When precedent proves questionable: a structural analysis of overturning precedent on the US Supreme Court

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Abstract: When looking to overturn precedent, US Supreme Court Justices are faced with a challenge, how to maintaining the guise that they have not crafted new law. The principle of stare decisis dictates that when adjudicating cases, precedent should influence and direct future rulings. For countless reasons, the justices do deviate from precedent, intermittently expunging established precedent by overturning cases, and substituting the old with a new view of the law. How then do majority opinions simultaneously maintain the façade of judicial interpretation while asserting new law? Through the analysis of overturning cases three factors:

1 dismissal
2 invocation of precedent
3 appeal to societal norms – emerge in order to successfully supplant old law, while maintaining institutional legitimacy.

Keywords: stare decisis; precedent; Supreme Court; law; legitimacy; overruling; interpretation; judicial review; constitutional law; USA.

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1 Introduction

History shows that the US Supreme Court does depart from precedent when overruling previous cases. If then, deference to precedent is the mechanism by which to ensure that the Court is not "bypassing *Stare Decisis* for the purpose of successfully writing the Justices' policy preferences into law,"[1] how then do the justices assert their preferential outcome while maintaining institutional legitimacy? How are opinions of overturning cases crafted so that a language of stare decisis permeates, but desired conclusions are attained?

Part 2 analyses the prevalent scholastic approach to stare decisis and, looks at the extent to which the justices adhere to the doctrine of stare decisis in lieu of their personal policy preferences. Part 3 argues that the justices do make law, but in order to maintain institutional legitimacy they shroud their decisions in the language of interpretation. In order for a ruling to be seen as effective and forceful a justice must incorporate precedent, which acts as an external buttress to their decisions. This section will present a structured model adhered to by the justices when seeking to overturn precedent. Parts 4–6, will examine the applicability of this model.

This article utilises a case-style analysis, looking at three landmark decisions that have impacted US jurisprudence – *Gideon v. Wainwright,*[2] *Lawrence v. Texas,*[3] and *Citizens United v. F.E.C.*[4] Looking at the linguistic features of those Supreme Court decisions through the prism of a highly structured schema will expose the necessary actions to overrule cases. In other words, when advancing a policy preference in opposition to already established precedent what linguistic techniques and phenomena do the justices use in order to maintain the guise of deference to precedent, while simultaneously achieving their preferred outcome? By viewing the act of ruling as a performative proclamation,[5] the specifics of language become the primary instrument through which the justices can overturn precedent, while sustaining judicial efficacy.[6]

Scholars and judges have view the constraint of stare decisis to be more formidable in statutory review than in cases regarding constitutional adjudication.[7] Though judges see statutory interpretation to place a considerable constraint on their decisions to depart from precedent, the action of overturning constitutional decisions is no less formidable. Judges are not free to assert their preferences without taking a systematic approach. The sample set is far from exhaustive. There are many other cases that could have been selected and should still be scrutinised. However, these cases effectively and efficiently highlight the tactics necessary to overturn precedent, positing that this schema is applicable to all constitutional decisions rendered by the Supreme Court.

2 How scholars view stare decisis

The importance of stare decisis (literally let the decision stand) in influencing Supreme Court Justices is an area of much debate. Legal scholars and political scientists actively engaged in judicial politics all would assert different theories to explain the influence of precedent on the decisions of judges and justices.[8] Law students are expected to read and dissect judicial decisions to understand the application of the law, lawyers use previously decided cases in their briefs and arguments, and jurists of all levels cite cases in their decisions as justification,[9] all leading to a conclusion that precedent in some form is important for the functioning of a legal system. As asserted by Justice Benjamin Cardozo "adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice."[10] This may be true of lower court judges' respect for superior court decisions, yet it is questionable as to the importance of stare decisis on the decisions of Supreme Court Justices.[11]

Under an attitudinal model approach, it is assumed that the individual justices have policy preferences and will adjudicate cases in conformity with desired outcomes.[12] The US Supreme Court is organised in such a way as to allow the justices "to base their decisions solely upon personal policy preferences,"[13] where the disposition of any given

justice in conjunction with their normative perspective on policy direction is of paramount importance. Judges are not robots, thus appellate adjudication is not a quantitative science and to suggest such is substantially indefensible.[14] In their work *Crafting Law on the Supreme Court*, Maltzman, Spriggs, and Wahlbeck[15] convincingly show that a mechanical jurisprudence approach is flawed. The justices are strategic actors seeking to achieve personal policy preferences, but due to both institutional constraint, as well as existing in an interdependent forum, "outcomes on the Supreme Court depend on forging a majority coalition that for most cases... final Court opinions will be the product of a collaborative process…"[16] Adherence to one model would prove detrimental in looking to adequately account for the myriad of factors contributing to judicial decisions.[17] Therefore, to best assess the extent to which justices pay deference to stare decisis when looking to change policy, all judicial actions will be viewed through a threefold lens – that of attitudinal, strategic and institutional models.

