# ESSAY

## NARROWING PRECEDENT IN THE SUPREME COURT

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*"Narrowing" occurs when a court declines to apply a precedent even though, in the court's own view, the precedent is best read to apply. In recent years, the Roberts Court has endured withering criticism for narrowing in areas such as affirmative action, abortion, the exclusionary rule, campaign finance, and standing. This practice—often called "stealth overruling"—is widely condemned as deceptive, as well as contrary to stare decisis. On reflection, however, narrowing is not stealthy, tantamount to overruling, or even uncommon. Instead, narrowing is a distinctive feature of Supreme Court practice that has been accepted and employed by virtually every Justice. Besides promoting traditional stare decisis values like correctness, fidelity, and candor, legitimate narrowing represents the decisional-law analogue to the canon of constitutional avoidance. As a rule, an en banc appellate court, including the Supreme Court, engages in legitimate narrowing when it adopts a reasonable reading of precedent without contradicting background legal principles. Under this rule, most if not all instances of narrowing during the Roberts Court are readily defensible—including frequently overlooked decisions by the Court's more liberal members. Moreover, prominent cases involving narrowing can be grouped into four categories: experimental narrowing, narrowing rules, narrowing to overrule, and aspirational narrowing. Far from being unusual or unwarranted, narrowing is a mainstay of Supreme Court practice—and a good thing, too.*

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## INTRODUCTION

> What heart but spurns at precedent
> And warnings of the wise,
> Contemned foreclosures of surprise?[1]

Pick your least-favorite Supreme Court precedent—the one that, in your view, was most wrongly decided—and imagine that you are a Justice. If asked to apply the precedent in a new case, you would probably try to *distinguish* it. In other words, you would like to conclude that the precedent, when best understood, does not actually apply to the new case before you. But what if you think that the precedent, when best read, does apply to the new case at hand? You would then be faced with an uncomfortable choice. You could overcome your opposition to the precedent and *follow* it, notwithstanding its wrongness and any resulting injustice. Alternatively, you could *overrule* the disfavored case, notwithstanding the drastic nature of that action. Yet another option remains. Instead of

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1. Herman Melville, The March into Virginia, *in* Battle-Pieces of Herman Melville 42, 43 (Hennig Cohen ed., Thomas Yoseloff 1963) (1866).

either following the precedent or overruling it, you could *narrow* it. That is, you could interpret the precedent in a way that is more limited in scope than what you think is the best available reading. If you took that last route, then the precedent would survive in an altered form. It would remain on the books and valid within a certain domain. But it would have been denied a zone of application that, when best read, it should have had.

In recent years, prominent commentators have lambasted the Roberts Court for its frequent willingness to narrow apparently applicable precedents.[2] According to these critics, narrowing lacks any coherent or legitimate meaning if viewed as distinct from the more familiar practices of overruling, following, extending, and distinguishing.[3] Narrowing has even been called a form of deception, since it allows the Court to expound readings of precedent that the Court itself recognizes as incorrect.[4] Based on those widely held views, the Roberts Court has come in for scathing criticism, including from some of its own members,[5] when it has *not* overruled earlier cases and, instead, has construed those precedents narrowly in light of the current majority's first-principles views of the law.

For example, critics have castigated the Roberts Court for narrowly interpreting—but not overruling—precedents in such hot-button areas

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2. See Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 1 (2010) (arguing that, through stealth overruling, "[d]octrine is rendered incoherent, and public officials are encouraged to evade federal law"); Christopher J. Peters, Under-the-Table Overruling, 54 Wayne L. Rev. 1067, 1090–1102 (2008) (criticizing "under-the-table overruling" as illegitimate); Geoffrey R. Stone, The Roberts Court, Stare Decisis, and the Future of Constitutional Law, 82 Tul. L. Rev. 1533, 1538 (2008) (alleging Chief Justice Roberts's and Justice Alito's technique "is to purport to respect a precedent while in fact cynically interpreting it into oblivion"); Ronald Dworkin, The Supreme Court Phalanx, N.Y. Rev. Books (Sept. 27, 2007), http://www.nybooks.com/articles/archives/2007/sep/27/the-supreme-court-phalanx/ [hereinafter Dworkin, Supreme Court Phalanx] (on file with the *Columbia Law Review*) (alleging *Hein* had "silently overruled" *Flast*, and *Parents Involved* had drawn an untenable distinction); Ronald Dworkin, Bad Arguments: The Roberts Court and Religious Schools, N.Y. Rev. Books: Blog (April 26, 2011, 10:15 AM), http://www.nybooks.com/blogs/nyrblog/2011/apr/26/bad-arguments-roberts-court-religious-schools/ (on file with the *Columbia Law Review*) (arguing Court dismissed precedent with argument so bad it overruled precedent while pretending not to); see also Michael J. Gerhardt, The Power of Precedent 36–40 (2008) (noting Rehnquist Court had frequently suffered "charge[]" of having "weaken[ed] precedents through narrowing"); Richard A. Posner, How Judges Think 277 (2008) (discussing Court's "gradual extinguishment of unloved precedents").

3. See infra note 31 (discussing academic criticism of narrowing); see also infra note 275 (discussing Justice Scalia's adherence to only four precedential options).

4. E.g., Friedman, supra note 2, at 16 (arguing stealth overruling is "in fact 'dissembling'").

5. See infra note 142 (listing cases in which Justice Scalia objected to narrowing).

as abortion,[6] campaign finance,[7] standing,[8] affirmative action,[9] the Second Amendment,[10] the exclusionary rule,[11] and *Miranda* rights.[12] In an influential study, Barry Friedman has coined an increasingly popular term for this type of purported infidelity to precedent: "stealth overruling."[13] The term's implication is that narrowing a precedent is just a sneaky way to overrule it, without honestly confronting the high standard normally required to overcome stare decisis. Consistent with that view, modern casebooks teach how to distinguish precedents,[14] and law journals debate when to overrule them.[15] But nobody talks about the legitimate grounds for narrowing precedent, because, it seems, no such grounds exist.

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6. See Gonzales v. Carhart, 550 U.S. 124, 154 (2007) (narrowing Stenberg v. Carhart, 530 U.S. 914 (2000)). For criticism, see, e.g., Stone, supra note 2, at 1538 (arguing in *Gonzales* Court upheld federal law "even though the Court had held a virtually identical state law unconstitutional" in *Stenberg*).

