision of a nonjudicial kind; need for respect to a decision already made; or a need for finality; or avoidance of embarrassment.

²⁷⁷ *Nixon*, 113 S. Ct. at 735-37.

²⁷⁸ *Id.* at 737-38.

²⁷⁹ *Id.* at 739-40 (only cursory treatment given by Chief Justice Rehnquist to *Baker v. Carr*'s other factors). Justice White, joined by Justice Blackmun, concurred. To him, arguments based upon text and a lack of judicially manageable standards were unpersuasive. *Id.* at 741-43, 745-46. Instead, engaging in a broader inquiry, Justice White concluded that the historical evidence suggests a deep concern of the Framers with a basic system of checks and balances underlying the separation of powers. A balance is achieved by having the Senate control the oth-

C. *Manipulating a Precedent to Claim It Is Merely Being Followed*

Judges usually make an effort, where it can logically be done, to show that current decisions either follow from prior decisions or are not inconsistent with prior decisions. Instrumental Justices are particularly creative in interpreting and grouping precedents in order to show that they support, or at least are not inconsistent with, a result believed just in a particular case.²⁸⁰

This tactic, however, is not reserved exclusively for instrumental Justices. For example, Holmesian Justice Rehnquist applied the skill in *Paul v. Davis*²⁸¹ and *Posadas de Puerto*

erwise largely unaccountable judiciary, with judicial review ensuring that the Senate adheres to a minimal set of procedural standards in conducting impeachment trials. *Id.* at 743-45.

Justice Souter, tracing the political question doctrine back to the separation of powers, thought that unusual circumstances, such as a coin-toss by the Senate, might make judicial interference appropriate even though prudential concerns would ordinarily counsel silence. *Id.* at 747-48.

²⁸⁰ One example is Justice Brennan's opinion in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), which stated that the Court, when engaging in equal protection review, could find "implicit support" for applying strict scrutiny to gender classifications in *Reed v. Reed*, 404 U.S. 71 (1971), even though Chief Justice Burger explicitly stated in that case that the question was "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective" See *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996) (Justice Ginsburg perhaps manipulating precedents to increase scrutiny in gender discrimination cases from "intermediate scrutiny" to a new "exceeding persuasive" standard of review); *id.* at 2288 (Rehnquist, J., concurring) (criticizing the majority opinion for simultaneously using "intermediate scrutiny" and "exceedingly persuasive" language); *id.* at 2294-96 (Scalia, J., dissenting) (same).

Another example of this type of reasoning is Justice Douglas's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, Justice Douglas found a general right of privacy in the "penumbras" of several specific guarantees of the Bill of Rights. For trenchant criticism of this aspect of Justice Douglas's methodology in *Griswold*, see David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 844-48 (1996).

²⁸¹ 424 U.S. 693 (1976). In *Paul*, Justice Rehnquist creatively interpreted prior precedents to find that there is no reputational interest under the liberty component of the fourteenth amendment procedural due process analysis. See generally *TRIBE*, *supra* note 32, at 701-02; Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 86-88, 92-95 (1976). For an article praising Justice Rehnquist's opinion in *Paul* for its "brilliant contemporary example of narrative prose in the service of the adjudicator's unspoken desires," see Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor* With an Application to Jus-*

Rico Associates v. Tourism Co. of Puerto Rico,²⁸² though *Posadas* recently was overruled.²⁸³ Formalist Justice Scalia applied the skill in *Employment Division v. Smith*, by reinterpreting prior free exercise cases to require the combination of a free exercise claim with another fundamental right in order to trigger strict scrutiny.²⁸⁴ Of course, the practical impact of *Smith* has been limited by Congress.²⁸⁵

tice Rehnquist, 57 N.Y.U. L. REV. 1, 42-58 (1982).

²⁸² *Pasados de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), overruled by 44 *Liquor Mart v. Rhode Island*, 116 S. Ct. 1495 (1996); see generally Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 299-304 (1987) (discussing Justice Rehnquist's attempts to "water-down" commercial speech doctrine in *Posadas* and other commercial speech cases).

²⁸³ See *supra* text accompanying notes 130-134.

²⁸⁴ 494 U.S. 872, 881-82 (1990).

²⁸⁵ Congress has limited *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1(b) (Supp. 1993), which was signed by President Clinton. The Act provides in part:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

If this law is viewed as an attempt by Congress to tell the Court how to decide a question of constitutional law relating to the First Amendment, it seems likely that the Court would hold the law unconstitutional as violating the independence of the judiciary and the separation of powers. *But see* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (rejecting the view that RFRA violates separation of powers). If it can be viewed as a self-imposed restraint on the exercise of executive or administrative power by the federal government, it would have a good chance of being sustained as an exercise of power under the Necessary and Proper Clause. If interpreted as applicable to the states, as appears to be intended, the best bet for constitutional authority would be the Commerce Clause, with the view that the regulation involves something which has a substantial effect on interstate commerce. At least one federal court has sustained the constitutionality of the Act on these grounds. See *id.* Using § 5 of the Fourteenth Amendment might be questionable as Congress would be attempting to remedy a situation the Court has not found to be unconstitutional. *But see* *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3017 (U.S. Oct. 15, 1996) (upholding the RFRA as a valid exercise of congressional power under § 5 of the Fourteenth Amendment). In addition, the actual constitutional doctrine in *Smith* may soon be overruled by the Supreme Court. See generally *Kelso, Styles, supra* note 1, at 184.

CONCLUSION

In this Article, we have described the four styles of decisionmaking and the views on precedent that fit most comfortably with each style—particularly the restraints on departing from precedent characteristic of the formalist, Holmesian and natural law styles. We then discussed a number of cases in which the post-instrumental Court has overruled or limited instrumental-era precedents or, on the other hand, followed or extended them.

As stated at the beginning of this Article, one might expect today's post-instrumentalist Court to engage in a wholesale overruling or limiting of instrumental-era precedents. After all, these precedents resolved constitutional issues in ways unlikely to garner support by a majority of today's Justices. However, as this Article has demonstrated, the current post-instrumental Court typically overrules or limits instrumental precedents only when a showing can be made that the instrumental precedents are: (1) unworkable in practice; (2) inconsistent with related constitutional doctrines; (3) based on false factual assumptions; (4) inconsistent with a commitment to the rule of law; or (5) substantially wrong. As for this last factor, the Court has reserved a finding of "substantial error" almost exclusively for cases involving structural issues of separation of powers, federalism, checks and balances or judicial review.

One practical consequence of this analysis is that those who would advocate before the Court that an instrumentalist precedent on a nonstructural issue should be overruled or limited should do more than contend that the precedent was wrongly decided. Reference should also be made to one or more of the additional "special reasons" for overruling precedent as discussed in this Article.

Returning to legal theory, we conclude with the thought that the current Supreme Court's reluctance to overrule a precedent, absent some special factor beyond a perception that the case was wrongly decided, is an appropriate stance for a modern natural law Court to take. This hesitance makes sense from a theoretical standpoint, given the respect traditionally

Accorded by natural law jurists to prior judicial work product, reasoned elaboration of the law, and lawmaking as largely in the province of the legislative branch.²⁸⁶

²⁸⁶ See generally Kelso & Kelso, *Nine Tribunes*, *supra* note 1, at 1310-13, 1321-23.