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STABILITY AND RELIABILITY IN JUDICIAL DECISIONS

Frank H. Easterbrook†

Text and precedent are an old pair. So old it should frighten us that we do not have a theory of their interaction. Precedent is the device by which a sequence of cases dealing with the same problem may be called law rather than will, rules rather than results. (In a system of civil law there may be no “precedent” at all, on the conceit that the Code contains all rules and the gloss none.) To have a theory of precedent is to have a theory of the extent to which judges’ acts are law. Yet we do not have such a theory. Veteran judges such as Cardozo can proclaim that no theory is possible, that adherence to precedent is simply a matter of trial and error, and that when adherence is too dissonant with other rules or too harmful because of effects of the rules, we shall stop adhering.¹ There we have it—a grand balancing test, with neither a maximand nor weights to produce a decision when the criteria conflict, as they always do. Few Justices hint at a theory of precedent; no Justice has produced a consistent theory; although the academy is awash with competing theories of substantive law, there is no contest in the theory of *stare decisis*. Not because one candidate has swept the boards, but because no one has a principled theory to offer.

This backwater of the law is nonetheless incalculably important for the theory of adjudication as well as the practice. Precedent is important for reasons other than the desire that likes be treated alike, so that decisions can be called law. It is valuable for reasons classical liberals should approve because it is the way in which rules arise without a central authoritative decider. The stock of precedents is produced by generations of judges wrestling with hard questions. They study the problems and record their conclusions, as traders of coal study its qualities and make their bids. Like the price of coal, the system of precedent may incorporate more wisdom

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¹ See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142-80 (1921). Karl Llewellyn took the position that the interaction of judges on a multi-judge court, and a sense of the leeway in the existing cases, rather than texts and rules, are the sources of stability in decisionmaking. K. LLEWELLYN, *THE COMMON LAW TRADITION* 19-61 (1960); see also *Grumman Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (overruling the doctrine).

than any single trader or judge possesses. Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others. In a world where questions arise faster than the information necessary to supply answers, this is a boon. Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem. This increases both the chance of the court's being right and the likelihood that similar cases arising contemporaneously will be treated the same by different judges.

Yet to express the role of precedent as one of economizing on information and of cutting down idiosyncracies is to show why it will be unstable. Although the system of precedent impounds information and wisdom greater than any judge can bring to bear, no particular decision does so. A given case may have been tossed off between sandwiches or based on a factual blunder.² In principle, modern judges have all the information available to their forbears, plus any discoveries in the interim, and the benefit of hindsight. Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects—both for other strands of doctrine and for the world at large—and improve on the treatment of the earlier case.³ This possibility of improvement makes precedent unstable. It ought to be unstable, provided we can focus judges' attention and bring to the case sufficient care to be sure that our information exceeds that of the judges who acted earlier. Yet this also means that we do not have—never can have—a comprehensive theory of precedent, any more than we can have a complete theory of the "just price" of wheat, or of when to spend more time studying the attributes of securities. There is an equilibrium degree of disequilibrium.

Precedent is under pressure from other sources as well, sources that ensure continual evolution and occasional sharp breaks. One is the power of *ex post* claims. Precedents—rules—are based on categorical predictions: rule utilitarianism, when that is the system of reasoning. Each case may seem to be an exception. Perhaps the rule may be subdivided; perhaps a claim of act utilitarian nature appears to countermand the rule; perhaps a simple *ex post* claim for "fair" division of the stakes, the future be damned, will appeal to

² For example, the infamous *Enelow-Ettelson* doctrine. See *Employers Ins. of Wausau v. Shell Oil Co.*, 820 F.2d 898 (7th Cir. 1987); *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731 (7th Cir. 1986); see also *Grumman Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988) (overruling the doctrine).

³ See *Israel, Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

judges.⁴ These are all temptations to be resisted, but judges often yield. That will put pressure on good rules. Sometimes the power of these claims will produce bad rules (multi-factor balancing test with two tiers, three prongs per tier, and four tines per prong); these flabby cases should come under pressure in turn. Too many forks in doctrine produce forks in tongues.

