Introduction

The summer of 2005 was a time of transition at the US Supreme Court. Soon after the Court decided the last of its cases in June, Sandra Day O'Connor announced her plan to retire. Justice O'Connor had served on the Court since 1981. She made history as the first female justice, and her trademark pragmatism left a deep impression on American law. Around the halls of the Court, it is commonly said that any time a justice departs, the institution is made anew. With a jurist of Sandra Day O'Connor's stature on the cusp of leaving, that sentiment seemed as true as it had ever been.

Just two months after Justice O'Connor's announcement came the news that William Rehnquist had died. He had served on the Court since 1972, taking over as Chief Justice in 1986. His legacy extended beyond his legal decisions and into countless aspects of the Court's procedures and practices. Viewed alongside the retirement of Justice O'Connor, Chief Justice Rehnquist's passing foretold the end of one era and the dawn of another. Before 2005, the most recent departure from the Court had been that of Harry Blackmun, who retired in 1994. Now eleven years later, the Court faced the loss of two justices of enormous influence – who between them had served for more than fifty years – in the course of only a few months.

Initially, Justice O'Connor's seat on the Court was to be filled by John Roberts, who was serving at that time as a federal appellate judge. But after Chief Justice Rehnquist's death, President George W. Bush revised Judge Roberts's nomination. Judge Roberts would now take over as Chief Justice, with Justice O'Connor's successor – eventually, Samuel Alito – to be selected later.

Supreme Court justices earn their appointments based on their individual qualities and achievements. Upon their confirmation, however, they join a tribunal with two centuries of practices, customs, and decisions. A key issue for every new justice is how to balance respect for the Court's past with consideration of its future.

That issue would arise in illuminating fashion during Judge Roberts's confirmation hearing before the Senate Judiciary Committee. Like previous nominees, Judge Roberts was asked about the degree of respect that is owed to the Supreme Court's prior opinions – in other words, its precedents. In American legal culture, courts commonly describe precedents as carrying great weight. By respecting precedent, courts validate a time-honored principle: *stare decisis*, a Latin phrase meaning "to stand by things decided."[1] The phrase captures the idea that today's judges should not lightly disrupt the decisions of their predecessors. Even so, it is always *possible* for a court to overrule its precedents, so long as there is sufficient justification for doing so. The goal is to preserve the law's stable core without permanently entrenching every judicial mistake.

During an exchange with Judge Roberts, Senator Arlen Specter raised the topic of stare decisis in the context of *Roe v. Wade* (1973), the Supreme Court's landmark ruling on abortion rights. Yet the Senator's question went beyond *Roe* and addressed "principles of stare decisis" more generally. Judge Roberts responded in kind. He began with an appeal to history, explaining that America's founders "appreciated the role of precedent in promoting even-handedness, predictability, stability, [and] the appearance of integrity in the judicial process." He then turned to the Supreme Court's modern approach to precedent, which considers factors such as whether prior decisions have "proven to be unworkable" or "been eroded by subsequent developments."

Judge Roberts noted that to overrule a precedent is to give "a jolt to the legal system." At the same time, he cautioned that deference to precedent is only presumptive, not absolute. It is true that overruling precedent can tax the system. But sometimes "that's a price that has to be paid." He illustrated this point with the example of *Brown v. Board of Education* (1954), in which the Court broke from its past to make clear that racial segregation in public services violates fundamental constitutional precepts.[2]

The experience of Judge Roberts – now Chief Justice Roberts – was far from unique. His appointment was followed by those of Samuel Alito, Sonia Sotomayor, and Elena Kagan. The role of precedent arose during each of their confirmation hearings. All three of them offered explanations similar to that of then-Judge Roberts: The Court's precedents warrant meaningful deference, but such deference is not absolute.[3] And they have continued to endorse

[1] Black's Law Dictionary (10th ed. 2014).
[2] 109th Cong. 141–4 (2005).
[3] 111th Cong. 300 (2010) (J. Kagan); 111th Cong. 96–7 (2009) (J. Sotomayor); 109th Cong. 318–9 (2006) (J. Alito).

this understanding of precedent upon taking their positions on the Court. Indeed, every sitting justice has acknowledged the importance of deferring to precedent under certain circumstances. Each justice has also noted that precedent must sometimes yield. The question is *when*.

