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Charles J. Cooper

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# STARE DECISIS: PRECEDENT AND PRINCIPLE IN CONSTITUTIONAL ADJUDICATION

Charles J. Cooper†

Let me say at the outset that it is high time that the Federalist Society devoted a panel at a national symposium to the doctrine of constitutional stare decisis. For if there is any principle that is fundamental to the true conservative, if there is any doctrine that is inviolable to the true conservative, if there is any rule that is cardinal to the true conservative, it is stare decisis. And if you don't believe me, ask any true liberal.

Isn't it amusing that liberals, who only recently have perceived the profound value of "stability of the law," have taken to lecturing conservatives on what it takes to be a true conservative?

Listen to Sidney Blumenthal, a Washington Post writer who fancies himself as an expert on conservatives. He has denounced conservative attempts to "rescind the standing law" on "settled" constitutional questions. Blumenthal explains that "[c]onservatism is a defense of tradition," and he bemoans calls for a return to a constitutional jurisprudence of original intention. This path, he says, "attacking at least 60 years of Supreme Court precedent," is "unprecedented" and "a radical departure from settled law."<sup>1</sup>

My favorite authority on true conservatism, though, is Professor Alan Dershowitz of the Harvard Law School. As he explained during the 1984 presidential campaign, "truly conservative justices . . . will abide by the notions of stare decisis, . . . [a]nd they will not move in to simply count the votes and try to overrule a prior decision."<sup>2</sup> Any attempts to undermine settled cases, such as *Roe v. Wade*<sup>3</sup> or *Miranda*,<sup>4</sup> would constitute a departure from true conservative principles. But if you vote for Ronald Reagan, he warned in 1984, "Mr. Meese will appoint judges who are essentially sworn to a program of reversing certain Supreme Court decisions. Some-

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† Assistant Attorney General, Office of Legal Counsel, United States Department of Justice. The author gratefully acknowledges the contributions of Bradford Clark, an attorney-adviser in the Office of Legal Counsel, to the preparation of this Article.

<sup>1</sup> Blumenthal, *The Right's Quest for Law from a Mythical Past*, Wash. Post, Nov. 3, 1985, at C1, col. 4.

<sup>2</sup> *The MacNeil/Lehrer News Hour: The Character of the Court—A Timeless Sport*, Transcript #2357, at 2 (EBC & GWETA television broadcast, Oct. 9, 1984) [hereinafter *MacNeil/Lehrer*] (available on Nexis).

<sup>3</sup> 410 U.S. 113 (1973).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

thing the liberals have never done."<sup>5</sup> Perish the thought!

The truth, of course, is that stare decisis has always been a doctrine of convenience, to both conservatives and liberals.<sup>6</sup> Its friends, for the most part, are determined by the needs of the moment. Justice Douglas, writing in 1949, candidly described the phenomenon: "Today's new and startling decision," he said, "quickly becomes a [new] coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new *status quo*. It will then take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past."<sup>7</sup>

Justice Douglas, of course, was describing the conflict between the *Lochner*-era Court and the Court of which he was then a member. But his observations are equally applicable to describe today's rush to embrace constitutional stare decisis by those who, only a short time ago, thrilled to the sight of the Warren Court engaging in the judicial equivalent of strip-mining. As Professor Phillip Kurland has observed: "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."<sup>8</sup>

The shifting allegiance to stare decisis by Justice Robert Jackson vividly demonstrates the point. In 1937, when he was a lowly Assistant Attorney General in the Justice Department stumping in support of President Roosevelt's court-packing plan, Jackson said this: "Precedents are the most powerful influence in aiding and supporting reactionary conclusions. The judge who can take refuge in a precedent does not need to reason."<sup>9</sup> Thus, he called for enactment of a law permitting Roosevelt to appoint a "majority of the Court [with] the courage to throw overboard the doctrine that precedents rule constitutional decisions. A minority has already indicated a will to relax this dead hand."<sup>10</sup> But, he complained, "[a]rchaic procedure [and] musty precedents . . . make government by litigation impossible."<sup>11</sup>

The court-packing plan failed, but Roosevelt got the Court that

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<sup>5</sup> *MacNeil/Lehrer supra* note 2, at 2.

<sup>6</sup> I am not here speaking, of course, of vertical stare decisis; that is, the obligation of lower federal courts to follow decisions of the Supreme Court. There is no serious debate regarding this obligation, perhaps because the alternative is so obviously chaos.

<sup>7</sup> Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

<sup>8</sup> P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 90-91 (1970).