7. See FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449, 476 (2007) (narrowing McConnell v. FEC, 540 U.S. 93 (2003)). For criticism, see, e.g., infra note 237 (describing Justice Scalia's acknowledgment that *WRTL* stealthily overruled *McConnell*).

8. See Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007) (narrowing Flast v. Cohen, 392 U.S. 83 (1968)). For criticism, see, e.g., Friedman, supra note 2, at 10 (calling *Hein* "good example" of kind of stealth overruling); Dworkin, Supreme Court Phalanx, supra note 2 (describing Court's distinction in *Hein* as "arbitrary").

9. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007) (narrowing Grutter v. Bollinger, 539 U.S. 306, 328 (2003)). For criticism, see, e.g., Peters, supra note 2, at 1071 ("*Parents Involved* . . . seems arbitrarily to have limited *Grutter* to its facts under the guise of applying it.").

10. See District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (narrowing United States v. Miller, 307 U.S. 174 (1939)). For criticism, see, e.g., William G. Merkel, *The District of Columbia v. Heller* and Antonin Scalia's Perverse Sense of Originalism, 13 Lewis & Clark L. Rev. 349, 365 (2009) ("[T]he Court ultimately chose to reread that precedent [namely, *Miller*] creatively instead of casting it aside as bad law.").

11. See Herring v. United States, 555 U.S. 135, 144 (2009) (narrowing Mapp v. Ohio, 367 U.S. 643 (1961)). For criticism, see, e.g., Tracey Maclin & Jennifer Rader, No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule, 81 Miss. L.J. 1183, 1209 (2012) (arguing *Herring*'s goal was to confine exclusionary rule to specific misconduct identified in *Mapp*).

12. See Florida v. Powell, 130 S. Ct. 1195, 1199–1200 (2010) (narrowing Miranda v. Arizona, 384 U.S. 436, 471 (1966)). For criticism, see, e.g., Friedman, supra note 2, at 23 (discussing *Powell* as example of Court "continu[ing] its undermining of *Miranda*").

13. Friedman, supra note 2, at 3–4; see also, e.g., Aziz Z. Huq, Removal as a Political Question, 65 Stan. L. Rev. 1, 19 (2013) (noting "Roberts Court's habit of approaching disfavored precedents obliquely, gradually undermining them by 'stealth overruling'").

14. Cf. Dworkin, Supreme Court Phalanx, supra note 2, at 95 (arguing *Parents Involved* had made "kind of distinction—unrelated to any difference in principle—that first-year law students are taught to disdain").

15. In addition to the many articles cited in later footnotes, see Robert C. Wigton, What Does It Take to Overrule? An Analysis of Supreme Court Overrulings and the Doctrine of *Stare Decisis*, 18 Legal Stud. F. 3, 3–4 (1994), which uses express overrulings to evaluate the "vitality and importance" of stare decisis.

Yet narrowing happens all the time, with the approval of every recent Supreme Court Justice.[16] Indeed, cases are narrowed far more frequently than they are overruled, as the Court routinely encounters scenarios in which a past decision is worth pruning but not abolishing. The Court's frequent preference for narrowing over overruling is readily intelligible under many different theories of stare decisis. For instance, stare decisis is often defended with reference to reliance interests,[17] and transition costs are often far greater when it comes to overruling as opposed to narrowing. What is more, narrowing is the second cousin of a familiar and firmly entrenched jurisprudential technique: the canon of constitutional avoidance. When reading ambiguous statutes, the Court bends its interpretations toward first principles. A similar approach is even more appropriate when the Court interprets its own ambiguous precedents. Moreover, Justices who engage in narrowing do not fly under the radar but are instead criticized by their dissenting colleagues—much as in cases involving overruling or matters of first impression. The upshot is that "stealth overruling" is actually neither stealth nor overruling but just a pejorative term for an underappreciated mainstay of modern Supreme Court practice.[18] And, like other powerful techniques, narrow-

16. Leading commentators have long noted narrowing's ubiquity. See, e.g., Benjamin N. Cardozo, The Nature of the Judicial Process 48 (1921) ("Sometimes the [doctrinal] rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed."); Karl N. Llewellyn, The Bramble Bush 69 (Quid Pro Books 2012) (1930) ("[T]here is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful."); Richard H. Fallon, Jr., The Supreme Court, Habeas Corpus, and the War on Terror, 110 Colum. L. Rev. 352, 376 (2010) ("[A]ll of the Justices must decide for themselves . . . how broadly or narrowly to read cases with which they disagree."); Frederick Schauer, The *Miranda* Warning, 88 Wash. L. Rev. 155, 156 n.9 (2013) [hereinafter Schauer, *Miranda*] ("Stealth overruling is now so common that it can hardly be considered stealthy, and, moreover, seems to be a common way for the Court to diminish the import of an unpopular precedent while waiting for the right political and legal environment to overrule it explicitly."); Stephen E. Sachs, The Uneasy Case for the Affordable Care Act, 75 Law & Contemp. Probs., 2012, at 17, 26–27 [hereinafter Sachs, The Uneasy Case] ("Courts often amend past doctrines by distinguishing prior cases on narrow, sometimes formal, grounds. That's how doctrine usually changes over time; not by wholesale overruling, but by slow evolution and reassessment of the law.").