There will also be pressure because no one can quantify how bad is bad enough. We can see the virtue of abandoning *Plessy*,⁵ *Swift v. Tyson*,⁶ *Lochner*,⁷ even *Low v. Austin*,⁸ despite the fact that each lasted fifty years or more. *Low*, for those who don't remember, was the original-package doctrine of 1872, disabling states from taxing or regulating goods until removed from their original packages. It led to all sorts of bizarre warehousing adaptations and doctrinal curlicues. It is the reason why only a constitutional amendment could produce Prohibition: without the amendment, states could not stop the importation and distribution of liquor in its original package. One day in 1976 the Court overruled *Low*, in a case where the parties hadn't even asked.⁹ After the original package doctrine vanished, everyone instantly forgot what it had been all about.

Doctrines with sufficiently bad pedigrees or sufficiently bad effects must go, but this is argument by weasel word—how bad is bad enough? Do reliance interests counsel caution? Surely some, but how much? We have no way to reduce these questions to a common metric and therefore no way to give the answer.

Next there is the problem that the alternative to disavowing precedent is manipulating it—and again we have no sound way other than shared values of the legal culture to deal with such manipulation. Some “manipulation” is beneficial. The need to get around a doctrine may show that there is some problem. Just as a series of anomalies in the data may spur scientists to propose a new theoretical model, so a series of “manipulative” cases that evade or mischaracterize some existing precedent may set the stage for overruling. Or they may show the value of the precedent, leading the manipulative cases to be buried and the original doctrine to be reaffirmed.

Manipulation as experiment is inevitable and sometimes beneficial. But like biological mutation, manipulation may do a lot of harm to a few people before dying out. How do we recognize and

⁴ See Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12 (1984).

⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶ 41 U.S. (16 Pet.) 1 (1842).

⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

⁸ 80 U.S. (13 Wall.) 29 (1871).

⁹ *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

control manipulation, to separate the beneficial experiments from the claims of just-this-one-time, the siren song of ex post division? Neither legal system nor legal culture contains a method of identifying the "good-ness" of a given manipulation, and there is no way to control it. Manipulation is possible because the precedent does not constrain the selection of which factors matter. Was *Plessy* a case about blacks on trains, or was it about Jim Crow? It could have been read broadly or narrowly. Which features of a case matter will be influenced by subsequent developments in the legal culture.

Then there is the problem of public choice.¹⁰ Kenneth Arrow showed that when institutions make decisions by majority vote, they will generate logically inconsistent results unless the voters have very similar orderings of choices. Over many years the court will leave behind precedents that, if not inconsistent, generate inconsistent implications. We have been told in tort law, for example, that physicians must give elaborate warnings of the risks of their services, to protect the autonomy of the patients to decide what treatment to receive. We have also been told that laws requiring physicians to give warnings about the medical service of abortion are unconstitutional infringements on the autonomy of physicians—apparently, and incongruously, because these warnings might affect the patients' choices.¹¹ Faced with such tension, what does the system of precedent contain, when a judge comes to another case about warnings? Or about autonomy? Or about abortion? "Adherence" to precedent when the system has built-in conflicts increases the judge's power of decision, the opposite of its intended effect. The judge may decide either way in the name of precedent, while hiding the actual reasons. Only the overruling or reconstruction of an earlier case can relieve this pressure and restore effective constraint! The alternatives are either no guidance at all, or a precedential rumor chain, each repetition diverging subtly from its predecessor until the rule bears no resemblance to the original.¹²

There is another way in which precedent destabilizes the system: path dependence. There is a formal proof that someone who has control of the order in which decisions are taken can bring about any result, provided he can reduce each choice to a selection between two alternatives and provided old disputes are closed. Each time there is a choice between two pairs, with majority winning. The defeated choice is cast aside and never reemerges—even

¹⁰ See generally Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

¹¹ *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760-64 (1986).

¹² See *NLRB v. International Bhd. of Elec. Workers*, 107 S. Ct. 2002, 2016 (1987) (Scalia, J., concurring); *Hickey v. Duffy*, 827 F.2d 234, 242-43 (7th Cir. 1987).