Unlike the presidency or the legislature, which possess tangible sources of power – the legislature being the national bursar,[18] and the executive commanding the armed forces[19] – the judiciary, alternatively, exercises its power through the use of the pen. Comparatively, the pen seems weak when matched against the sword and the purse. In order to combat this inequality the Court crafts for itself institutional legitimacy through the fiction that the justices interpret, rather than construct law, "although every court makes law in a few of its cases, judges must always deny that they make law."[20] The law must be rooted in steadfast reasoning, and anchored to earlier decisions allowing for predictability. For if the justices were to assess each case anew and consistently supplant established norms with their own judicial preferences there would be little pretext for "accept[ing] the decisions of the Court as the governing framework for our society."[21]

Institutional legitimacy is paramount in the Court's dealings with other branches of government, however the source of this legitimacy is what is under scrutiny. Precedent serves as one legitimating factor. The purpose of precedent:

> "Is to urge judges to refrain from the usurpation and exercise of powers which, under the established law, do not belong to them or, as it is otherwise frequently expressed in legal terminology, to insure that our governments (both federal and state) shall be 'governments of law rather than governments of men'."[22]

Justices can proceed by shrouding their decisions behind precedent, so that it acts as a buttress for their reasoning and situates their choices on an equal footing with those who have occupied the bench before them.[23] The adherence to judicial constraint, whether external or self-imposed, is important in reaffirming the Court's power, thus creating renewed acceptance of its decisions. By constructing the appearance of restraint, members of the Supreme Court are able to successfully "move away from the fiction of interpretation and into the act of creation,"[24] while maintaining the façade that they have acted as elucidator of law. Jeffery Mondak contends that, "legitimacy is best viewed not merely as public agreement with a decision but as public acceptance of the authoritative basis of a ruling,"[25] through carefully selected language and reliance on the words of predecessors, the justices attempt to suggest that they have eschewed crafting law from whole-cloth. Instead, they strategically use the rationalisation of others to bolster their own reasoning, thereby creating an 'authoritative basis' for their decisions.

Precedent provides a foundation from which an opinion derives legitimacy. The lapsing of time gives an air of authority, turning something – which at its inception was considered questionable – into a "seemingly immutable source of external authority."[26]

By relying on previously decided cases, the author lends legitimacy not just to himself, but to the Court as an institution, making it more likely that others will accept and comply with its decisions and policies.[27]

Justices of the Supreme Court adhere to a doctrine of stare decisis, seeing it as the basis for their legitimacy. Individual personalities, and personal whims are checked against an adherence to established norms.[28] This notion suggests that, "on account of this [stare decisis] justices use the rules that are established by previous court cases as the basis for their subsequent judicial decisions."[29]

3 Judicially-made law

Ninety-nine cases out of a hundred, judges are not seeking to make law, but simply to apply the law to the facts before them.[30] The justices, in their opinions, spend a great deal of time recounting the facts of a case and considering how best to use the law to adjudicate the case. Further, from 1789 until the conclusion of the 2004 term, the Court overruled outright 208 previously established precedents,[31] which when compared with the overall number of cases decided throughout the history of the Supreme Court, comprise less than 1%. The Court has deemed precedent as an important factor, allowing for predictability and curbing caprice; "the judicial system requires that the rule of law be above the whims of the individual personalities who happen to occupy positions on the Supreme Court at any given time."[32]

Still, the justices are individual actors who are subject to all the faculties that are human. To opine that the justices approach each case as *tabulae rasae,* looking to align facts with legal scope in hopes of matching precedent with case, rendering mathematically accurate results is myopic. If judicial decision-making were so calculable then society should expect to consistently see nine harmonious votes. Yet, the annuls of US legal doctrine are replete with decisions that are affirmed with the smallest of margins. Further, the Court does overturn cases which it deems outdated or no longer reflective of societal values, indicating that mistakes are possible. Yet to overrule without a firm basis in established law would undermine the Court integrity and remove predictability from the law.

Legitimacy is important as far as the Court's capacity to ensure that its decisions will be considered authoritative by the other branches of government and society. However, justices need not simply influence those outside the Court, but must be conscious of intra-Court legitimacy. Though an author may have the support of a majority to announce his decision as law, the composition of the Court may change, bringing new members, all keenly aware of the words of Justice William O. Douglas:

> "A judge looking at a constitutional decision may have compulsions to revere 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. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him."[33]

Stare decisis may add a constraint factor to the breadth of any given opinion, however personal policy is paramount, and a member of the Court may look to advance their own punctilios, often at the expense of tradition.

As participants in a 'collegial game', justices find themselves jousting with their colleagues, strategically negotiating to achieve preferred personal outcomes. They do not "merely seek to establish legal policy consistent with their policy preferences; instead, they endeavor to create legal rules that are both consistent with their preferences and that actually influence legal and political outcomes in the intended manner."[34] Policies that reflect a justice's preferences are of little consequence if they are ignored by the other branches of government. Thus, an appeal to the doctrine of stare decisis grants both justification and gravitas to decisions by linking them to already realised rules of law.[35]

Institutional legitimacy is a concern for the justices when interpreting precedent. When making the decision to overrule, an opinion need not just garner the support of a majority of the Court, but must present itself in a way to engender acceptance by society. A decision to overrule is not a theoretical abstraction as conducted in law schools; it has practical applications on the rules that govern citizens of the USA. Reversing precedent is the most pronounced form of judicial influence, thus the decision to overturn should not be a hasty one. Judge Wallace believes; "a judge should consider overturning a prior decision only when the decision is clearly wrong, has significant effects, and would otherwise be difficult to remedy."[36] Yet, to claim "the decision is clearly wrong"[37] yields fertile grounds for undermining judicial legitimacy. Deciding "whether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any objective fact."[38] Judicial decision-making does not exist in a vacuum; the Court cultivates an aura of authority by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation"[39] Therefore, to ensure authority and plausibility, the "justices have an incentive to include a discussion of precedent in an opinion,"[40] allowing them to acceptably "reshape an existing legal rule and thus impact legal or political outcomes."[41]

The act of overruling is a delicate process. When a court makes the decision to undo the actions of their predecessors, they open themselves up to the possibility that they may be subject to that same scrutiny.[42] Despite this, judges do overrule since a blind adherence to the doctrine of stare decisis is not always appropriate or sound judgment.[43] As penned by Justice Oliver Wendell Holmes

> "It is revolting to have no better reasons for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the ground upon which it was laid down have vanished long since, and the rule simply persists from blind limitation of the past."[44]

It would be expected when overturning prior decisions that persuasive reasoning would be paramount. However, in addition to the use of persuasive reasoning, the justices appeal to dissenting opinions (should they exist) as justification for breaking from established law.[45]

The act of overturning previous cases forces the justices to sheds the guise of interpreting law and transitions them into crafters of law.[46] To maintain legitimacy and acceptance by others of their decisions, "a Justice must consider whether to incorporate relevant precedents and, if incorporated, how to interpret or treat those precedents."[47] Therefore, in order to overturn while "persuad[ing] the people that the decisions they make have principles justification, Justices often rely on the doctrine of stare decisis."[48] The justices will create the perception that they have shed erroneous decisions for a more principled one, which has justifiable foundations in precedent.