17. See infra Part II.A.2 (discussing practicality as key principle of stare decisis).

18. The prevalence of narrowing may shed light on the ample literature addressing whether stare decisis meaningfully constrains the Court. See, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 50 (1993) (noting that "[l]imiting a precedent in principle" is, in addition to overruling, one "of the two methods of formally altering precedent"); Jeffrey A. Segal & Harold J. Spaeth, The Influence of Stare Decisis on the Votes of United States Supreme Court Justices, 40 Am. J. Pol. Sci. 971, 983–84 (1996) (finding most Justices in statistical sample did not "remotely display adherence to precedent"). However, that broader question lies beyond the scope of the present Essay.

ing can be legitimate or not, depending on the situation.[19]

To see narrowing's widespread and legitimate appeal, one need only reflect on the most salient decisions of the Roberts Court. The Supreme Court is understood to have authority to overrule its own precedents. Sometimes, however, the Court takes the lesser step of narrowing in order to mitigate its own past errors or to experiment with new jurisprudential possibilities. At other times, the Court narrows overbroad statements of fundamentally correct principles. And at still other times, the Court narrows as a precursor to overruling. Finally, dissenting Justices sometimes propose narrowing in the hope of limiting a precedent's future effect. Moreover, instances of narrowing include not just the conservative decisions decried by recent critics but also watershed decisions supported by the Court's liberal bloc. For example, the five-Justice majority in *Boumediene v. Bush* narrowed prior cases on the scope of constitutional habeas corpus.[20] Four years later, that same five-Justice majority narrowed an apparently on-point precedent on the scope of Eighth Amendment rights.[21]

Of course, Justices often pen dissents that complain about narrowing. But those complaints really reflect disagreement on the merits or as to the use of narrowing in a particular instance. By finally recognizing narrowing as a distinctive jurisprudential tool, courts and scholars can make progress toward establishing criteria for legitimate narrowing.

The argument proceeds as follows. Part I sets the stage by defining and characterizing narrowing as a distinctive jurisprudential technique. This means situating narrowing alongside the more familiar but separate jurisprudential techniques of overruling, distinguishing, extending, and following. In addition, this Part critically evaluates Barry Friedman's argument that narrowing is stealthy, as compared with the more familiar uses of precedent.

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19. Of course, narrowing also happens outside the Supreme Court. E.g., David M. Dorsen, Henry Friendly: The Greatest Judge of His Era 351 (2012) (quoting letter by Judge Henry Friendly stating, "I find myself increasingly in the position where I disagree not so much with the result as with the language in other Second Circuit opinions and feel obliged to make distinctions that really do not stand up"). Narrowing by lower and intermediate courts raises special difficulties and so lies beyond the scope of this Essay. See infra text accompanying note 65 (discussing lower courts' limited authority in interpreting precedent); infra Part II.A.2 (discussing impractical implications of lower courts narrowing appellate-court opinions).

20. 553 U.S. 723 (2008) (narrowing Johnson v. Eisentrager, 399 U.S. 763 (1950)); see infra Part IV.B (discussing *Boumediene*'s narrowing of *Eisentrager*).

21. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (narrowing Harmelin v. Michigan, 501 U.S. 957 (1991)); see infra Part IV.D (discussing *Miller*'s narrowing of *Harmelin*).

Part II proposes a modified rule of stare decisis applicable only to courts that have authority to overrule their own past decisions.[22] The proposal is this: An en banc appellate court legitimately narrows one of its own erroneous precedents when it reasonably interprets the precedent in a way that is consistent with background legal principles.[23] This proposed rule, where it applies, is substantially more permissive than the conventional stare decisis test applicable to overruling. Further, this rule is considerably more permissive than the stare decisis standards proposed by recent critics of the Roberts Court. To wit, Friedman's central alleged instance of stealth overruling during the Roberts Court, *United States v. Patane*, can easily qualify as legitimate narrowing.[24]

Parts III through VI then show that the Court has recently engaged in legitimate narrowing for a variety of reasons, which might be called: (i) experimental narrowing, (ii) narrowing rules, (iii) narrowing to overrule, and (iv) aspirational narrowing. This merely illustrative and nonexclusive survey of leading cases includes rulings by the more liberal Justices, thereby demonstrating that narrowing has no particular ideological valence in the Roberts Court.

Finally, the Conclusion suggests that narrowing can enrich our understanding of stare decisis. Commentators often perceive cynical abuses of precedent when the Court has actually used its case law in relatively subtle ways. Given all this, narrowing's special salience in the Supreme Court should be viewed as a feature and not a bug. Far from being unusual or unwarranted, narrowing is a mainstay of Supreme Court practice—and a good thing, too.

## I. WHAT NARROWING DOES

The first order of business is nailing down precisely what narrowing does, as compared to other, more familiar methods of engaging with precedent. Section A hones the customary vocabulary that lawyers and judges use when discussing case law. Once this task is accomplished, narrowing emerges as a distinct precedential activity apart from overruling, distinguishing, extending, and following. Section B scrutinizes a claim

22. In the federal system, only en banc appellate courts, including the Supreme Court, have the authority to overrule precedents. See, e.g., Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). On vertical narrowing—that is, narrowing of higher-court precedent—see infra text accompanying note 272.

23. When this Essay refers to law in the "background," it means legal principles apart from the precedential rule that is or might be narrowed.

24. 542 U.S. 630 (2004); see Friedman, supra note 2, at 2–3, 22–37 (discussing *Patane* as stealth overruling); infra text accompanying notes 123–128 (challenging Friedman's assessment that *Patane* constituted illegitimate treatment of precedent).

underlying critiques of narrowing—namely, that narrowing is stealthier than overruling.

### A. *Why Narrowing Is Special*

As defined here, "narrowing" means deliberately interpreting a precedent in a way that is more limited in scope than the best available reading. So defined, narrowing is synonymous with at least one salient meaning of the pejorative term "stealth overruling." As Barry Friedman recently put it in his leading study, stealth overruling "looks superficially like the ordinary process of distinguishing a prior case; it is simply that the distinction is not persuasive."[25] To say that a court has drawn an unpersuasive distinction ("stealth overruling") is just like saying that the court has adopted an interpretation of the precedent that isn't the best one available ("narrowing").

Friedman seeks to cast narrowing as a kind of (stealth) overruling,[26] but that would be a mistake. Instead, narrowing should be situated

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25. Friedman, supra note 2, at 12; see also id. at 10 ("[D]istinctions drawn by a subsequent court must be germane to the purpose or justification for the rule itself. When they are not, then one begins to see the gap between distinguishing prior precedents and overruling them." (footnote omitted)); id. at 13 ("When critics insist that the Justices are overruling by stealth, they are asserting that the author and those joining the decision know the distinctions just do not work and that claims of fidelity to the germinal precedent will not wash."); id. at 15–16 (defining "overruling" in part as "drawing distinctions that are unfaithful to the prior precedent's rationale"). In this sense, stealth overruling is partly a "question of motive"—that is, whether the Justices intend to be stealthy. Id. at 8. Insofar as he suggests that a precedent should be distinguished only based on its own reasoning, Friedman arguably proposes a high bar for legitimate narrowing, rather than opposing narrowing (that is, unpersuasive distinctions) in all cases.