if almost all would prefer it to the final choice. The technical proof is daunting.¹³ The insight is simple. Consider an example in the Supreme Court: abortion and sodomy. Both deal with sexual privacy. Suppose decisions occur in this sequence: (1) does the right of sexual privacy protect abortion?; (2) is this right the same as the right of sexual privacy about sodomy?; (3) does the right protect sodomy? The abortion case is decided 7-2 pro, and we learn in *Bowers*¹⁴ that eight of the nine Justices think abortion and sodomy are identical cases; so if all follow stare decisis, sodomy is protected. Now reverse the order of decision: if sodomy arrives first and is held not protected, then abortion also is not protected. The link between result and the sequence of cases was broken only because some justices, Powell in this instance, put stare decisis to one side. No sound system of law allows such fundamental questions to turn solely on the order in which cases arrive for decision—but stare decisis could do so unless tempered.¹⁵

There must be play in the joints. Only the optimal amount is uncertain. For a long time judges have said that statutes are different from common law and constitutional law. Courts should attach a meaning to a statute, then let Congress act or not; a court could only confuse Congress and increase uncertainty by revisiting the subject; Congress can correct mistakes.¹⁶ I doubt that this is so. A statute, like a constitution, is a text—a way in which decisions taken in the past influence the present. To treat a statute as different denies this role to the text. It assumes, in other words, that as soon as the judges have spoken, the decision of the past ceases to matter, and the only question is what the sitting Congress wishes. This simply denies the purpose of the enterprise: to enforce the decisions of a prior Congress. (I put to one side decisions under statutes, such

¹³ McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 *ECONOMETRICA* 1085 (1979).

¹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁵ You could give less weight to precedent even at the expense of logical consistency. Consider what would happen if the rule of *Griffin v. Illinois*, 351 U.S. 12 (1956), under which the state must pay for a criminal defendant's transcript on appeal—even if there is no constitutional right to take an appeal, were used to require the state to pay for everyone's newspaper. See Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 588-91 (1987). This possibility—rather, the variant in which parents say that the Constitution requires free transportation to school—is before the Supreme Court in *Kadrmas v. Dickinson Pub. Schools*, 402 N.W.2d 897 (N.D.), *prob. juris. noted*, 108 S. Ct. 63 (1987).

¹⁶ See, e.g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). One of the most famous overruling decisions also contains a strong statement of the special durability of the construction of a statute. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938). E. LEVY, *AN INTRODUCTION TO LEGAL REASONING* 32, 54 (1948) contains a sophisticated argument in support of this approach. Most other treatments of the point are more assertion than argument. The Court itself has never offered more than fragmentary justifications for its custom.

as the Sherman Act, that transfer a dollop of law-making power to the courts after the fashion of the common law. I am concerned here with statutes that might be thought to contain rules rather than an allocation of power to make rules.)

Treating statutory interpretations as binding—even as “part of” the statute—might be the best way to proceed if we had one perpetual Congress sitting full time. But we have had 100 Congresses, all different. Today’s Congress may leave in place an interpretation of a law simply because today’s coalitions are different. The failure of a different body to act hardly shows that the interpretation of what an earlier one did is “right.”

More than that. It takes less political support to block a law than to get one passed. The structural features of government make legislation hard. To break a filibuster requires 60% of the votes, substantial time, and concessions on other subjects; all may be in short supply. Suppose Congress #1 passes a law because it has 65 votes in the Senate and the time to pass it; Congress #2 with 59 Senators supporting the original rule may be unable to reenact it or unwilling to do so given other priorities. Senators who had extracted concessions in exchange for their support of the bill on the first occasion may demand a new set of concessions—and these, cumulatively, may have been too high a price to pay had all been demanded in the first instance. There are many related points. For example, the judicial interpretation itself may create a legislative constituency, a form of political wealth effect that makes undoing a decision costly. Agenda influence is at work and may defeat a majority will as a committee sits on a bill. The coalition may settle on a second-best position if the first is removed.

We must think of Congress as a *discontinuous* body. Doing this affects the theory of precedent. If the purpose of statutory construction is to carry out the decisions of the enacting body, the quiescence of a later body does not reflect at all on the propriety of the interpretation.¹⁷

¹⁷ The difference between *Monell v. Department of Social Serv.*, 436 U.S. 658, 695-701 (1978), and *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987), makes the point. Although one Justice wrote both opinions, they employ utterly inconsistent methods to decide when a statutory decision may be reconsidered. *Monell* says that the Court may revisit an issue when necessary to produce (1) consistency with prior practice (as opposed to holdings) and (2) consistency with recent “willingness” of Congress to legislate municipal liability in other statutes; and when (3) there is an absence of reliance interests and (4) a plain error in the earlier decision. *Transportation Agency* talks only about congressional acquiescence. The two approaches lead to very different results. Adding *United States v. Johnson*, 107 S. Ct. 2063 (1987), where all the Justices except Scalia and Powell switched sides from their position in *Transportation Agency*, shows the problems of the enterprise. See also *Grumman Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988), in which the Court unanimously jettisoned a 53-year-old doc-