<sup>9</sup> Address by Assistant Attorney General Robert H. Jackson at the New York Economic Club, New York City, transcript at 10 (Mar. 24, 1937) (on file at *Cornell Law Review*).

<sup>10</sup> *Id.* at 10-11.

<sup>11</sup> *Id.* at 11. Elsewhere Assistant Attorney General Jackson argued that the Supreme

he wanted nonetheless, a Court that included Jackson. In 1944, after the Court's task of replacing the old with the new was pretty much complete, Justice Jackson returned to the issue of precedent: "I cannot believe," he told the American Law Institute, "that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would . . . substantially impair the rule of *stare decisis*."<sup>12</sup>

Similarly flexible in his attitude on *stare decisis* is Justice Goldberg. Anticipating, no doubt, a reexamination of many Warren Court rulings, Justice Goldberg attempted in 1971 to construct a new theory of the doctrine. Realizing that his participation from 1962 to 1965 in the Warren Court's unprecedented string of constitutional overrulings "suggests a 'credibility' problem," Goldberg admitted that "making my defense of *stare decisis* at all convincing requires justification of the Warren Court's overrulings."<sup>13</sup> Those overrulings were justified, according to Justice Goldberg, by "a general and neutral principle that has long been observed, although, as far as I am aware, it has never before been fully articulated."<sup>14</sup> Justice Goldberg described his "neutral" theory of *stare decisis* as follows:

The principle to which I refer . . . is that *stare decisis* applies with an uneven force—that when the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of *stare decisis* are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution.<sup>15</sup>

Notwithstanding his use of the term "neutral," this theory of *stare decisis* is a convenient doctrine for Justice Goldberg. A close

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Court's contradictory decisions on the binding nature of precedent were precedents supporting his call for the Court's departure from precedent:

It is true that the precedents of the past hang like a shroud about the Court. But the degree of devotion to precedent in lieu of reason is in that Court's discretion, even by its own precedents. A minority of the Court has expressed [its] will to freedom. Justice Brandeis has said: "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not decisive. Whether it shall be followed or departed from is a question entirely within the discretion of the Court which is again called on to consider a question once decided." (*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 at 405-409).

*Reorganization of the Federal Judiciary Hearings on S.1392 Before the Senate Comm. on the Judiciary, 75th Cong., 1st Sess. 37, 51 (Mar. 11, 1937) (statement by Robert H. Jackson, Assistant Attorney General).*

<sup>12</sup> Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944).

<sup>13</sup> A. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 74 (1971).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 74-75.

examination of Justice Goldberg's writing on constitutional issues, especially his votes and opinions during his tenure on the Supreme Court, reveals a rather straightforward constitutional philosophy: constitutional decisions that contract personal freedoms are erroneous; constitutional decisions that expand individual liberties are correct. Indeed, Justice Goldberg has said as much. In a recent article, he explained that "the Supreme Court itself has overruled prior decisions restricting the rights of Americans to liberty and equality and, indeed, has courageously enlarged these rights."<sup>16</sup> One searches the United States Reports in vain for a case in which Justice Goldberg invoked this theory of stare decisis in affirming an earlier constitutional case with which he disagreed. Thus, far from neutral, Justice Goldberg's theory of stare decisis is carefully designed not only to justify many Warren Court decisions overruling precedent, but also to shelter those decisions from the rigor of reexamination by successors who do not share his constitutional philosophy.

I think that the doctrine of stare decisis, in the context of written (i.e., constitutional or statutory) law, suffers from two serious weaknesses: First, it is inherently subjective, and few judges, including Supreme Court Justices, can resist the natural temptation to manipulate it. Second, and more fundamentally, its avowed office is to shelter error from correction.

Both of these deficiencies were on display in the Supreme Court's recent decision in *Johnson v. Transportation Agency*.<sup>17</sup> In *Johnson*, a male employee in the roads division of the county transportation agency was passed over for the position of road dispatcher in favor of a female employee found by the district court to be less qualified. He argued (1) that he had been denied the promotion because of his sex and (2) that Title VII of the 1964 Civil Rights Act was intended by Congress to prohibit such discrimination. Five Justices of the Supreme Court agreed—that is, agreed that Mr. Johnson had been passed over solely because of his sex and that Title VII had been designed to ban such discrimination. Yet a majority of the Supreme Court nonetheless denied him relief and thus ensured that countless persons like him would suffer precisely the kind of sex and race discrimination that Title VII, according to five members of the Court, was designed to forbid.