Friedman alternatively defines stealth overruling as intentionally "reducing a precedent to essentially nothing, without justifying its de facto overturning." Id. at 16; see also Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 108 (1991) ("[T]he Court can destroy a precedent without overruling it by distinguishing precedents in ways that practically nullify them . . . ."). As Friedman colorfully acknowledges, his two alternative forms of stealth overruling often "run together," in the sense that repeated stealth overrulings of the first type "can, like gradual slicing of a salami, ultimately reduce the precedential status of the case to almost nothing." Friedman, supra note 2, at 12. Still, Friedman's second type of stealth overruling could have unique content in that the Court may sometimes "reduc[e] a precedent to essentially nothing" through means *other* than narrowing. Id. at 16.

26. See Friedman, supra note 2, at 9 ("Contrary to critics of stealth overruling, who tend to see a binary choice between following existing precedents to their logical conclusion and discarding them to reach the contrary result, the Justices they criticize claim to seek a middle way."). Friedman concludes that there is no legitimate "middle way." Id. at 63; see also Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 19 (1989) (noting under "rule model of precedent," "[a]ll modifications of the rule, like subsequent amendments of a statute, amount to overruling the precedent rule and replacing it with a new rule" and there is no distinction "between overruling a precedent and narrowing/modifying a precedent" (emphasis omitted)); infra note 176 and accompanying text (describing same purported "adhere-to" or "overrule" dichotomy). Of

among a cluster of distinct ways of using precedent. Besides overruling precedent, courts can follow, narrow, extend, or distinguish. As used in this Essay, these four terms represent the distinct ways of answering two sequential questions: First, is the precedent at issue best read to apply to the facts before the court; and second, does the court in fact apply the precedent to the facts before it? *Following* means applying a precedent when it is best read to apply. *Narrowing* means not applying a precedent, even though the precedent is best read to apply. *Extending* means applying a precedent where it is not best read to apply. And, finally, *distinguishing* means not applying a precedent where it is best read not to apply. These four possibilities are diagrammed below.

TABLE 1: FOUR WAYS OF USING PRECEDENT

| | Best Reading Does Apply | Best Reading Doesn't Apply |
|---|---|---|
| Apply Precedent | Follow | Extend |
| Don't Apply Precedent | Narrow | Distinguish |

Given these definitions, "distinguishing" a precedent is the same as "not extending" it.[27] Both expressions refer to cases in which a precedent is best read not to apply, and the court so holds. Adopting different terminology, Friedman repeatedly suggests that stealth overruling "*fails to extend* a precedent to its logical conclusion."[28] But stare decisis

course, Friedman recognizes that, "[s]trictly speaking, stealth overruling does not involve the overturning of precedents in the way explicit overruling does." Friedman, supra note 2, at 9.

27. Narrowing courts sometimes claim to be engaged in distinguishing or, equivalently, not extending. E.g., Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 615 (2007) (plurality opinion) ("We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it."); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 342 (2000) (Souter, J., concurring in part and dissenting in part) ("Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine *Beer*, that policy does not demand that recognized error be compounded indefinitely, and the Court's prior mistake about the meaning of the effects requirement of § 5 should not be expanded . . . ."). As explained in the main text, these rhetorical strategies are unlikely to quell opposition to divisive demotions of precedent. See also infra Part II.A.3 (discussing issues of candor).

28. Friedman, supra note 2, at 9 (emphasis added); see id. at 10 ("When the Justices *fail to extend* a precedent as the logic of its rationale would require, that is one form of stealth overruling." (emphasis added)); cf. id. at 16 n.66 (differentiating stealth overruling from not "extend[ing] precedents beyond the scope of their logic").

commands, at most, the application of precedent, not its extension.[29] When compared with the best reading of a particular precedent, only narrowing leaves the precedent with a reduced ambit. By contrast, distinguishing or not extending preserves the precedent as it was. So when Friedman complains about "failures to extend" precedents to their logical conclusions, he presumably means failures to apply the precedents where, in light of their reasoning, they are best read to apply. In other words, Friedman is talking about narrowing.

Of these four options, narrowing is the most problematic. When courts distinguish or follow, they adhere to the best reading of precedent. By contrast, extending and narrowing create tension between the best reading of a supposedly binding precedent and how that precedent is applied to a new case. For that reason, both extending and narrowing are subject to criticism, including on candor grounds.[30] But whereas extending uses inapposite case law to resolve open questions, narrowing dilutes the force of earlier decisions where they are best read to apply. In effecting a partial erasure of decisional law, narrowing implicates the core of precedential obligation.

### B. *Is Narrowing Stealthy?*

Friedman's leading study of "stealth overruling" places great weight on the idea that narrowing is, well, stealthy. In other words, Friedman thinks that *stealth* overruling is significantly less likely than *regular* overruling to be noticed or understood by the public.[31] Friedman offers an interesting discussion of whether stealth overruling is more objectionable than overt overruling (he concludes that it is),[32] but that inquiry may rest

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29. Justice Benjamin Cardozo used language similar to Friedman's when he famously bemoaned the tendency of a legal principle "to expand itself to the limit of its logic." Cardozo, supra note 16, at 51.

30. See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 739–40 (1987) (criticizing suggestions that, through "conscious dissembling," a judge may either "distinguish a precedent he believes to be controlling when he is unable or unwilling to overrule it" or "apply a precedent he does not believe to be relevant").

31. See, e.g., Friedman, supra note 2, at 6 (contending "ultimate normative question regarding stealth overruling" is whether it is "appropriate for the Justices to shield their decisions from public view"); id. at 33 (suggesting one "perhaps even obvious" explanation "for why Justices engage in stealth overruling" is "avoiding the publicity"); id. at 63 ("Most seriously, stealth overruling obscures the path of constitutional law from public view, allowing the Court to alter constitutional meaning without public supervision.").

32. See, e.g., id. at 6 ("reject[ing]" defenses of stealth overruling); id. at 53 ("One can imagine arguments to justify the practice [of stealth overruling]—it does not get much explicit defense—but ultimately this section concludes they are flawed."); id. at 63 ("Perhaps *Miranda* should be overruled. . . . But if that is the case, then [the Justices] should do that overtly . . . .").

on a false premise. In short, there is no persuasive reason to think that narrowing is significantly stealthier than overruling.