Even if Congress were a continuous body, there would still be two objections to treating statutory interpretation as a special case.¹⁸ One is constitutional structure. Inferring legislative authority from inaction is what the one-house veto case was about.¹⁹ To change the law you need the concurrence of Congress and President. The action of the President and one house won't do it. So why should a proposal by the Court change the law if Congress does not act? Remember, there is a one-house veto within Congress; bicameralism and all that mean that a single house can "veto" a change in the law in response to a "proposal" embedded in a judicial decision. Inaction of the legislature as a whole means nothing more than that one house or the President balked. If the first construction of a statute is sacrosanct, then the Court can change the law forever by making a proposal that is followed by the inaction of a single house of Congress. That is structurally unsound. We wouldn't say that if the President promulgates a regulation and Congress doesn't change the law, then the regulation *is* the law, beyond recall. There is no reason to treat cases differently from regulations.²⁰

The second objection appears in Justice Scalia's dissent in *Johnson v. Transportation Agency*.²¹ It is based on logrolling. Suppose a majority of both houses wants something (say, preferences for women in employment) but can't get it—because of a filibuster, be-

trine without even referring to principles of stare decisis—although the Court in *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 185 (1955), had declined to revisit this doctrine on the ground that Congress was the appropriate body. *Grumman* seemed to take the next 33 years of congressional silence as a reason why judges should act!

¹⁸ At least, I offer only two. Professor Eskridge offers some others in a critique of the accepted doctrine quite different from mine. Eskridge, *Overruling Statutory Precedents*, (forthcoming in GEO. L.J. (1988)). He proposes to relax the strong presumption against revamping a statute when changing circumstances (including later statutes)—"subsequent developments in social mores, public policy, and social trends"—have made the old interpretation outmoded or undesirable. This proposal depends on his model in Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987), which in turn accepts too much of G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) for my taste; statutes are not just helpful advice on how courts should go about governing. Attention to changing mores is more appropriate in constitutional law, for reasons to which I return. Still, Professor Eskridge's treatment is an uncommonly thoughtful combination of survey and critique, which no one interested in the subject can overlook.

¹⁹ *INS v. Chadha*, 462 U.S. 919 (1983).

²⁰ Treatments that portray the Court and Congress as partners in a dialogue, producing a form of "constitutional common law" or "statutory common law," see G. CALABRESI, *supra* note 18; Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), disregard the nature of Congress as a divided and discontinuous institution, in which a single house, sometimes a single member, can block action. By treating Congress as a "person" holding the same views today as twenty years ago, they assume away the most interesting problems.

²¹ 107 S. Ct. 1442 (1987).

cause of a veto, because it wants something else even more and must give up its highest hopes to satisfy opponents. So it settles for color-blindness, in exchange for which it gets wide application, a federal enforcement agency, and other benefits. If a court later flips the color-blindness rule into a preferential rule, the new rule will be impossible to repeal—that original majority is still there. But using the inability to repeal the rule as a reason to stand pat on it simply ignores the fact that legislation is *compromise*—that laws are not enacted section by section, but as a package.²² If courts become instruments by which packages are undone, laws will be harder to pass. Bargains must be kept to be believed, and inferences from legislative inaction are a means by which bargains are broken.

Having challenged the shibboleth that it should be harder to overrule a statutory decision than a constitutional or common law decision, I want to kick sand on the shibboleth that it should be easier to overrule a constitutional decision than a statutory or common law decision. (No, they are not the same thing.) I agree with but do not take up the cry: “If the Justices expect the rest of us to take their decisions seriously, they had better take them seriously themselves.”²³ None of the sitting Justices feels bound by precedent in the way the second Justice Harlan did.²⁴ Today’s Justices cast their votes just as if prior cases did not exist, adding for good measure (often with transparent insincerity) that “even if the earlier case were binding on me, I would still vote the same way because” That, however, is not my target; nor is the fillip that the same Justices often blubber about their colleagues’ faithlessness to precedent; Justices who take this line simply ensure that their successors and comrades treat their opinions in the same way they treat others’. I am concerned with the widely-shared belief that it should be especially easy to revisit a constitutional holding because these decisions are immune from legislative upset. Statutory and common law cases may be revised by Congress; constitutional doctrines may be revised only by amendment and by the Court; since amendment is so hard, it follows that revision by the Court should be easier. Everyone supports this position—with what enthusiasm in a given case depends on whose ox is being gored, but every Justice subscribes to the basic proposition.²⁵