This candid judicial repealer of a duly enacted congressional statute came about because two of the five Justices who believed that Mr. Johnson was entitled to relief under Title VII invoked the doctrine of stare decisis. Justices Stevens and O'Connor could not

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<sup>16</sup> Goldberg, *Keeping Faith With the Constitution*, *Christian Science Monitor*, Apr. 20, 1987, at 15, col. 1, 16, col. 1.

<sup>17</sup> 107 S. Ct. 1442 (1987).

bring themselves to join Justice Brennan's opinion, but joined the result because they did not want to overrule the *Weber* decision.<sup>18</sup> *Weber*, you will recall, held that the racially discriminatory exclusion of a white male from a craft-training program is not prohibited by the section of Title VII that provides as follows: "It shall be . . . unlawful . . . for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ."<sup>19</sup>

Let's take a moment to examine Justice Stevens' discussion of stare decisis, for it provides an extraordinary illustration of the extent to which stare decisis can be a doctrine of convenience. Incidentally, while the *Johnson* case raises the stare decisis issue in a statutory rather than a constitutional context, I believe that the following points apply equally in both contexts.

Justice Stevens defined the issue thus: "[T]he only problem for me is whether to adhere to an authoritative construction of the Act [*Weber*] that is at odds with my understanding of the actual intent of the authors of the legislation."<sup>20</sup> Noting the "undoubted public interest in 'stability and orderly development of the law,'" Justice Stevens decided to adhere to *Weber* because (1) it had been decided and (2) it was, as he put it, "now an important part of the fabric of our law."<sup>21</sup>

For his standard, Justice Stevens borrowed from Benjamin Cardozo's book, *The Nature of the Judicial Process*: " "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." ' "<sup>22</sup> In relying on this passage, however, Justice Stevens failed to recognize that Cardozo was discussing the role of stare decisis in the development of the *common law*. After all, Cardozo made the point in 1921, when he was a judge of the New York Court of Appeals, the bulk of whose decisions dealt with the common law. And much of the rationale underlying the operation of the doctrine of stare decisis in the common law context is simply inapplicable in the statutory or written law context. Justice Stanley Reed, when he was Solicitor General, explained the distinction well. Noting that "[s]tare decisis has been a guiding principle of the common law from its beginnings," Justice Reed wrote:

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<sup>18</sup> *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

<sup>19</sup> 42 U.S.C. § 2000e-2(a)(1) (1982); *see also* 42 U.S.C. §§ 2000e-2(d), 2000e-2(a)(2) (1982).

<sup>20</sup> *Johnson*, 107 S. Ct. at 1459 (Stevens, J., concurring).

<sup>21</sup> *Id.* at 1459.

<sup>22</sup> *Id.* at 1459 n.4 (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (quoting B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 152 (1921))).

However, the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere. The other systems apply a written document to the concrete controversies which come before the court . . . The judge who applies a section of a civil code, a constitution or a statute, must always measure the decisions of his predecessors against the document which they were interpreting. However high the authority of the prior decisions, they remain inferior to the law itself. Contrast with this the philosophy of the common law jurisprudence. There is no law but the judicial decisions themselves. The judge who decides a case fashions the law as he decides. His decision, at the moment of its pronouncement, joins the mass of decisions which constitute the common law. . . . Right or wrong, they are the law. Accordingly, the common law judge who does not follow *stare decisis* does more than to differ with his predecessors; he quite literally changes the law.<sup>23</sup>

Thus, if the lawmaker in the first instance is the judge, as in the common law, then the judge is free to change the law, but should do so only for reasons that outweigh the public interest in stability in the law. That the governing common law precedents are in conflict with the "mores of the day," Cardozo thought, as do I, is sufficient reason to depart from the common law precedents. But if the lawmaker is the legislator or the framer, the judge is not free to change the law, regardless of how inconsistent it is with the judge's view of the mores of their day. While the Supreme Court has often exercised the powers of the legislature and the framers, it has never claimed them.

Let's indulge the assumption, however, that "the *mores* of [our] day" are somehow relevant to issues of statutory construction, and go on.

Justice Stevens next concluded that "the *mores* of [our] day" "favor adherence to, rather than departure from, precedent."<sup>24</sup> To sustain this proposition, he offered one proof: namely, that Chief Justice Burger, in his dissent in *Weber*, "observed that the result reached by the majority [in that case] was one that he 'would [have been] inclined to vote for were [he then] a Member of Congress considering a proposed amendment to Title VII.'"<sup>25</sup>

Now, Chief Justice Burger is many good things, but to my knowledge Justice Stevens is the first to regard him as a failsafe barometer of the "*mores* of [our] day." To the contrary, if one consults

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<sup>23</sup> Address by Solicitor General Stanley Reed at the Meeting of the Pennsylvania Bar Ass'n, transcript at 133 (Jan. 7, 1938) (on file at *Cornell Law Review*).