Any claim about the relative visibility of narrowing and overruling must rest on a conception of how often the public notices each of those two types of decisions. But, as Friedman acknowledges, there are very obscure instances of overruling and very high-profile instances of narrowing.[33] For example, the Court recently issued 5-4 decisions overturning precedent in both *Montejo v. Louisiana*[34] and in *Alleyne v. United States*,[35] but it is fair to assume that no appreciable portion of the American public will ever hear about those cases or their holdings.[36] Meanwhile, recent decisions in *Ledbetter v. Goodyear Tire & Rubber Co.*[37] and *Hein v. Freedom from Religion Foundation, Inc.*[38] received ample critical press coverage, even though they overruled no Supreme Court case.[39] Friedman suggests that, in a particular case, opting to narrow can render the Court's decision less visible. But without rigorous statistical research, it's difficult to assess the connection, if any, between overruling and public opinion.[40]

What's more, Friedman's critique of stealth overruling must assume not only that overruling is relatively likely to capture public attention but also that the public's awareness of such decisions is significant in absolute terms. Friedman's argument would not be of much practical import, for example, if two percent of the public were aware of major overrulings and one percent were aware of major stealth overrulings. In that hypo-

33. Id. at 37–38 (discussing, inter alia, Montejo v. Louisiana, 556 U.S. 778 (2009)).

34. 556 U.S. 778, overruling Michigan v. Jackson, 475 U.S. 625 (1986) (prohibiting police interrogation of criminal defendant once he requests counsel at arraignment or similar proceeding).

35. 133 S. Ct. 2151, 2163 (2013) (holding any fact increasing mandatory minimum sentence must be submitted to jury and found beyond a reasonable doubt), overruling Harris v. United States, 536 U.S. 545 (2002).

36. See Friedman, supra note 2, at 38 & n.24 (noting *Montejo* "garnered no significant notice" and describing search uncovering few news stories about case); see also David Cole, The Anti-Court Court, N.Y. Rev. Books (Aug. 14, 2014), http://www.nybooks.com/articles/archives/2014/aug/14/anti-court-supreme-court/ (on file with the *Columbia Law Review*) (arguing "decisions involv[ing] technical questions of civil and criminal procedure . . . do not receive the public attention given to the Court's highly publicized constitutional cases" despite being "far more consequential").

37. 550 U.S. 618 (2007).

38. 551 U.S. 587 (2007).

39. See, e.g., Linda Greenhouse, Justices Reject Suit on Federal Money for Faith-Based Office, N.Y. Times (June 26, 2007), http://www.nytimes.com/2007/06/26/washington/26faith.html (on file with the *Columbia Law Review*) (covering *Hein* decision); infra notes 53, 59 (noting press coverage of *Ledbetter* and *Winn*).

40. Notably, any study in this area would have to find a way to account for the different doctrinal implications of overruling or narrowing in any given case. To see why, imagine that overruling a precedent would upset the entire public, whereas narrowing the precedent by fifty percent would upset fifty percent of the public. Would narrowing be the stealthier option? Or would narrowing's reduced visibility simply reflect that there was less to see?

thetical world, the differential effect of proceeding through stealth overruling would likely be too small to matter.

Without attempting to establish a rigorous theory of the Supreme Court's image in the public eye, it's worth considering an account different from Friedman's. In general, people don't think about the Court because they rationally direct their attention elsewhere.[41] And in the unusual instance when a significant number of Americans do think about One First Street, they generally reflect opinions offered by trusted authorities, such as politicians and media commentators. These trusted authorities include sophisticated readers who can easily spot "stealth" overruling. Moreover, these authorities are fully capable of rousing public ire without mentioning past case law.

Take *Citizens United v. FEC*,[42] which Friedman offers as anecdotal evidence that overrulings tend to be noticed.[43] Did it really matter that *Citizens United* overruled two precedents? Or was what really mattered that the Court had invalidated a major federal statute that was beloved by leading commentators and politicians, including a sitting President, all of whom railed against the decision's purportedly adverse effects for American democracy? Notably, President Obama's famous (or infamous) State of the Union remarks against *Citizens United* didn't so much as mention judicial precedent. Instead, the President asserted that the Court had overturned "a century of law," thereby focusing not on relatively recent judicial precedents, but rather on federal statutes that had long regulated campaign finance.[44] Likewise, the President's famous (or infamous) remarks after the oral argument in *National Federation of Independent Business v. Sebelius* (*NFIB*)[45] didn't accuse the Roberts Court of being on the verge of overturning *Wickard v. Filburn*,[46] *Gonzales v.*

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41. Cf. Frederick Schauer, The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's, 120 Harv. L. Rev. 4, 9 (2006) (discussing "small proportion of the nation's agenda that comes directly before the Supreme Court in particular and the courts in general").

42. 130 S. Ct. 876 (2010).

43. See Friedman, supra note 2, at 4 (discussing public reaction to *Ledbetter*); id. at 39 (discussing President's public statements on decision).

44. President Barack H. Obama, State of the Union Address (Jan. 27, 2010), available at http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (on file with the *Columbia Law Review*). The President presumably had in mind the Tillman Act of 1907, ch. 420, 34 Stat. 864, 864–65 (codified as amended at 2 U.S.C. § 441b(a) (2012)), which first prohibited corporate campaign contributions. Cf. *Citizens United*, 130 S. Ct. at 930, 952–53 (Stevens, J., dissenting) (also invoking Tillman Act). By contrast, the oldest case overruled in *Citizens United* was then about twenty years old. See id. at 913 (majority opinion) ("*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures."); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654–55 (1990) (upholding act prohibiting corporations from making independent campaign donations).

45. 132 S. Ct. 2566 (2012).

46. 317 U.S. 111 (1942).

*Raich*,[47] or any other precedents that only lawyers had ever heard of. Rather, the President contended that it would be an "unprecedented" and "extraordinary" instance of "judicial activism" if "an unelected group of people would somehow overturn a duly constituted and passed law," meaning the Affordable Care Act.[48] The force of this preemptive public criticism did not depend on the contents of the *U.S. Reports*.