²² A point the Court sometimes recognizes. See *Rodriguez v. United States*, 107 S. Ct. 1391 (1987); see also Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988).

²³ See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

²⁴ See Bourgnignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251.

²⁵ Two cases decided on the same day—*Solorio v. United States*, 107 S. Ct. 2924 (1987), and *Welch v. Texas Dep’t of Highways*, 107 S. Ct. 2941 (1987)—make the point.

Yet the Constitution is a text and, like a statute, designed to constrain the options of the present by a decision made in the past. The objective in each case is to understand and apply that decision. That the decision may imbue the living with discretion (whether through an open-ended clause of the Constitution or through a grant of power to regulate in the “public interest, convenience, or necessity”) is a detail; we are interested in either case with transmitting the original decision free from garbles, and it is a garble to misunderstand a rule or to treat a grant of discretion as if it were a rule. The text (its history, structure, and so on) identifies the correct treatment for either Constitution or statute.

The observation that it is hard to amend the Constitution does not imply that judges should revise their work more freely. Consider why the Constitutional Convention made amendment so hard. One reason is to ensure that a super-majority of the people supports any constitutional rule—whether a grant of power to the national government, or a constraint on the exercise of power by government—at the time of its inception. Another is to ensure stability in the structure of government. The political branches and the people can plan against the background of known rules; statutes presuppose certain constitutional doctrines (think of all the statutes, both passed and foregone, that presuppose the existence of a “dormant commerce clause”). They can plan not only transactions and statutes but also campaigns of constitutional change.

Ready overruling of constitutional cases interferes with both objectives. It reduces the stability of governmental institutions, denying the polity the benefit (if such it is) of continuity. Not coincidentally, it saps the drive for change in the constitutional text. People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive (depending on the new rules the Court supplies). Legislators may explain their inattention to proposed amendments

Solorio overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Welch* overruled *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). In each case the majority (Rehnquist, C.J., White, Powell, O'Connor, and Scalia, JJ.) appealed to the principle that constitutional interpretation should be flexible. Although Justices Brennan, Marshall, and Blackmun, dissenting in *Solorio*, chastised the majority for disregarding principles of *stare decisis*, 107 S. Ct. at 2934, 2941 (“blatant disregard for principles of *stare decisis*”), the same three (joined by Justice Stevens), dissenting in *Welch*, complained that the majority was eliminating an aberrant case while taking the landscape as given; they proposed to overrule more than 100 cases and completely recast the law of governmental immunities, 107 S. Ct. at 2962-70. It did not trouble them that the same contention had been raised and rejected quite recently. I do not join the battle about who was right on the merits in *Solorio* and *Welch*. I raise the cases only to show that all nine Justices in these cases were willing to revise constitutional rules, and the dispute seemed to be only about whether to do so by the quart (the majority) or the tank car (the dissenters in *Welch*).

with the refrain that the proposal may be unnecessary. (This was one of the many excuses given for opposing the Equal Rights Amendment. Whether the prophesy was self-fulfilling is an interesting question that I do not pursue.) Proponents of the amendment perceive the gains of change as less when the Court may come 'round, so they work less hard. The Court's emphasis on the difficulty of amending the Constitution therefore may lead, paradoxically, to an increased difficulty in securing a change.

As for stability: it does not take much argument to demonstrate that ready alteration of constitutional rules makes the effects of statutes and private bargains less predictable. So although I do not quarrel with the proposition that the Court ought to inter recent mistakes before they do serious damage,²⁶ I doubt that judges should be any more ready to unravel long-standing constitutional doctrines than they should be to revise long-standing statutory interpretations. Indeed, things should work the other way. Precisely because constitutional rules establish governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings.