<sup>24</sup> *Johnson*, 107 S. Ct. at 1459 n.4 (Stevens, J., concurring) (quoting *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring)).

<sup>25</sup> *Id.* (quoting *Weber*, 443 U.S. 193, 216 (Burger, C.J., dissenting)).

something that at least purports to measure the “mores of [our] day”—public opinion polls—one finds that a large majority of the American people consistently oppose the granting of race and sex preferences in the workplace. Indeed, shortly after the *Johnson* case was handed down, *U.S.A. Today* published the results of a nationwide poll showing that 58% of the women surveyed disagreed with the Court’s ruling.<sup>26</sup>

So, Justice Stevens’ analysis reduces to this: he cast his vote in favor of permitting sex discrimination that he believes is barred by Title VII, because a five-Justice majority made a similar error in 1979 regarding race discrimination, and the error is now a part of the fabric of our law, because it is in harmony with the mores of our day in 1987, which mores are clearly reflected by the fact that in 1979 Warren Burger would have voted in favor of a measure permitting sex discrimination had he been in Congress. So strained is this reasoning that the candid mind is tempted to suspect that Justice Stevens’ vote was driven instead by the decision’s result, which he praises elsewhere in his opinion.<sup>27</sup> The temptation becomes difficult to resist upon an examination of a prior comparable case: *Monell v. Department of Social Services*.<sup>28</sup>

In *Monell*, the Supreme Court held that municipalities are subject to damages liability under section 1983.<sup>29</sup> In so doing, the Court overruled the contrary case of *Monroe v. Pape*,<sup>30</sup> decided seventeen years earlier and followed in several subsequent cases. Justice Stevens overcame his devotion to stare decisis and voted with the majority, but he did not write separately. In subsequent opinions, however, he has provided two justifications for his vote in *Monell*. Both reasons betray the inherent subjectivity and manipulability of stare decisis. First, *Monroe* did not qualify for stare decisis, according to Justice Stevens, because it was “egregiously incorrect.”<sup>31</sup>

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<sup>26</sup> USA Today, Mar. 31, 1987, at 3A, col. 7.

<sup>27</sup> See 107 S. Ct. at 1458, 1460.

<sup>28</sup> 436 U.S. 658 (1978).

<sup>29</sup> Section 1983 reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

<sup>30</sup> 365 U.S. 167 (1961).

<sup>31</sup> The “egregious” error test is evidently an evolving standard. In *Florida Dep’t of Health and Rehabilitative Serv. v. Florida Nursing Home Ass’n*, 450 U.S. 147, 153 (1981), Justice Stevens adhered to *Edelman v. Jordan*, 415 U.S. 651 (1974), although he thought it erroneous, on the ground that it “represents an interpretation of the Eleventh

*Weber*, then, must be just "incorrect," not egregiously so. But the truth is that calling *Weber* "egregiously incorrect" is an understatement. As Professor Gerald Gunther noted shortly after *Weber* was handed down, "there has rarely been a case in which the normal ingredients of statutory interpretation, the text and the legislative history, were so one-sidedly against the majority."<sup>32</sup>

His second justification for overruling *Monroe* is that "Congress phrased some older statutes [such as section 1983] in sweeping, general terms, expecting the federal courts to interpret them . . . on a case-by-case basis in the common-law tradition."<sup>33</sup> And what was the sweeping, general term at issue in *Monell*? "Person."

Quite apart from the inherent subjectivity of the doctrine, application of *stare decisis* in most cases, including *Johnson*, is objectionable for a more fundamental reason. The point was made well, and very well, by the Pennsylvania Supreme Court in 1787:

A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgement, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.<sup>34</sup>

I find this argument powerful, more powerful than the countervailing arguments based on stability and predictability. And it is at its strongest in constitutional cases, for judges are oath-bound to rule in accordance with the Constitution, not with prior opinions interpreting the Constitution.<sup>35</sup> But it is not strong enough to support the necessary consequence of its own logic—i.e., that no issue

Amendment that had previously been endorsed by some of our finest Circuit Judges [and] therefore cannot be characterized as unreasonable or egregiously incorrect." Four years later, in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 304 (1985), Justice Stevens was won over. In a dissenting opinion, he stated that "additional study has made it abundantly clear" that the decision "can properly be characterized as 'egregiously incorrect.'" *Id.* Justice Stevens refrained, however, from disclosing what new learning on the subject had been unearthed by the additional study.