Friedman might respond that narrowing is less likely than overruling to be noticed by media experts and politicians. But that argument would blink the role of dissenting opinions. If anyone knows what is happening at the Court, it is the Justices themselves. And when Justices see what they regard as shenanigans, they blow the whistle. Justice Ginsburg has been unparalleled at this. The most famous example is *Ledbetter*, where the Court divided 5-4 on an issue of statutory interpretation.[49] *Ledbetter* arguably narrowed *Bazemore v. Friday*,[50] whose relatively expansive logic had been followed in a number of courts of appeals.[51] Yet *Bazemore* didn't figure into public opposition to *Ledbetter*. Instead, the charge against *Ledbetter* was that it had diminished many employees' legal protections against invidious discrimination. Justice Ginsburg said just that (but nothing about *Bazemore*) in her powerful dissent from the bench.[52] And the country noticed. The press picked it up.[53] Elected officials campaigned on it.[54] In time, Congress overrode the Court's interpretation.[55] None of this depended on judicial precedent.

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47. 545 U.S. 1 (2005).

48. President Obama: Overturning Individual Mandate Would Be "Unprecedented, Extraordinary Step," CNN: The 1600 Report (Apr. 2, 2012, 3:55 PM), http://whitehouse.blogs.cnn.com/2012/04/02/president-obama-overturning-individual-mandate-would-be-unprecedented-extraordinary-step/ (on file with the *Columbia Law Review*).

49. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

50. 478 U.S. 385 (1986). The *Ledbetter* majority found the plaintiff's "interpretation" of *Bazemore* "unsound," in part based on "obvious inconsistencies between [the plaintiff's] interpretation" and related cases. *Ledbetter*, 550 U.S. at 633–37.

51. See *Ledbetter*, 550 U.S. at 654–55 (Ginsburg, J., dissenting) (collecting courts-of-appeals decisions following *Bazemore*).

52. See Oral Dissent of Justice Ginsburg at 3:46, *Ledbetter*, 550 U.S. 618 (No. 05-1074), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_1074/opinion (on file with the *Columbia Law Review*); see also *Ledbetter*, 550 U.S. at 660 (Ginsburg, J., dissenting) (also raising policy arguments).

53. See, e.g., Robert Barnes, Over Ginsburg's Dissent, Court Limits Bias Suits, Wash. Post (May 30, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900740.html (on file with the *Columbia Law Review*) (discussing Justice Ginsburg's "stinging" oral dissent).

54. See, e.g., Robert Pear, Justices' Ruling in Discrimination Case May Draw Quick Action by Obama, N.Y. Times (Jan. 4, 2009), http://www.nytimes.com/2009/01/05/us/politics/05rights.html (on file with the *Columbia Law Review*) (noting Obama's campaign promise to abrogate *Ledbetter*).

55. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (2012)).

The Justices are fully equipped to do the same thing in response to narrowing in constitutional cases. Take *Arizona Christian School Tuition Organization v. Winn*,[56] a case discussed at greater length below as a potential instance of narrowing.[57] Even though the majority didn't overrule any precedents, Justice Kagan was able to write one of the best debut dissents in the history of the Supreme Court.[58] And, again, people noticed.[59] So members of the press don't have to be very insightful to know when something noteworthy is going on. All they have to do is read the Court's slip opinions or, as in *Ledbetter*, listen to the dissent from the bench.[60] In both *Ledbetter* and *Winn*, the dissenting Justices made their cases directly to the public. The legalistic difference between narrowing and overruling seems to play only a marginal role in this process.

## II. When Narrowing Is Legitimate

This Part outlines two independent but mutually reinforcing arguments for the legitimacy of narrowing precedent. The first line of reasoning (section A) draws on theories of stare decisis and shows that narrowing is often a legitimate alternative to overruling. The second way to defend legitimate narrowing (section B) is to analogize it to the interpretive canon of constitutional avoidance. Each line of reasoning leads to the same rule of thumb: A court legitimately narrows what it views as an erroneous precedent when it reasonably interprets the precedent in a way consistent with background legal principles. To be clear, this discussion is limited to horizontal stare decisis—that is, a court's treatment of its own past decisions—and does not address the distinct questions

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56. 131 S. Ct. 1436 (2011).

57. See infra text accompanying notes 148–159.

58. 131 S. Ct. at 1450 (Kagan, J., dissenting). Justice Kagan's dissent effectively complained of narrowing. See id. at 1459 (complaining *Winn* majority "plucks . . . three words . . . from the midst of the *Flast* opinion, and suggests that they severely constrict the decision's scope").

59. See, e.g., Robert Barnes, Supreme Court Tosses Private-School Tax-Credit Challenge, Wash. Post (Apr. 4, 2011), http://www.washingtonpost.com/politics/supreme-court-tosses-private-school-tax-credit-challenge/2011/04/04/AFe2LGfC_story.html (on file with the *Columbia Law Review*) (using Justice Kagan's *Winn* dissent as evidence of noteworthiness of case); Adam Liptak, Supreme Court Allows Tax Credit for Religious Tuition, N.Y. Times (Apr. 4, 2011), http://www.nytimes.com/2011/04/05/us/05scotus.html (on file with the *Columbia Law Review*) (same). For a thoughtful treatment in the popular press, see Avi Schick, Get Your Hands Off My Tax Deduction: The Supreme Court Muddles Through Tax and Religion, Slate (Apr. 5, 2011, 7:08 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/get_your_hands_off_my_tax_deduction.single.html (on file with the *Columbia Law Review*).

60. See generally Lani Guinier, The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent, 122 Harv. L. Rev. 4 (2008) (discussing power of oral dissents from the bench, particularly Justice Ginsburg's in *Ledbetter*).

associated with a lower court's treatment of precedents issued by a superior court.[61]

## A. *Narrowing as Stare Decisis*

This section discusses five values often linked to stare decisis in order to derive standards for legitimate narrowing. Instead of advancing a particular theory of precedent, this section appeals to as many familiar theories of stare decisis as possible, in the hopes of forming a "big tent" in favor of narrowing.[62]

1. *Correctness.* — Legitimate narrowing can serve the most basic judicial value of all: the value of getting it right. In general, narrowing presupposes a belief that a precedent is (or could be) mistaken, at least in its reasoning.[63] And that kind of first-principles assessment, in turn, presupposes a hierarchy of legal authorities wherein precedent is not necessarily at the top. A court might believe, for instance, that a precedent supports affirmance, whereas the text of a relevant statute or constitutional provision supports reversal. The resulting tension between legal sources creates the impulse to overrule. Most theories of legitimate overruling accordingly demand that overruling courts have, at a minimum, a confident belief that the precedent being overturned is incorrect, including as to its core applications.[64]

In general, courts have only limited authority to act based on their own views of correctness. Trial courts and even three-judge appellate panels, for instance, cannot normally overrule prior appellate precedents, even when the trial court or panel is absolutely sure that the

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61. See infra text accompanying notes 272–273 (discussing narrowing by lower courts).