When choosing to depart from precedent the justices "are deprived of a justification that would automatically lend legitimacy"[49] to their decisions. By overruling, the Court erodes the very factor that grants its legitimacy, namely the concept of interpreting law. Justices of the Supreme Court, therefore, look to maintain the guise that they are simply interpreting law and not creating it. To make law is to usurp a Constitutional charge granted to the legislative branch of the government. Yet, to perpetuate "the constative fallacy of pretending to interpret, not create law, as well as the constative fallacy of overruling while pretending not to rule,"[50] the Court asserts that they have not made law, they simply have expounded its meaning. The challenge becomes how to sustain the fiction that they have not legislated, while overturning established precedent. To achieve this, the Court will appeal to three necessary tactics:

1 the dismissal of the overruled case

2 the invocation of precedent

3 appeal to morals and norms of society.

4 Gideon v. Wainwright

Gideon v. Wainwright[51] will begin this formal analysis of the linguistics of overturning precedent. Petitioner, Clarence Gideon, was charged in Florida state court with breaking and entering into a pool-hall with the intent to commit a misdemeanor. Under Florida law, such an act is considered to be a felony. Appearing in court Gideon requested that counsel be appointed to represent him. The presiding judge then informed him:

> "Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in the case."[52]

Upon granting certiorari, the Supreme Court allowed Petitioner to proceed in *forma pauperis* – appointing counsel to represent him. The question before the Court was "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?"[53]

Notably, in the *Gideon* case, Justice Black formally acknowledges that to leave *Betts v. Brady* standing "would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel."[54] Upon this basis the Court sought to overrule the *Betts* case. In order to reach the preferred outcome, the Court needed to 'erase' *Betts* from the cannon of law, replacing it with a new decision that was more congruous with their preferences. However, ruling without justification would leave the justices vulnerable to attack, specifically, that they had actively engaged in the law making process, a duty entrusted to the legislature, not the judiciary.

The *Gideon* Court evaluated whether the decision in *Betts* proved inconsistent with previous jurisprudence. To dismiss *Betts* would require the Court to substantiate a need to abandon it. Simply to assert that a case is wrong, without justification, would not safeguard this new decision from being overturned by later justices. Supporting its divergence, the Court asserted, "we but restore constitutional principles established to achieve a fair system of justice."[55] Though it appears that the Court is breaking with precedent, to buttress this position the Court claims that it is, in reality, restoring order

and correcting a wrong. The majority opinion in *Gideon*, though wary that ruling in favour of the Petitioner would contravene the decision in *Betts*, nonetheless contends, "upon full reconsideration, we conclude that *Betts v. Brady* should be overruled."[56] This new case – *Gideon v. Wainwright* – comes to dismiss the previous case – *Betts v. Brady*.[57]

In a further attempt to erode the foundation upon which the *Betts* case rested on, the decision in *Gideon* suggests that the *Betts* Court "has ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."[58] A series of cases all looking to undermine the decision in *Betts* are presented. *Powell v. Alabama,*[59] is cited as a case where the Court had previously upheld the right to counsel, as well as *Grosjean v. American Press Co.*,[60] and *Johnson v. Zerbst,*[61] which again affirmed:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment necessary to insure fundamental human rights of life and liberty.... The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done'."[62]

Thus far, the Court has looked to dismiss the overruled case as being unsound in logic and mistakenly incongruous with a litany of cases[63] establishing a pattern of jurisprudence that has recognised the Constitutional guarantee of representative counsel as incumbent upon the states; "[t]he Court in *Betts v Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested."[64] Hoping to secure the binding nature of *Gideon* on subsequent justices, the decision appeals to a believed normative societal view, "the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[65] The decision ends by noting, "twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down,' and that is should now be overruled."[66] In *Gideon*, all three tactics have been employed – dismissal of the overruled case, invocation of precedent to act as a bolster to the new position, and finally an appeal to greater societal norms.

5 Lawrence v. Texas

In 2003, the Supreme Court decided a case regarding the individual liberties of homosexuals to engage in consensual sexual activities. Two men, Petitioners John Geddes Lawrence and his partner Tyron Garner were engaging in personal sexual acts when a police officer entered, arrested both men and charged them with violating multiple sections of the Texas Penal Code, which states: "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[67] The statutes continues to define deviate sexual intercourse as:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person"
>
> "(B) the penetration of the genitals or the anus of another person with an object."[68]

The Petitioners challenged the constitutionality of this state statute, contending that it is a violation of the Equal Protection Clause[69] as well as Art. I § 3a of the Texas State

Constitution. Both claim were rejected and petitioners were assessed a fine. This case was reviewed by the Court of Appeals for the Texas Fourteenth District. The majority opinion for the Court of Appeals affirmed the lower court's decision, claiming that *Bowers v. Hardwick*[70] was the controlling federal case. The Supreme Court among other questions of individual rights and the status of consenting adults was faced with deciding, "whether Bowers v. Hardwick, supra, should be overruled?"[71]

The *Bowers* case, which was decided in 1986, upheld a Georgia state law that forbade all forms of sodomy, whether preformed by hetero- or homosexual individuals. Though the Georgia law looked to outlaw all actions of sodomy, the case in *Bowers* was brought by two consenting homosexual adults found engaging in anal-intercourse.[72]

In *Lawrence v. Texas*, the justices were faced with deciding, "whether Bowers itself has continuing validity."[73] If *Bowers* were to be held as binding, then an entire class of citizens would be denied equal protection under the Fourteenth Amendment.[74] Therefore, the central holding in *Bowers* could no longer be viewed as binding since, "its continuance as precedent demeans the lives of homosexual persons."[75] The controlling force of *Bowers* is criticised and subsequently erased, thus making room for new constitutional interpretations.

