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Precedent, the Amendment Process, and Evolution in Constitutional Doctrine

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PRECEDENT, THE AMENDMENT PROCESS, AND EVOLUTION IN CONSTITUTIONAL DOCTRINE

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Recently, a formal policy report within the Department of Justice recommended that the Department should urge the Supreme Court of the United States to overrule its landmark 1966 decision in *Miranda v. Arizona*.[1] The general tenor of the report called to mind Gulliver's analysis of the doctrine of precedent. "It is a maxim among [our] lawyers," said Gulliver, "that whatever has been done before may be legally done again, and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedent, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly."[2]

In what circumstances, if any, is it appropriate for a Justice of the Supreme Court to vote to overrule a major constitutional decision? This is a timely and, indeed, always important question. It is also a question whose answer does not necessarily correspond to any particular political ideology. In some circumstances, liberals may see themselves as benefiting from a more aggressive tendency to overrule. In other circumstances, conservatives may see themselves as the beneficiaries. I would like to examine this question without regard to whether the precedent at issue is *Miranda* or *Bowers v. Hardwick*.[3]

There are two extreme positions. First, the Supreme Court should never overrule a prior decision. To support this view, one might argue that prior Justices should be treated in much the same way as the Framers themselves. The Justices of the Supreme Court may and indeed must interpret the prior judgments of the Framers, as expressed in the constitutional text, but they may not explicitly "overrule" those judgments. If the

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1. 384 U.S. 436 (1966). *See* UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1987).

2. J. SWIFT, GULLIVER'S TRAVELS 275 (Novel Library ed. 1947).

3. 106 S. Ct. 2841 (1986) (no constitutional right to engage in homosexual sodomy).

judgments of the Framers are to be explicitly overruled, it must be through the process of constitutional amendment.

One might argue that the decisions of prior Justices should be analogized to the judgments of the framers. Subsequent Justices may and must interpret such decisions, but they may not explicitly overrule them. If such decisions are wrong, outdated, or bad policy, they too should be dealt with through the processes of constitutional amendment.

At the time the Constitution was adopted, there was considerable disagreement over the amendment process. Thomas Jefferson believed that the Constitution should be rewritten every generation, on the theory that without frequent constitution-making there would be too little participation in the affairs of government. As Jefferson put it, "Some men look at constitutions with sanctimonious reverence, and deem them . . . too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human. . . . Let us not weakly believe that one generation is not as capable as another of taking care of itself. . . ."[4] James Madison rejected this view. He believed that Jefferson's vision would produce instability and generate "violent struggle."[5]

Had Jefferson's view prevailed, a policy of unalterable precedent would have been quite plausible, for the interpretive decisions of the Justices would then routinely be open to reversal through the processes of amendment. In fact, however, the Madisonian view has prevailed. The processes of constitutional amendment are quite cumbersome. As a consequence, in the 200-year history of the Constitution, only four times has the nation adopted a constitutional amendment to overrule a Supreme Court decision: the Eleventh Amendment overruled *Chisholm v. Georgia*[6]; the Fourteenth Amendment, *Dred Scott v. Sandford*[7]; the Sixteenth Amendment, *Pollack v. Farmers' Loan and Trust Co.*[8]; and the Twenty-Sixth Amendment, *Oregon v. Mitchell*.[9]

4. Letter to Samuel Kercheval, July 12, 1816, *reprinted in* THE PORTABLE THOMAS JEFFERSON 558-59 (1975).

5. Letter to Thomas Jefferson, Feb. 4, 1790, *reprinted in* THE MIND OF THE FOUNDER 232 (M. Meyers ed. 1969).

6. 2 U.S. (2 Dall.) 419 (1793).

7. 60 U.S. (18 How.) 393 (1857).

8. 157 U.S. 429 (1895).

9. 400 U.S. 112 (1970).

In such circumstances, the position that prior judicial decisions may not be overruled would produce a highly rigidified and inflexible jurisprudence. There would be little or no opportunity to correct mistakes or to reexamine prior decisions in light of the changing circumstances of an evolving society.

Now, it is important to note that these same concerns also arise with respect to the judgments of the Framers. Because we amend the Constitution so rarely, the judgments of the Framers entrap and rigidify our constitutional jurisprudence. As Jefferson warned, we may have come to see our Constitution as "too sacred to be touched."[10]

There are at least two factors, however, that may make this state of affairs acceptable with respect to the judgments of the Framers, even though it would not be acceptable with respect to the decisions of prior justices. First, the judgments of the Framers are for the most part expressed in grand generalities. They bind, but only in the most general sense. We can and have developed a lively and dynamic constitutional jurisprudence within the very broad confines of the Framers's design. A system of unalterable judicial precedent, on the other hand, with an ever-growing body of decisions, would gradually choke off all opportunity for growth and reexamination.

Second, the Framers's judgments were embodied in the text of the Constitution through the processes of constitution-making. The Justices of the Supreme Court may and must interpret those judgments, but no theory of constitutional interpretation suggests that the Justices are empowered explicitly to overrule those judgments. Prior Justices, on the other hand, have no greater constitutional authority than subsequent Justices. Their power to interpret the Constitution is not superior to the power of their successors under any interpretive theory. Thus, if subsequent Justices overrule the judgments of their predecessors, they are not rejecting judgments that have any greater constitutional status than their own.

This, then, brings me to the second extreme position— every issue of constitutional law is a question of first impression. Under this view, prior decisions have persuasive authority only. This poses the question: Why adopt a policy of precedent at all? Why should subsequent Justices ever have to follow a deci-

10. *See supra* note 4.

sion they believe to be wrong? Since their authority to interpret the Constitution is equal to that of their predecessors, why should they not be free to make their own, independent judgments as to the most appropriate interpretation of the constitutional text?