62. The great pluralism of views on precedent is linked to the inevitable pluralism as to interpretive methods. See Randy J. Kozel, Settled Versus Right: Constitutional Method and the Path of Precedent, 91 Tex. L. Rev. 1843, 1847 (2013) ("The perceived benefit of deviating from precedent is always derivative of one's interpretive method and normative priors.").

63. For separate discussions of narrowing to correct errors in outcome and to correct errors of exposition, see infra Part III ("Experimental Narrowing") and Part IV ("Narrowing Rules"), respectively.

64. See Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent."); Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 3 (2001) (discussing legitimacy of overruling when precedent is "demonstrably erroneous"); Roscoe Pound, What of Stare Decisis?, 10 Fordham L. Rev. 1, 6 (1941) (explaining common-law requirement of "overriding conviction" of error, along with other requisites, to justify overruling); cf. Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 Ave Maria L. Rev. 1, 4 (2007) ("A court may properly use precedent if, but only if, the precedent is the best available evidence of the right answer to constitutional questions.").

precedent was wrongly decided.[65] By contrast, the Supreme Court (like many other en banc appellate courts) always has authority to overrule its own past decisions. These settled precepts suggest that en banc appellate courts are understood to have greater access to legal correctness than earlier precedent-making courts. That view makes sense. Both earlier and later Supreme Courts have equal legitimacy, expertise, and ability to set nationally uniform rules. The passage of time typically affords later Justices nothing but an advantage—namely, the advantage of greater experience and information.[66] The fact that overruling can be legitimate in the Supreme Court provides strong evidence that the smaller step of narrowing can be as well.[67]

As compared with overruling, legitimate narrowing should require a less demanding showing of correctness in two respects. First, narrowing should not generally require the same degree of confidence that overruling does. The reason for this is simple: Once overruled, a negated precedent can be resuscitated only through another act of overruling. The resulting whiplash would generate substantial reliance costs for affected parties, while also undermining future judicial credibility.[68] Narrowing, by contrast, allows a potentially erroneous precedent to survive and, perhaps, to be expanded again, depending on future events. For example, a judge who believes that a precedent is wrong might reasonably want to stem the precedent's damage right away, while also leaving open the possibility of reassessment based on new information at a future time.[69] That

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65. See, e.g., McMellon v. United States, 387 F.3d 329, 332–33 (4th Cir. 2004) (discussing "basic principle that one panel cannot overrule a decision issued by another panel"). For more on uniformity, see infra Part II.A.2 ("Practicality").

66. Deference to prior rulings may be appropriate when legally relevant historical practices have grown cloudy with the passage of time. See, e.g., Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 457 (1996) (Scalia, J., dissenting) ("[W]e should be hesitant to advance our view of the common law over that of our forbears, who were far better acquainted with the subject than we are.").

67. This Essay focuses on constitutional doctrine. Notably, however, stare decisis is sometimes thought to have special force in cases involving statutes, the common law, or private contractual or property rights. See Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (asserting extra force of stare decisis in those areas). To the extent that overruling is less acceptable in these contexts, narrowing may be as well.

68. See also infra Part II.A.2 (discussing practicality concerns).

69. The Court's recent decision in Harris v. Quinn, 134 S. Ct. 2618 (2014), may be an example of this phenomenon. In *Harris*, the Court heard full briefing on whether to overrule Abood v. Detroit Board of Education, 431 U.S. 209 (1977), and thereby recognize a First Amendment right not to contribute to public-sector unions. See *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting). Justice Alito's opinion for the Court spent over three pages on points that *Abood* "fundamentally misunderstood" and "failed to appreciate." Id. at 2630–34 (majority opinion). Yet the Court declined to overrule and instead held that *Abood* didn't "extend" to dual private–public employees. Id. at 2634–38. In arguing that *Abood* was correct and "easily" applied to the facts in *Harris*, the dissenters framed the majority opinion as an act of narrowing: "Save for an unfortunate hiving off of ostensibly

kind of doctrinal experimentation is incompatible with overruling. Second, narrowing should not require a belief that the precedent was wrongly decided as to its core applications. Rather, it is enough if the precedent established an overbroad rule.[70] In other words, narrowing may well be appropriate, even if the narrowing judge would have reached the same result as the original precedent.

2. *Practicality.* — Practicality means adopting rules that avoid deleterious effects. The paradigmatic practicality concerns are reliance and judicial manageability, which often loom large in tests for legitimate overruling.[71] Thus, for example, even a judge thoroughly convinced that the *Legal Tender Cases* were wrongly decided would be unlikely to revisit those decisions,[72] since casting doubt on the legality of paper currency might spark a national and even international economic crisis. Though arguments from economics do not normally constitute legal argument, the law of stare decisis is attentive to pragmatic concerns of this kind. Indeed, courts must be attentive, not just to the immediate consequences of eroding case law, but also to the more general instability that comes from repeated disruptions of precedent.[73] To some extent, these concerns are context dependent. In rights cases, for instance, the Court has apparently concluded that personal freedoms outweigh generalized governmental interests, including reliance interests. As a result, the Court has adopted a libertarian bias when it comes to stare decisis, such that practicality concerns are discounted when the Court seeks to overturn precedents that restrict individual rights.[74]

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'partial-public' employees, *Abood* remains the law." Id. at 2646, 2653 (Kagan, J., dissenting) (citation omitted).

70. See infra Part IV ("Narrowing Rules"). An overbroad rule isn't necessarily dictum: If a Court relies exclusively on a broad rule even though a narrower one would have sufficed, the broad rule might be viewed as a holding.