Dismissing *Bowers* allows for the crafting of new precedent. After deciding that a continued adherence to the central ruling in the *Bowers* case would deny a whole segment of the population equal protection, it becomes necessary to legally substantiate the claim that individuals have a right to decide intimate matters for themselves. Though the Court does cite a myriad of cases that deal with "the broad statements of the substantive reach of liberty under the Due Process Clause,"[76] two cases in particular are used as fodder for the decision in *Lawrence. Planned Parenthood of Southeastern Pa. v. Casey*[77] reaffirmed for society "that our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, family relationships, child rearing, and education."[78] The decision in *Casey* goes even further to assert "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[79] For the Court, homosexual individuals have the same right as heterosexual persons to enjoy these freedoms. Holding *Bowers* as binding would deny this right.

The second case that led the Court to invalidate *Bowers* was *Romer v. Evans.*[80] In this case it was decided that legislative action taken by the State of Colorado to deprive homosexuals protection under antidiscrimination laws was a violation of the Equal Protection Clause. *Romer* was important to establish that discrimination against homosexuals is not a legally defensible position, namely that there exists precedent indicating that homosexual persons are not to be excluded as a separate class of people. Invoking the precedents established in *Casey* and *Romer*, the decision in *Lawrence* is granted substantial footing on which to overturn *Bowers.*

Much had changed in the USA since the decision in *Bowers* was announced. Public opinion regarding homosexual activities and lifestyles had become more tolerant, and as such there was a societal expectation that all individuals were guaranteed the rights to love and intimately be with those whom they choose. Recognising this shift in American life, *Bowers* could no longer be sustained as credible, "in the United States criticism of Bowers has been substantial and continuing, disapproving of its reasoning in all respects,..."[81] At the time that *Lawrence v. Texas* was granted certiorari "the 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced

now to 13, of which 4 enforce their laws only against homosexual conduct."[82] The decision in *Lawrence* was not only supported by the Courts' understanding of *Casey* and *Romer*, but also by appealing to society's belief in a right to liberty for all. Dismissing the *Bowers* case, relying on precedent, and appealing to a national sense of liberty, the Court successfully removed *Bowers* from the US cannon of jurisprudence and substituted a new decision.

6 Citizens United

Finally, this analysis will assess the right to free speech – a zealously defended concept in US law – in light of the principles necessary to effectively overturn established precedent. The Court has spilt much ink protecting individual rights to speak without fear of reprise by governmental censorship or aggressive action. In *Citizens United v. F.E.C.*,[83] Citizens United, a non-profit corporation, sought to release a film entitled *Hillary: The Movie*, a 90 minute piece looking to persuade viewers not to vote for then Senator Clinton for president. It was Citizens United's intent to make the movie available through video-on-demand within 30 days of the 2008 primary elections. To do so would violate a federal statute, which prohibits corporations and unions from using general funds to make direct contributions to candidates or independent expenditures that expressly advocate for the election or defeat of a candidate through any media form.[84] Under federal statute 2 U.S.C §441b, Citizens United would be subject to criminal and civil penalties. In 2007, the corporation sought injunctive relief from the Federal Elections Committee. This claim was denied by the District Court. The case was granted review by the Supreme Court, which sought to consider whether statutory limits placed on a corporations' right to free speech is an infringement on First Amendment rights.

The lower courts had dismissed Citizens United's claims, holding that two cases had since been decided, *Austin v. Michigan Chamber of Commerce*,[85] and *McConnell v. F.E.C*,[86] which held that political speech may be limited due to a speaker's corporate identity.[87] Upon review, the Supreme Court asserted, "it has been noted that '*Austin* was a significant departure from ancient First Amendment principles'" and further, "we agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin.*"[88] Immediately, in the majority opinion, the Court looked to dismiss the controlling nature of *Austin*, preparing for a full overturning of established precedent.[89]

Similar to *Gideon*, when viewed in the context of US jurisprudence, the decision in *Austin* deviated from what had been established precedent, "the Court has recognized that First Amendment protection extends to corporations."[90] The Court shrouds its decision in the language of corrective judicial review to ensure legitimacy and support for the action of overturning. By asserting that they are correcting a mistake, the justices maintain the guise that they are simply interpreting and not crafting the law. Until the decision in *Austin,* the Court had never restricted speech based on the corporate identity of the speaker.[91] *Austin* is dismissed on grounds that it was a wrongly decided case and should no longer be considered binding, "our precedent is to be respected unless the most convincing of reasons demonstrated that adherence to it puts us on a course that is sure error."[92] Determining that *Austin* was a deviation from similar circumstances, the Court posits a 'most convincing of reasons' to reject the *Austin* case, and replace it with a decision that is both congruent with past decisions, and advances the preferential outcome of the majority.

To rule without steeping the new decision in recognisable precedent would more readily leave the decision open to question and possibly reversal by a later Court. The two cases that set the foundation for the ruling in *Citizens United* are *Buckley v. Valeo*,[93] and *First National Bank of Boston v. Bellotti.*[94] *Buckley* contends that government may not place limitations on the amount of personal capital a candidate may invest in their own campaign.