Several justifications are commonly offered for the doctrine of precedent. First, we do not have unlimited judicial resources. If every issue in every case is a question of first impression, our judicial system would simply be overwhelmed with endless litigation. Second, we need a degree of predictability in our affairs. Interests of fairness, efficiency, and the enhancement of social interaction require that governments and citizens have a reasonably settled sense of what they may and may not do. Third, the doctrine of precedent raises the stakes. The Justice who knows that each decision governs not only the litigants to the particular case, but the rights of millions of individuals in the present and future, will approach the issue with less concern with the merits of the litigants as individuals and more concern with the merits of the underlying legal question to be decided. Fourth, the doctrine of precedent reflects a generally cautious approach to the resolution of legal issues. It reflects the view that change poses unknown risks, and that we generally should prefer the risks we know to those we cannot foresee. It thus values Madisonian stability over Jeffersonian change. Fifth, the doctrine of precedent reduces the potential politicization of the Court. It moderates ideological swings and thus preserves both the appearance and the reality of the Court as a legal rather than a purely political institution. And finally, from the perspective of the Justices themselves, the doctrine of precedent enhances the potential of the Justices to make lasting contributions. If a Justice disregards the judgments of those who preceded him, he invites the very same treatment from those who succeed him. A Justice who wants to preserve the value of his own coin must not devalue the coin of his predecessors.

Now, if we reject the two extreme positions—precedent always controls, and precedent never controls—we are left with the hard question. When may a Justice appropriately overrule an important constitutional decision? What is needed is some accommodation between the values of stability and the necessity for change.

Perhaps the best way to approach the question is by reference to the reasons for overruling a case. Three reasons are worth considering. First, in some instances, a Justice may conclude that a prior decision was based on certain factual premises that have been proven incorrect and that the Justices who reached the prior decision would themselves have reached a different result, had they known then what the Court knows now. This would be the case, for example, if the prior decision was based on erroneous assumptions either about the state of the world or about the likely consequences of the decision. Honestly applied, this is the least problematic reason for overruling.

Second, in some instances, a Justice may conclude that a prior decision was premised on a state of affairs that has changed so much over time that the Justices who reached the prior decision would themselves have reached a different result in light of the changed circumstances. This might be the case, for example, when there are significant technological, economic, social, political, institutional, or jurisprudential changes. With such factual changes, our understanding of the meaning of particular constitutional provisions may evolve as well. On this view, a decision that was "right" in one set of circumstances may appropriately be overruled because it is "wrong" in a new and different era. This is a more controversial basis for overruling than the first, for there are those who eschew the idea of an evolving constitutional jurisprudence and who reject the relevance of changed circumstances. Nonetheless, this basis for overruling, honestly applied, seems to me perfectly reasonable.

Finally, a Justice may conclude that a prior decision was simply "wrong" at the time it was decided. Had he been a Justice at the time of the prior decision, he would have voted the opposite way. Now that he has found four other Justices who share his view, he will overrule the "wrong" decision. This is the most problematic basis for overruling. Without the justification of either inaccurate factual premises or changed circumstances, the Justice in this situation is merely substituting his judgment for that of his predecessors. And although his predecessors may have no claim to greater interpretive authority than their successors, it is likewise true that the successors have no greater interpretive authority than their predecessors. Why,

then, should the view of the successors prevail? Such a basis for overruling substitutes power for principle and generates instability, unpredictability, politicization, and all the other dangers sought to be avoided by the doctrine of precedent.

Having said this, I must concede that it has long been recognized, as Justice Frankfurter put it, that "the ultimate touchstone of constitutionality is the Constitution itself, not what [the Justices have] said about it."[11] Accordingly, the Justices have consistently maintained that the doctrine of precedent has less force in the realm of constitutional interpretation than in other areas of the law.

It is important, however, to understand the rationale behind this approach. The rationale has been well stated by Edward Levi:

> A change of mind from time to time is inevitable when there is a written constitution . . . [for] there can be no authoritative interpretation of the Constitution. . . . The Constitution in its general provisions embodies the conflicting ideals of the community. Who is to say what these ideals mean in any definite way? Certainly not the framers, for they did their work when the words were put down. The words are ambiguous.[12]

This ambiguity is no accident. Situations change and people's desires change. There must be room for the infusion of new ideas. In this manner, constitutional interpretation is able to "express the ideas of the community."[13]

Thus, the third basis for overruling—that the Justices are free to "go back to the Constitution itself"—is at its core merely a restatement of the second. Except in the most extraordinary of circumstances, a prior interpretation can be said to be "wrong" not in any definitive sense, but only in the sense that the process of constitutional interpretation is a process of evolution. It is a dynamic process through which constitutional law comes, as in Mr. Levi's words, "to express the ideas of the community."[14] Those who reject this vision of the Constitution and who insist on a definitive and static view of constitutional "right" and "wrong," ultimately must rely on power, rather than on principle, to effect their constitutional change.

11. Graves v. New York, 306 U.S. 466, 491 (1939).
12. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 58 (1949).
13. *Id.* at 4.
14. *Id.*

The real truth is that within the bounds of reason—and I believe that there are bounds of reason—*Miranda v. Arizona* is no more definitely wrong than *Bowers v. Hardwick* is definitely right. These decisions are based on widely divergent theories of constitutional interpretation, but these theories are each held by persons possessing intellect, thoughtfulness, a commitment to the Constitution, and good will. We must never stop debating these questions, but we must also not lose our humility in the process. If we stop, and if we insist definitely on the ultimate "rightness" of our views, then we surely pose the greatest threat to our constitutional order.