Doctrines of the last twenty or even forty years do not have the same structural effects as the dormant commerce clause (a product of the mid-nineteenth century) or the application of the Bill of Rights to the states (which had been going on slowly since 1897, long before the acceleration in the 1960s).²⁷ They still have widespread effects on planning. Take *Miranda v. Arizona*,²⁸ which the Court unanimously reaffirmed a few years ago even though a majority of the sitting Justices probably would not have thought the doctrine attractive as a matter of first principles. *Miranda* has become a structural decision on which other doctrines and institutions depend. For example, to the extent *Miranda* makes it harder to obtain convictions, courts respond by increasing the sentences of those who are convicted, so as to keep general deterrence constant. The higher sentence levels are built into the guidelines that control sentencing in federal courts, and into the penalty structures of state

²⁶ See, e.g., *United States v. Scott*, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)). The *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), are the most famous flip-flop of this kind. It is easy to call such reversals "self-inflicted wounds," but the costs of, say, leaving the first *Legal Tender* case, *Hepborn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), standing would have been much higher.

²⁷ See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (takings clause); see also *Hurtado v. California*, 110 U.S. 516 (1884) (laying groundwork for some incorporation, although Court did not follow *Hurtado's* path).

²⁸ 384 U.S. 436 (1965).

law. One could not change *Miranda* without being prepared to re-think criminal sentences. So too with civil liability. We can contemplate "good faith immunity" for the police with more equanimity, given *Miranda* and the pressure it places on police to behave, than we could if only the pre-*Miranda* voluntariness doctrines governed interrogations.

A slightly different way to put this is to say that a constitutional overruling depends on moral and prudential judgments more than strictly legal ones. On the legal side, we can tell that a given rule has been eroded, but the erosion usually marks a moral or prudential problem—moral in the case of *Plessy v. Ferguson*,²⁹ prudential in the case of *Betts v. Brady*,³⁰ two cases properly dispatched even under my approach. The willingness of later generations of judges to evade or cabin the cases suggests that they were wrong, and even if not wrong were causing more trouble than they were worth. Other doctrines have received different treatment. "Substantive due process"—a doctrine without a constitutional foundation,³¹ but one practiced by judges ever since Justice Chase invoked "natural law" in *Calder v. Bull*³²—has been expanded rather than contracted through time. We see little effort to evade or challenge it in the legislature, no moral revulsion, no indication that the body of the law has rejected a transplanted foreign organ. Later Justices should respect such a doctrine as part of our governmental structure whether or not they think it wrong as a matter of first principles.

To accept the structural features of a doctrine is not necessarily to accept any given application. The application of this doctrine to produce a case such as *Roe v. Wade*³³ is not immune from scrutiny. The structural aspects of any constitutional doctrine should be more enduring than any one application. (I am not interested for current purposes in applications and express no views on any legal rule.) There is, moreover, a genuinely difficult problem in understanding the level of generality at which a constitutional doctrine should be preserved. Take the application of the equal protection clause to subjects other than race. That was accomplished long ago and is the basis of much of our existing governmental structure. But the conclusion that laws must be equal with respect to things other than race does not assist us in knowing what "equality" is; it is an empty vessel that can receive many libations. Judges should be shy about taking any rule at a high level of generality. Exceedingly general

²⁹ 163 U.S. 537 (1895).

³⁰ 316 U.S. 455 (1942).

³¹ See Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

³² 3 U.S. (3 Dall.) 386, 387-89 (1798).

³³ 410 U.S. 113 (1973).

rules, coupled with the understanding that judges have the power to interpret the law, transfer effective legislative power to the courts.³⁴ None of these limitations, however, affects the point I have been making, so long as it is clear that the proposition “doctrine X should be left in place unless there is a consensus that it is wicked” is not equivalent to “doctrine X should be pressed for all it can be worth.” Just as the Court wisely has declined to discard *Miranda*, so it has wisely declined to extend it.

I have brought you a few contentions: that the role of precedent should be similar for all decisions interpreting texts, with any difference in the direction of making it harder to revise constitutional interpretation, and that precedent can be a destabilizing as well as a stabilizing influence. Beyond those affronts to accepted wisdom I have little to say. I began without a theory of stare decisis and end that way.

³⁴ See *American Jewish Congress v. Chicago*, 827 F.2d 120, 137-40 (7th Cir. 1987) (dissenting opinion).