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[95]

This is important for establishing a foundation that money is a form of speech and an individual is free to spend their money to advance their message. In the *Bellotti* case, the Court ruled that a corporation has a First Amendment right to make contributions to political campaigns. Using the decision in *Buckely* to establish the notion that money *is* speech, the Court was able to hold in *Bellotti*, that if an individual may spend money to influence the political landscape, then a corporation should enjoy that same right. *Austin*, being viewed in light of *Buckely*, and by extension *Bellotti*, deviates from established precedent.

After exhausting other means by which to decide the case,[96] the Court determined that "there is no principled basis for doing this without rewriting *Austin's* holding that the Government can restrict corporate independent expenditures for political speech."[97] This is substantiated by the invocation of precedent, highlighting that presently, the action of overturning, is being undertaken to rectify a mistake in judicial decision-making. Legitimacy is maintained by appealing to a sense of corrective obligation, as well as advancing the claim that the Court is not crafting law, but interpreting law in light of a litany of cases all pointing to protecting corporate speech.

Lastly, to ensure acceptance of its decision by society, the Court crafts its majority opinion in a way to appeal to societal norms and accepted practices. The right to freely express oneself is a hallmark of US democracy; "speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[98] By recognising the visceral attachment Americans have to the First Amendment, the Court is able to legitimate the holding in *Citizens United* in the eyes of the general public as a means to curb governmental intrusion into personal rights:

> "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[99]

By appealing to a collective belief in the pseudo-sacrosanct nature of the First Amendment, the majority opinion capitalises on a societal norm that allows for the effective overturning of *Austin*.[100]

7 Conclusions

Judicial review, as conducted by the US Supreme Court, is not a monolithic process yielding uniform decisions. Cases are rendered that prove to be incongruous or unsustainable within the purview of the law. Precedent should not be taken lightly,

justices cannot choose to ignore the weight of an established case simply because they disagree with the holding, such an approach would turn the rule of law into the rule of personal predilection. Yet, neither is stare decisis an insurmountable obstacle, it "...is a principle of policy and not a mechanical formula of adherence to the latest decision."[101] Through carefully crafted and well reasoned decisions, the Court can – and sometimes is required – rewrite US jurisprudence.

Judges seek to maintain the guise that they are expounding and interpreting the law, yet this is a ruse. As individuals, judges approach their jobs with preconceived ideas and ideologies and these play a role in the decisions they make. Though, "ordinarily stare decisis is the rule,"[102] cases are decided incorrectly and need to be reexamined. Overturning precedent necessitates that the new decision successfully remove the old case. The framework provided to view the process of overturning is a starting point for a systematised analysis of the overruling process of the Supreme Court. The justices' use language to maintain the notion that they are legal interpreters since it is necessary for institutional legitimacy; "they must lie, or the fiction of legitimacy that we have so carefully constructed will come crashing down, bring with it the entire judicial system as we know it."[103] Choosing to overturn is not an easy process and the Court assumes an institutional risk when suggesting that it must deviate from established principles in order to best serve society.

Though far from exhaustive, this study presents a qualitative approach to understanding the processes for overturning previous Supreme Court cases. By viewing cases through this tri-fold approach, a highly structured pattern emerges in judicial decision-making - when overturning precedent the Court defends itself against legitimacy attacks by

1 explaining why the previous case is no longer applicable

2 invokes precedent to substantiate the new decision

3 appealing to a sense of societal norms so that public opinion will act as a buffer between the Court and its co-governmental partners.

This structure should continue to be developed and be applied as a standard analysis method to overturned cases. Stare decisis and the adherence to precedent is linked to a perceived notion that that which is established is inextricable, yet, the fact that judicial review and the process of overturning exists proves the contrary. A nation that lack adaptability is a nation that will not persist.

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Notes

1 Banks, C.P (1999) 'Reversal of precedent and judicial policy-making: how judicial conceptions of stare decisis in the US Supreme Court influence social change', *Ak. L. Rev.*, Vol. 33, No. 2, p.236.

2 372 U.S. 335 (1963).

3 539 U.S. 558 (2003).

4 588 U.S. _ – 08-205 (2010).

5 J.L. Austin's speech act theory provides a unique lens by which to view the act of Supreme Court decision-making, namely as a performative action taken on the part of the justices. See Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.493. ("to view the act of ruling as a discrete performative utterance that requires certain conditions to be fulfilled before it can function properly").

6 An example would be the Miranda rights, where the Court has ruled that a suspect placed in police custody must be informed of the right to remain silent and the right to an attorney. However, with regards to the right to legal counsel, the suspect must act in some manner (either through speech or otherwise) to invoke this protection. Alternatively, when two people stand under the wedding canopy the act of becoming wed cannot take place until a performative utterance is made, specifically the well-known phrase 'I do'. The proper speech act is necessary to enact this right. See Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.493. ("the speech act is necessary to *create* the right") (emphasis added). Similarly, Supreme Court Justices structure their decisions in such a manner as to preformatively establish their ruling as binding. The process of overruling requires conditions be met so that the decision is justifiable and founded on substantively acceptable principles.

7 See e.g., Rehnquist, J.C. (1986) 'Note, the power that shall be vested in precedent: stare decicis, the Constitution, and the Supreme Court', *B.U. L. Rev.*, Vol. 66, p.345, 349; Monaghan, H.P. (1981) 'Our perfect constitution', *NYU L Rev*., Vol. 56, pp.392–93; Grey, T.C. (1975) 'Do we have an unwritten constitution?', *Stan L Rev*., Vol. 27, pp.703–704; Posner, R.A. (1990) *Problems of Jurisprudence*, pp.247–61 (Harvard 1990); Eskridge, Jr., W.N. (1987) 'Dynamic statutory interpretation', *U. Penn. L. Rev.*, Vol. 6, No. 135, pp.1479–1480 (1987) (the differences between constitutional adjudication and statutory interpretation are dealt with); Hubbard v. United States, 514 U.S. 695, 711 (1995) ("Respect for precedent is strongest 'in the area of statutory construction, where Congress is free to change this Court's interpretation….'" [quoting III. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))].