That question has been at the center of many of the Court's most controversial rulings. It was there when the Court upheld the central holding of *Roe v. Wade*. It was there when the Court rejected a challenge to the *Miranda* warnings that police officers must give to suspected criminals. More recently, it was there when the Court ruled that the First Amendment affords strong protection to political ads by corporations and labor unions – a decision President Barack Obama criticized during the 2010 State of the Union address not simply for being wrong, but for having "reversed a century of law." These disputes over precedent are pervasive and important. They are also deeply complex. The complexity reaches all the way down to the foundational issue of why a judge would ever willingly accept a ruling she believes to be wrong.

The study of precedent is the study of mistakes. Some past decisions were misguided from the outset. Others began sensibly enough but became shaky over time as facts changed. The issue in either case is what to do next. Should today's judges stand by prior decisions they view as incorrect? Or should they set the record straight and improve the law going forward?

At first glance the answer may seem obvious: Judges should never consciously repeat the mistakes of the past. But the calculus turns out to be complicated. People might have made investments and modified their behaviors as a result of past judicial decisions. There is also the worry that if judicial decisions are reversed too readily, the law will lose its durability and impersonality and be reduced to whatever today's judges say it is. And it is always possible that, notwithstanding the contrary belief of today's judges, the previous decision actually represents the more accurate interpretation of the law. In light of possibilities like these, maybe it is better – at least sometimes – to let things be.

As then-Judge Roberts noted during his confirmation hearing, the Supreme Court has offered a host of considerations to inform the choice between retaining and jettisoning a decision that is incorrect in the eyes of today's justices. Relevant factors include the precedent's procedural workability, the soundness of its factual premises, the extent to which subsequent decisions have eroded its foundations, and the reliance it has generated. Still, the justices continue

to disagree over the role of precedent in particular cases. To some students of the Court, the best explanation for this disagreement is that stare decisis is really no principle at all. On that account, fidelity to precedent seldom (if ever) sways a justice from her preferred course. There is so much play in the joints that even as they talk about stare decisis, the justices manage to preserve the precedents they like and overrule the ones they don't.

These sentiments occasionally come from the justices themselves. Justice Scalia once criticized a majority opinion for using the doctrine of stare decisis as a "result-oriented expedient" rather than a consistent principle.[4] A decade earlier, Justice Marshall directed a comparable criticism at a majority opinion that upset settled doctrine. He concluded that "[n]either the law nor the facts" had changed; "[o]nly the personnel of this Court did." To Justice Marshall, the lesson was clear: "Power, not reason, is the new currency of this Court's decisionmaking."[5]

Comments like these reflect a tension in the Supreme Court's treatment of precedent. While there is widespread agreement among the justices about the factors that are potentially relevant to a dubious precedent's retention or overruling, there has been far less discussion of how stare decisis fits into various theories of judging. Nor has the Court devoted much attention to explaining why certain outcomes are so problematic as to trigger prompt overruling, while others should be tolerated in pursuit of values such as stability, continuity, and the protection of settled expectations. The lack of a comprehensive explanation can sometimes make it seem like the Court is being inconsistent in its treatment of precedent. The effect is especially pronounced within the realm of constitutional law, which draws the Court into debates over the protection of fundamental liberties and the essential structure of government. Some thirty years ago, Henry Monaghan described the problem in terms that remain resonant today: "Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations. As a result, stare decisis seemingly operates with the randomness of a lighting bolt: on occasion it may strike, but when and where can be known only after the fact. A satisfactory theory of constitutional adjudication requires more than that."[6]

Without a meaningful role for precedent, the law sacrifices a share of its continuity, constraint, and impersonality. Decisions of the Supreme Court

[4] Lawrence v. Texas, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting).
[5] Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).
[6] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 743 (1988).

become the products of fluctuating assemblages of justices who come and go from the bench rather than the outputs of an enduring institution that maintains its identity over time. The danger is not that the overruling of precedent will lead to rioting in the streets or widespread resistance to the Supreme Court's edicts. The costs are more in the nature of untapped potential. Time and again, the justices have underscored that deference to precedent promotes the rule of law. But those affirmations occur at the level of abstract theory. By translating them into practice, the Court can bolster the idea that its decisions flow from enduring legal principles rather than individual proclivities, and that the Constitution truly is more than "what five Justices say it is."[7]