<sup>32</sup> Gunther, *Burger Court: Nine Men Search For What is Right, Regardless of Law*, Nat'l L.J., Aug. 13, 1979, at 60, col. 2; see also Mintz, *Court Ends '79 Term in Dissonance*, Wash. Post, July 8, 1979, at A1, col. 2. (Philip Kurland remarked of *Weber*: "The majority opinion was without substantial basis in any way, shape or form.")

<sup>33</sup> *Guardians Ass'n v. Civil Service Comm'n* 463 U.S. 582, 641 n.12 (1983).

<sup>34</sup> *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178 (1786).

<sup>35</sup> The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.

is decided finally until it is decided correctly. This view rejects the claims of stare decisis in all cases,<sup>36</sup> and that is farther than I am willing to go.

In defending his suspension of the writ of habeas corpus, Lincoln did not end his argument with the point that the Constitution authorizes the President to suspend the writ whenever rebellion threatens the public safety. That the suspension was necessary to the survival of the union was alone sufficient, Lincoln argued, whether or not it was constitutional. As he put it:

[T]he legality and propriety of what has been done . . . are questioned, and the attention of the country has been called to the proposition that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon. The whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?<sup>37</sup>

In essence, Lincoln believed that his obligation to abide by a single provision of the Constitution had to give way to his larger

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Douglas, *supra* note 7, at 736; see also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-10 (1932).

<sup>36</sup> Assistant Attorney General Robert Jackson expressed sympathy for this position: Legal philosophy sets up a method of thinking that is not accepted by any other profession. Unreasoning devotion to precedent is so normal for the lawyer that Joseph Choate in eulogy of James C. Carter, noted as almost an eccentricity of the genius "that he was not always willing to admit or to recognize the binding force of precedents, however numerous, which failed to run the gauntlet of his own reasoning powers. One of his favorite maxims was, that nothing was finally decided until it was decided right.\*\*" And Choate referred to this trait as "vulnerable"!

Address by the Assistant Attorney General Robert H. Jackson at Annual Dinner of the New York Bar Ass'n, New York City, transcript at 5, (Jan. 29, 1937) (on file at *Cornell Law Review*).

<sup>37</sup> Special Session Message to Congress (July 4, 1861), 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 25 (J. Richardson, comp.). Lincoln was responding to Chief Justice Taney's conclusion that only Congress is authorized under the Constitution to suspend the writ of habeas corpus "when, in cases of rebellion or invasion, the public safety *does* require it." *Id.* U.S. CONST. art I, § 9; see *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861).

obligation to take all necessary measures to save the union. While the analogy, to be sure, is imperfect, I think Lincoln's reasoning provides useful insight for a judge deciding whether to yield to a prior constitutional decision that he conscientiously believes to be erroneous.<sup>38</sup> Surely a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss—if to do so would cause such harm to the body politic that, in a relative sense, it would be on the order of killing the body to save a limb. True, this is a standard that few cases can satisfy. I am advised by experts in such matters that the paper money case is one such case,<sup>39</sup> and the claim seems entirely plausible to me. Judge Robert Bork has made a similar point regarding the commerce clause cases on which much of the modern administrative state has been constructed.<sup>40</sup> I do not doubt that there are other cases that would qualify under the Lincolnesque standard I have described.<sup>41</sup> But only such a stringent standard can justify following a precedent rather than the Constitution when the two are in conflict. In all other cases, I, along with Herbert Wechsler, "stand with the long tradition of the Court that previous decisions must be subject to re-examination when a case against their reasoning is made."<sup>42</sup>

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<sup>38</sup> I say "conscientiously believes to be erroneous" in order to distinguish those close and difficult cases in which the judge cannot elevate his *inclination* on an issue to *belief*. In such cases, stability and predictability in the law, a proper respect for the views of one's predecessors, and a sense of modesty regarding one's own infallibility are reason enough to follow precedent.

<sup>39</sup> *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

<sup>40</sup> There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not be overturned, even if thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it.

*A Talk With Judge Robert H. Bork*, DISTRICT LAW., May/June 1985, at 32.

<sup>41</sup> For example, while I do not agree with those who maintain that *Brown v. Board of Education*, 347 U.S. 483 (1954), was erroneously decided (*see* R. BERGER, GOVERNMENT BY JUDICIARY 116-33 (1977)), I think that, even if it was, it is among those cases that would qualify for application of *stare decisis*.

<sup>42</sup> Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).