8 Slotnick, E. (1989) 'Judicial politics theme paper', presented at the *Annual Meeting of the Midwest Political Science Association*, Chicago, 23. ("theoretical strands of many types have been prevalent").

Yet, of the myriad of theories advanced, two prominent opposing positions are considered in this paper. The first, is asserted by Segal and Spaeth (1996) 'The influence of stare decisis on the votes of United States Supreme Court Justices', *Am. J. Pol. Sci.*, Vol. 40, pp.971–1003. There they posit; Supreme Court justices are not constrained by precedence that they personally disagree with. Conversely, Knight and Epstein contend, that precedence is a norm that structures judicial decision-making. Knight, J. and Epstein, L. (1996) 'The norm of stare decisis', *Am. J. Pol. Sci.*, Vol. 40, pp.1018–135. The assumption of the paper is based on the work conducted by Knight and Epstein (1996), suggesting that precedent is a constraining factor even when overturning previous cases.

9 Spaeth, H.J. and Segal, J.A. (1999) *Majority Rule Or Minority Will: Adherence to Precedent on the U.S. Supreme Court*, 13; Knight, J. and Epstein, L. (1996) 'The norm of stare decisis', *Am. J. Poli. Sci.*, Vol. 40, pp.1018–35.

10 Cardozo, B.N. (1921) *The Nature of the Judicial Process*, Vol. 34.

11 Much work has been done seeking to determine the extent to which precedence is adhered to on the part of US Supreme Court Justices. See Fowler, J.H. and Jeon, S. (2008) 'The authority of Supreme Court precedent', *Soc. Net.*, Vol. 30, pp.16–30. (Offering an insightful quantitative analysis of 30,288 Supreme Court majority opinions and cases cited from 1754 to 2002, showing the decline in the adherence to stare decisis from the 19th century to the Warren Era Court).

12 See generally Hagle, T.M. and Spaeth, H.J. (1993) 'Ideological patterns in the justices' voting in the Burger Court's business cases', May, *J. of Pol's*, Vol. 55, pp.492–505; Hagle, T.M. and Spaeth, H.J. (1992) 'The emergence of a new ideology: the business decisions of the Burger Court', February, *J. of Pol's*, Vol. 54, pp.120–34; Segal, J.A. and Spaeth, H.J. (1993) *The Supreme Court and the Attitudinal Model*; Segal et al. J.A. (1995) 'Ideological values and the votes of US Supreme Court Justices revisited', August, *J. of Pol's*, Vol. 57, pp.812–823; Brenner, S. and Spaeth, H.J. (1995) *Stare Indecisis: The Alteration of Precedent on the Supreme Court*, 1946–1992; Spaeth, H.J. and Segal, J.A. (1999) *Majority Rule Or Minority Will: Adherence to Precedent on the US Supreme Court*.

13 Rohde, D.W. and Spaeth, H.J. (1976) *Supreme Court Decision Making*, 72.

14 The pervasive political science models of analysing judicial behaviour are the attitudinal theory and strategic actors model. See generally David W. Rohde, Strategy and Ideology: The Assignment of Majority Opinions in the US Supreme Court (1971); Thomas P. Jahnige and Glendon Schubert, The Federal Judicial System: Readings in Process and Behavior, (1968).

Many of these works have sought to target the legal model. Jeffrey A. Segal and Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited, 48 (2002) ("that, in one form or another the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statues and the Constitution, the intent of the framers, and/or precedent"). I assert that the legal model is an indefensible position, since logically, if the justices are substantially influenced by certain constraining factors then, such factors should curb preferential decision-making. Knight, J. and Epstein, L. (1996) 'The norm of stare decisis', *Am. J Pol. Sci.*, Vol. 40, p.1020. ("in subsequent cases, justices will adopt the precedent as their own preference and adjust their decisions accordingly"). However, such constraining factors do not seem to have an omnipotent capacity to counteract preferred judicial policy. This is not to say that the legal model cannot be applied as one aspect of Supreme Court decision-making, it simply cannot provide a singularly definitive model by which to account for the choices individual justices make.

15 Maltzman, F., Spriggs II, J.F. and Wahlbeck, P.J. (2000) *Crafting Law on the Supreme Court: The Collegial Game*.

16 Id. at 8.

17 Scholars have spent much time investigating theoretical models that best explain the mechanisms that lead justices to their conclusions. Though many of these models have their merits, to view them as distinct without overlap serves only as blinders to the multifaceted process of judicial decision-making. Maltzman, Spriggs, and Wahlbeck, do not explicitly subscribe to an institutionalist model, however, they acknowledge that institutions do provide the structure within which decision-making occurs, and thereby affect the choices that can be made. They then admit that this inference (regarding their acceptance of an institutionalist model) is not an anathema to their overall thesis. See Maltzman, F., Spriggs II, J.F. and Wahlbeck, P.J. (2000) *Crafting Law on the Supreme Court: The Collegial Game*, 13. ("this book fits squarely in this theoretical tradition"). The justices, therefore, are seen not as unconstrained actors whose individual policy preferences dictate behaviour; rather the trappings of their surroundings affect decision-making.

18 U.S. Const. art. 1, § 9, cl. 7.

19 Id. at art. 2, § 2, cl. 1.

20 Shapiro, M. (1994) 'Judges as liars', *Harv. J.L. & Pub. Pol'Y*, Vol. 17, p.155, 156.

21 Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.493.