Allow me to illustrate by reference to *Citizens United v. Federal Election Commission* (2010), about which I will have more to say in the pages ahead. In *Citizens United*, a five-justice majority voted to overrule precedent by enlarging the First Amendment liberties of corporations and labor unions. Four justices resisted that result, but they fell one vote short. For now, let us reserve judgment on whether the better argument was that of the five-justice majority or the four-justice dissent. Instead, think about the impact of the case going forward. Absent some presumption of deference to precedent, whether *Citizens United* remains the law of the land – which is to say, what the First Amendment means as applied to an important area of campaign finance regulation – depends on whether personnel changes at the Court turn the four-justice dissent into a five-justice majority. Nor does the cycle end there. Assume that *Citizens United* is reversed after a new justice arrives at the Court, but that in short order a member of the majority coalition retires and is replaced by a differently minded justice. Without a meaningful doctrine of stare decisis, the pendulum could just as easily swing back. All this despite the fact that the Constitution itself will not have changed a bit.

The *Citizens United* example sheds light on the connection between politics, judicial appointments, and the role of the Supreme Court in the constitutional order. In 2016, Lawrence Norden wrote in *The Atlantic* that "it is no exaggeration to say that the next appointments to the Supreme Court will have a profound impact on political power in the United States."[8] The underlying premise is clear: In modern constitutional law, the salient mechanism of change is not the formal amendment process, but rather the appointment of new justices to the Supreme Court.

[7] Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

[8] Lawrence Norden, *The U.S. Supreme Court Can Still Take Big Money Out of Politics*, ATLANTIC, January 13, 2016.

This reality, I submit, is dispiriting and detrimental. Constitutional principles should be overarching and enduring. Deference to precedent advances the valuable ideal that it takes something more than a group of nine (or, in a split decision, five) individuals to revise what the Constitution requires. To be sure, the identity and interpretive predilections of individual judges will always matter. The composition of the courts will and should remain a topic of interest to political campaigns and social movements. But the fact that judges matter does not resolve the issue of *how much* they should matter. A meaningful doctrine of precedent asks the individual judge to subordinate – not always, but sometimes – her personal view of a case to the historical practice of her court as an institution. Judges still matter under a regime of stare decisis. They just matter less. And that is a valuable thing in a system that aspires to promote the rule of law as opposed to the rule of individual men and women.[9]

This book develops a theory of precedent designed to enhance the stability and impersonality of constitutional law. The problem with the Supreme Court's current approach to precedent is not that the justices are behaving in an unprincipled manner. The problem is that the modern doctrine of stare decisis is undermined by principled disagreements among justices acting in good faith. The doctrine's structure and composition all but guarantee that conclusions about the durability of precedent will track the justices' individual views about whether decisions are right or wrong and whether mistakes are harmful or benign. To rehabilitate the doctrine of stare decisis so it can bridge philosophical divides, we need to rethink the way in which precedent interacts with constitutional theory.

The starting point is recognizing the implications of a basic fact about US legal culture. The American legal system has not reached anything approaching consensus regarding the proper method for understanding and applying the Constitution. Rather, US law is home to pervasive disagreement over constitutional interpretation. That requires a theory of stare decisis attuned to the challenges of judicial disagreement and the value of precedent in overcoming them. It remains possible for stare decisis to play the vital role the Supreme Court has described for it in enhancing the continuity and impersonality of constitutional law. But for that to occur, we need to reconsider the doctrine from the ground up. The prevailing approach to precedent implies a greater degree of agreement about constitutional theory than actually exists. If stare decisis is to fulfill its promise, we must account for the unique challenges

[9] *Cf.* Monaghan, *Stare Decisis and Constitutional Adjudication*, *supra* note 6, at 752 ("A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

posed by disagreements – good-faith, principled disagreements – about the proper ends and means of constitutional interpretation.

Having foreshadowed the conclusions toward which the book will build, allow me to explain the path it will take.