22 Scott, A.M. (1963) *The Supreme Court v. The Constitution: An Essay on How Judges Become Dictators*, pp.9–10.

23 Nelson, C. (2001) 'Stare decisis and demonstrably erroneous precedents', *VA. L. Rev.*, Vol. 87, No. 1, p.3.

24 Dunn, *supra* note 21, at 504.

25 Mondak, J.J. (1990) 'Perceived legitimacy of supreme court decisions: three functions of source credibility', *Pol. Beh.*, Vol. 12, No.4, p.334.

26 Damren, S.C. (2000) 'Stare decisis: the maker of customs', *N. E. L. Rev.*, Vol. 35, No. 1, p.4.

Today, many would consider cases like Miranda v. Arizona, 384 U.S. 436 (1966), Griswold v. Connecticut 381 U.S. 479 (1965), and other as so integrated into society establishing unquestionable constitutional rights, such that any alternative interpretations would contravene the basic civil rights and liberties that Americans have come to expect and enjoy.

27 See generally Gibson, J.L., Caldeira, G.A. and Baird, V.A. (1998) 'On the legitimacy of national high courts', *Am. Pol. Sci. Rev.,* Vol. 92, pp.343–58; Gibson, J.L. and Caldeira, G.A. (1995) 'The legitimacy of transnational legal institutions: compliance, support, and the European Court of Justice', *Am. J. Pol. Sci.*, Vol. 39, pp.459–89; Mondak, *supra* note 25, at 339.

28 See Knight, J. and Epstein, L. (1996) 'The norm of stare decisis', 40 *Am. J. Pol. Sci.*, 1032, ("justices might be motivated by their own preferences over what the law should be, but they are constrained in efforts to establish their preferences by a norm favouring respect for stare decisis").

29 Id. at 1018.

30 See Daniel Butt, Courts, Legislatures, Administrators and the Making of Public Policy. Democracy, the Courts and the Making of Public Policy, Jun. 26. Cambridge UK: Foundation for Law, Justice and Society at Oxford University, 4 (2006) ("Ninety-nine per cent of cases are concerned not with law-making, but with the application of perfectly clear law to facts..."). (Remarks made by Lord Justice Stephen Sedely – formerly of the Court of Appeals of England and Wales at Oxford University's Foundation for Justice, Law and Society).

31 Gerhardt, M.J. (2008) *The Power of Precedent*, pp.9–10 ("From 1789 through the end of the 2004 term, the Court, in 133 cases, expressly overruled 208 precedents").

32 Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.493.

33 Douglas, W.O. (1949) 'Stare decisis', *Col. L. Rev.*, Vol. 49, p.736.

34 Spriggs II, J.F. and Hansford, T.G. (2002) 'The US Supreme Court's incorporation and interpretation of precedent', *L. & Soc. Rev*., Vol. 36, p.142.

35 See generally Gates, J.B. and Phelps, G.A. (1996) 'Intentionalism in constitutional opinions', *Pol. Res. Quart.*, Vol. 48, pp.245–61; Walsh, D.J. (1997) 'On the meaning and pattern of legal citations: evidence from state wrongful discharge precedent cases', *L. & Soc. Rev.*, Vol. 31, pp.337–360.

36 Wallace, J.C. (1987) 'Whose constitution? An inquiry into the limits of constitutional interpretation', in Joseph S. McNamara and Lissa Roche (Eds): *Still the Law of the Land? Essays on Changing Interpretations of the Constitution*, 10 (Hillsdale College Press 1987).

37 Id.

38 Monaghan, H.P. (1988) 'Stare decisis and constitutional adjudication', *Col. L. Rev.*, Vol. 88, p.723, 762 (emphasis original).

39 Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992).

40 Spriggs & Hansford, *supra* note 34, at 142.

41 Id.

42 See Arthur J. Goldberg, Equal Justice: The Warren Era of the Supreme Court, (1971).

43 Dunn, *supra* note 32, at 503 ("Judges overrule because unconditional adherence to precedent is not always desirable").

44 Holmes, O.W. (1920) 'The path of the law', in *Collected Legal Papers* p.167, 187.

45 In most instances where the Supreme Court looks to overturn previous decisions there is little to use for justification of this new position other than sound reasoning. Occasionally the Justices may appeal to dissents when seeking to reverse previous cases. When deciding Lawrence v. Texas, 539 U.S. 558, (2003), Justice Anthony Kennedy relied on Justices John Paul Stevens' dissent in Bowers v. Hardwick, 478 U.S. 186 (1986). See Lawrence v. Texas, 539 U.S. 558, pp.577–578 (2003). ("The rationale of Bowers does not withstand careful analysis...[i]n his dissenting opinion in Bowers Justice Stevens concluded that... a law prohibiting the practice,... of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process. That analysis should have controlled Bowers, and it controls here"). See e.g., Justice Blackmun's opinion for the Court in California v. Acevedo, 500 U.S. 565, 573–74 (1991) ("Dissenters in Ross asked why... We now agree"); Soloria v. United States, 483 U.S. 435, 441 (1987) ("[T]here is overwhelming force to Justice Harlan's reasoning that..."). There, Chief Justice Rehnquist vindicates Justice John Harlan's O'Callahan v. Parker 395 U.S. 285 (1969) dissent.

46 The ability to overrule a previous decision marks a stark contrast between a common law and a written law legal system. In a system based on common law, a court is not empowered to overrule. They may declare an act of the legislature as incompatible, but since the entire corpus of decisions and enactments must cohere to itself, judges do not 'overrule' as understood in the US context. Every decision joins the collective, and doctrinal inconsistencies are not tolerated, thus the concept of stare decisis is seen as Janus-faced. See Saul Brenner and Harold J. Spaeth, Stare Indecisis: The Alteration of Precedent on the Supreme Court, 3 (1995) ("while stare decisis is more Janus-like – looking both ways simultaneously"). Also see Dunn, *supra* note 32, at 504 ("that is not only backward-looking, but also forward-looking; it dictates that a decision must be made in conformity with the decisions that came before it, but also commands that all future decisions be made in conformity with the present one"). Whereas in a system based on written law, when choosing to overrule a case the judiciary uproots established law and substitutes it with a newly crafted one.