In the first part of the book, I aim to provide a descriptive and analytical account of precedent that is independent of the normative claims that will come later. Chapter 1 begins by distinguishing two common situations: those in which a court is considering the effect of its own prior decisions, and those in which a court must apply decisions from a tribunal of superior rank. The former scenario involves what are sometimes called horizontal precedents; the latter involves precedents that operate vertically, running from higher courts to lower courts. Though both situations deal with the impact of prior decisions on later courts, they are governed by different rules in the US federal system. While a court always has the power to reconsider its own past decisions, lower courts do not enjoy comparable discretion to revise the opinions of higher courts. The Supreme Court has insisted on this point, making clear that lower courts may never reject a Supreme Court decision – even if the decision is obviously flawed, has been eroded over time, or has been called into question by the justices themselves. These different rules require distinguishing between vertical and horizontal precedents, even while recognizing that some of the arguments for (and against) deference in the two contexts will overlap.

After drawing a line between vertical and horizontal precedents, Chapter 1 turns to another pivotal distinction, this one between precedential *strength* and precedential *scope*. In evaluating the role of precedent, it can be tempting to focus exclusively on the degree of constraint that prior decisions exert on future disputes. It is a precedent's strength that ultimately determines whether there is a sufficient justification for overruling it. Yet strength is only part of the equation. No matter how strong a precedent is deemed to be, it has no constraining force in situations it does not reach. There must be a threshold determination whether a prior decision applies to a later case. Sometimes it is quite clear that one case governs another, so the only valid options for the later court are to reaffirm or overrule. But in many other cases, whether a precedent applies to the case at hand is a thorny and contentious question. Keeping in mind these dual considerations of strength and scope is crucial to analyzing and, hopefully, improving the treatment of precedent.

Next, I introduce two more sets of distinctions that are helpful in understanding the law of precedent. The first is the type of case a court is called upon to resolve. Conventional wisdom holds that judicial interpretations of statutes are entitled to maximum deference going forward, whereas interpretations

of the Constitution receive weaker deference. I offer some reasons for being skeptical about this distinction, and I argue that in all events, the fact that constitutional precedents receive relatively weak deference under existing law does not mean such deference is weak in absolute terms. Even if statutory cases receive the most insulation from overruling, that leaves a broad range of possibilities for how much deference should attach to constitutional decisions. The intricacies of constitutional stare decisis will be my focus for much of the book, though many aspects of my analysis will apply to statutory (and common law) decisions as well.

The remainder of Chapter 1 surveys the various functions that precedents serve in modern American law. Precedents are means of transmitting knowledge from past to present, so they can improve judicial decision-making even when there is no obligation to follow them. In some cases, though, it is not left to the later court to make up its mind about whether to follow precedent. Instead, the later court is duty-bound to stand by an earlier decision. This is easiest to see in the context of vertical precedent, as when a federal trial court is required to follow a Supreme Court decision despite reservations about that decision on the merits. Precedent can also constrain future iterations of the court that issued it. The Supreme Court is properly understood as constrained to follow its precedents under certain conditions: namely, when the Court's articulated criteria for overruling are not satisfied. This constraining function presents both the strengths and weaknesses of precedent-based judging in their starkest form. At its best, precedent limits the discretion of subsequent judges and contributes to a stable, consistent, and impersonal system of law. Yet a strong doctrine of precedent can also lead to the repetition and entrenchment of earlier judges' miscues. These are the stakes of the debate.

I elaborate on these stakes in Chapter 2, which begins by chronicling some of the commonly cited benefits of deference to precedent. They include the conservation of judicial resources, the protection of settled expectations, and the preservation of a stable environment to facilitate planning. They also include impersonality. A commitment to precedent can encourage the equal treatment of litigants, reducing the extent to which the idiosyncrasies of their situations affect the outcome of their disputes. At the same time, deference to precedent can allow the law to transcend the identity of the judge who happens to be presiding over a particular case. If a judge must follow precedent, her individual preferences and tendencies become less salient.

On the other side of the scale are the costs of abiding by precedent. Imagine that five justices of the Supreme Court conclude that a prior decision reflects an erroneous understanding of the Constitution. Those justices also happen to be stalwart proponents of stare decisis, for reasons including continuity and

impersonality. They accordingly vote to reaffirm the decision, notwithstanding their misgivings about its rationale. While they believe themselves in possession of a sound basis for doing so, the justices relinquish the opportunity to replace (what they believe to be) an incorrect rule with a more accurate one. They consciously allow a mistake to go uncorrected. I will end up defending a meaningful doctrine of precedent despite these countervailing considerations. But the costs must be appreciated if the doctrine of stare decisis is to strike the appropriate balance between continuity and change.