47 Spriggs II, J.F. and Hansford, T.G. (2002) 'The US Supreme Court's incorporation and interpretation of precedent', *L. & Soc. Rev.,* Vol. 36, p.141.

48 Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.505.

49 Id. at 505.

50 Id. at 514 n. 128.

51 372 U.S. 335 (1963).

52 Id. at 337.

53 Id. at 338.

54 Id. at 339.

55 Id. at 346.

56 Id. at 339.

57 To blatantly dismiss a case without further reasoning would seem authoritarian and quickly lead others to abandon the Court's decision, viewing it as lacking immutable logical persuasion. In Gideon v. Wainwright, to lend additional support for an outright dismissal of the Betts case, an appeal to concepts of 'ordered liberty' is made. 372 U.S. 342 ("immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states"). Palko v. Connecticut implicitly incorporates these fundamental rights to the many states. "We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights." 372 U.S. 335, 342.

58 Gideon v. Wainwright, 372 U.S. 335, 341 (1963).

59 287 U.S. 45 (1932).

60 297 U.S. 233 (1936).

61 304 U.S. 458 (1938).

62 Id.

63 After quoting Johnson v. Zerbst (304 U.S. 458), the majority opinion proceeds by noting additional cases to support its positions. See Gideon v. Wainwright, 372 U.S. 335, 343 (1963) ["to the same effect, see Avery v. Alabama, 308 U.S. 444 (1940) and Smith v. O'Grady, 312 U.S. 329 (1941)"].

64 Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

65 Id., at 344.

66 Id., at 345.

67 Tex. Penal Code Ann. § 21.06(a) (2003).

68 Tex. Penal Code Ann. § 21.01(1) (2003).

69 U.S. Const. amend. XIV. ("…nor deny any person within its jurisdiction the equal protection of the laws").

70 478 U.S. 186 (1986).

71 Lawrence v. Texas, 539 U.S. 558 (2003).

72 This fact is important in critiquing the Court's decision in Bowers. The case before the Supreme Court was whether the Georgia law violated the Equal Protection Clause of the Fourteenth Amendment. By intruding into the privacy of the marital bedroom, the Georgia law was incongruous with Griswold v. Connecticut, 381 U.S. 479. Further, the logic used in the majority opinion in Lawrence should have been applied to the Bowers case. See Lawrence v. Texas, 539 U.S 558, 575 ("were we to hold the statute [Tex. Penal Code Ann. § 21.06(a) (2003)] invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct between same-sex and different sex participants"). Though the Texas law, which was limited only to homosexual activities, did blatantly contravene the Fourteenth Amendment by singling out only one group in society, the Georgia law legislated against all such activities, even those conceivably practiced by married individuals. On these grounds the Court should have rejected the Georgia law as violating the privacy of the marital bedroom.

73 539 U.S. 558, 575 (2003).

74 As mentioned in note 72 *supra*., Griswold extends only to marital couples. Since gay marriage was not a reality in the USA at the time of Bowers and Lawrence, the Court relied on the ruling in Eisenstadt v. Baird, 405 U.S. 438, which dealt with sexual relations between unmarried individuals to establish a right to privacy for homosexuals.

75 539 U.S. 558, 575 (2003).

76 Id. at 564.

77 505 U.S. 833 (1992).

78 539 U.S. 558, 574 (2003).

79 505 U.S. 833, 851 (1992).

80 517 U.S. 620 (1996).

81 539 U.S. 558, 576 (2003).

82 Id. at 573.

83 558 U.S. _ (2010).

84 2 U.S.C § 441b (2002).

85 494 U.S. 652 (1990).

86 540 U.S. 93 (2003).

87 The ruling in McConnell rested to a substantial extent on the holding in Austin. See Citizens United v. F.E.C., 588 U.S. ____, 1 (2010) ("in this case we are asked to reconsider Austin and, in effect, McConnell"). This analysis will focus only on the Court's actions regarding Austin. By successfully overturning Austin the Court will 'in effect' delegitimise McConnell.

88 Citizens United v. F.E.C., 588 U.S. ___, 1 (2010). (emphasis original).

89 Before continuing to analyse the language and structure for overturning cases, it should be noted that the Court did consider "whether Citizens United's claim that § 441b cannot be applied to Hillary may be resolved on other, narrower grounds." 558 U.S. __, 5 (2010). By discussing whether an alternative method can be applied to reach the preferred outcome the Court looks to further legitimise its decision on the grounds that no other means (other than overruling) would be possible to rectify this deviation from established norms.

90 Citizens United v. F.E.C., 588 U.S. ___, 25 (2010).

91 The majority opinion in Citizens United listed 22 cases, all of which recognised that the First Amendment protection extends to corporations. 558 U.S. ___, 25 (2010).

92 558 U.S. ___, 47 (2010).

93 424 U.S. 1 (1976).

94 435 U.S. 765 (1932).

95 424 U.S. 1, 19 (1976).

96 See note 89 *supra*.

97 558 U.S. ___, 11 (2010).

98 Id. at 23

99 Id. at 24.

100 The Court has upheld cases in which speech can be restricted, however these rulings were narrowly decided to permit governmental entities to perform their necessary functions. See Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Parker v. Levy, 417 U.S. 733 (1974), as well as other cases.

101 Helvering v. Hallock, 309 U.S. 106, 119 (1940).

102 Breyer, S.G. (2010) *Making Our Democracy Work: A Judge's View*, 151.

103 Pintip Hompluem Dunn (2003) 'Note, how judges overrule: speech act theory and the doctrine of stare decisis', *Yale L. J.*, Vol. 113, No. 2, p.531.