Before closing the second chapter, I offer a few thoughts about the link between stare decisis and the Constitution. Issues of constitutional legitimacy are complicated and fascinating, but I do not dwell on them for the simple reason that they are uncontroversial in modern judicial practice. Justices of the Supreme Court vary in their readiness to overrule flawed decisions, but no justice has challenged the lawfulness of stare decisis. Still, a few commentators have raised such a challenge, so I briefly examine some possibilities for defending the legitimacy of stare decisis in constitutional cases. Those possibilities draw on the Constitution's text, the background understandings and practices in place at the time of the founding, the structure of the federal judiciary, and the need for judges to act in a collective, cooperative fashion notwithstanding their interpretive disagreements.

Chapters 3 and 4 unpack the complementary concepts of precedential strength and precedential scope. I explain how both concepts operate under the Supreme Court's existing approach to precedent, and I emphasize how they are shaped by underlying conclusions about the ends and means of constitutional interpretation.

To begin with precedential strength: Nearly a century ago, Justice Brandeis described the tension inherent in the doctrine of stare decisis as pitting the importance of leaving the law *settled* against the value of getting the law *right*.[10] This characterization has endured, and for good reason. In deciding whether to overrule a flawed decision, it is natural to inquire into the bad effects the decision has created and to predict the beneficial effects that would accompany a change of direction. But the factors that make a decision good or bad are neither static nor universal. They depend on the interpretive theory that a particular judge adopts. For some judges, a prior decision's moral implications shape whether it is harmful or benign. Other judges treat those considerations as legally irrelevant. Some judges measure the severity of a mistaken interpretation based on how sharply it departs from the Constitution's original meaning at the time of the founding. Others find the Constitution's original meaning to

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

be less important than considerations such as a decision's pragmatic or moral ramifications.

The point is simply that judges rely, whether explicitly or implicitly, on their interpretive and normative commitments to determine whether a prior decision is correct in its reading of the Constitution. This can and does lead to principled disagreements. If some Supreme Court justices focus on the Constitution's original meaning while others focus on contemporary mores or policy judgments, it should be unsurprising when they part ways over the soundness of certain precedents. Those same variances in interpretive philosophy also inform the subsequent – and distinct – determination of precedential strength, which dictates whether a prior decision should be reaffirmed despite its flaws. Every judicial decision has a host of consequences, ranging from on-the-ground practical effects to broader implications for governmental design and political morality. Determining what types of consequences are legally relevant depends on a given judge's interpretive philosophy. In turn, assessing whether a prior decision is so problematic as to warrant overruling requires analyzing its legally relevant implications while excluding other matters. That enterprise is necessarily shaped by one's judicial philosophy.

The same is true of a precedent's scope of applicability, which I discuss in Chapter 4. Evaluating whether a prior decision is relevant to a newly arising dispute begins with figuring out what the prior decision means. In making that determination, a common step is to draw a line between judicial statements that were necessary to a case's resolution and statements that were dispensable, with the former representing the decision's *holding* and the latter mere *dicta*. That distinction informs the traditional definition of precedential scope: Holdings are entitled to deference in future cases, whereas dicta are nonbinding and may be accepted or rejected at the pleasure of the subsequent court.

Notwithstanding its historical pedigree, the holding/dicta distinction fails to explain existing federal practice, including at the Supreme Court. While the Court occasionally insists on a strict line between binding holdings and dispensable dicta, it regularly defers to aspects of its opinions – including sweeping rules and doctrinal frameworks – that range beyond the application of specific law to concrete fact. Whether this phenomenon should be lauded or jeered depends on underlying beliefs about the judicial role, the requirements of the Constitution, and the utility of precedent in constraining subsequent decision-makers. Some interpretive philosophies seek to minimize the extent to which judicial pronouncements displace factors such as the original meaning of the Constitution's text. On those theories, it is sensible to construe precedents narrowly. Other theories make greater use of precedent as a tool of judicial constraint or a source of common ground among differently minded