71. See, e.g., Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) (discussing possibility of overcoming stare decisis based on unworkability and lack of reliance); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (noting overruling is appropriate to remedy "inherent confusion created by an unworkable decision"); Randy J. Kozel, Stare Decisis as Judicial Doctrine, 67 Wash. & Lee L. Rev. 411, 414–15 (2010) (proposing weighing reliance interests against value of correctness "to determine whether *stare decisis* trumps in a given case").

72. 79 U.S. (12 Wall.) 457, 552–54 (1871) (holding act providing for paper currency constitutional).

73. See supra note 71 (discussing overruling's impact on reliance interests).

74. See Citizens United v. FEC, 130 S. Ct. 876, 912 (2010) ("'This Court has not hesitated to overrule decisions offensive to the First Amendment.'" (quoting FEC v. Wis. Right to Life, Inc. (WRTL), 551 U.S. 449, 500 (2007) (Scalia, J., concurring in the judgment)); Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The holding in *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved."); cf. Randy J. Kozel, Second Thoughts About the First Amendment 4–5 (Aug. 5, 2014) (unpublished manuscript), available at

Practicality has distinctive implications in the Supreme Court. When lower courts assume the authority to narrow higher-court precedents, several severe practicality problems can result. Perhaps most importantly, different lower courts are likely to narrow in different ways, yielding fragmentation of the doctrinal landscape and all the normal difficulties of national disuniformity. In addition, each higher-court precedent would be subject to frequent and nearly immediate narrowing by a multitude of lower courts, thereby undermining public reliance on higher-court rulings. But these difficulties do not arise when the Court narrows. Because its decisions to revisit precedent necessarily sweep in the entire country, the Court can narrow without spawning doctrinal fragmentation. And, as a single body that hears only several dozen cases per year, the Court is unlikely to narrow at a rate that would jeopardize reliance interests.

Moreover, practicality is generally a less pressing concern in connection with narrowing, as compared with overruling. For one thing, narrowing typically preserves significant aspects of the doctrinal status quo ante[75] and so is less likely than overruling to disrupt precedent-based expectations.[76] For another thing, the Court itself can more easily reverse course after narrowing, since a decision to narrow tends to signal that a doctrinal area is in flux.[77] Most importantly, narrowing creates a window for responsive action by private parties, political branches, and courts.[78]

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http://ssrn.com/abstract=2476586 (on file with the *Columbia Law Review*) (arguing stare decisis is greatly reduced in First Amendment cases).

75. See, e.g., infra Part IV.A (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992)).

76. This basic but important point underlies a recent shift in the public commentary regarding narrowing. In its most recent term, the Roberts Court repeatedly passed up opportunities to overrule precedents—causing conservatives to complain and liberals to breathe sighs of relief. See Adam Liptak, Roberts's Incremental Approach Frustrates Supreme Court Allies, N.Y. Times (July 14, 2014), http://www.nytimes.com/2014/07/15/us/supreme-court-shows-restraint-in-voting-to-overrule-precedents.html [hereinafter Liptak, Roberts's Incremental Approach] (on file with the *Columbia Law Review*) (explaining Court's choice not to overrule eight separate precedents "was a disappointment to the court's three most conservative justices"); David Cole, Supreme Court: It Could Have Been Worse, N.Y. Rev. Books: Blog (June 30, 2014, 7:45 PM), http://www.nybooks.com/blogs/nyrblog/2014/jun/30/supreme-court-could-have-been-worse/ (on file with the *Columbia Law Review*) ("In each of the cases I highlighted where litigants asked the Court to pursue the more radical course of reversing prior precedents, the Court declined, and instead resolved the cases more narrowly."). Disputing this picture, Friedman characteristically suggested that "it might benefit the left if the justices were more aggressive." Liptak, Roberts's Incremental Approach, supra (quoting Friedman).

77. See supra notes 75–76 and accompanying text (discussing preservation of status quo ante via narrowing); see also infra Part V.C (discussing Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012)).

78. For example, United States v. Lopez, 514 U.S. 549 (1995), narrowed the Court's previously expansive Commerce Clause doctrine and so inaugurated a period of change

By problematizing a disputed area of law, an act of narrowing can catalyze new research, reflection, and creativity in the affected jurisprudential area, while enhancing the Court's own flexibility to act. In all these respects, narrowing can offer a fruitful form of judicial minimalism.[79]

Critics often doubt that the Court has either the intent or the ability to learn from the doctrinal uncertainty that narrowing engenders.[80] For these skeptical commentators, the Court narrows as an end in itself, so as to obliterate a disfavored precedent. But even if it didn't foster improved decisionmaking, narrowing would be objectionable on practicality grounds only if it created significant practical problems.[81] And, usually, the demands of practicality will be met when the Court adopts a reasonable reading of precedent, since both private parties and governmental actors are more likely to rely on a precedent for its central, unambiguous holding. Even if intentional narrowing never occurred, after all, persons who rely on reasonably disputable interpretations of precedent do so while accepting the risk that fallible courts might reasonably go the other way. Moreover, narrowing along the fault line of a prior case's ambiguity is likely to yield a sensible rule. So it is fair to presume that reasonable interpretations of precedent are practical, too.

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that largely petered out in later cases, such as Gonzales v. Raich, 545 U.S. 1 (2005). For an example involving legislative reversal, consider Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). After *Ledbetter* narrowed Bazemore v. Friday, 478 U.S. 385 (1986), Congress legislated a version of the legal rule that had previously been followed in many federal courts of appeals. See supra notes 49–55 and accompanying text (discussing *Ledbetter*). For a related discussion of how the Roberts Court invites responsive action from political branches, see Richard M. Re, The Doctrine of One Last Chance, 17 Green Bag 2d 173, 179 (2014).

79. See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 20–21 (1999) ("A Supreme Court that is reluctant to overrule past decisions can accomplish much of the same thing through creative reinterpretation."). In outlining his influential case for minimalism, Sunstein focused on the resolution of open questions in the first instance. See, e.g., id. at 10–11 ("[M]inimalists ask that decisions be *narrow rather than wide*."). And, as Friedman accurately suggested, there are plausible reasons why the general virtues of minimalism might not carry over to the specific context of narrowing. See Friedman, supra note 2, at 6 ("Stealth overruling shares none of the supposed virtues of minimalism . . . ."); id. at 30–32 (arguing stealth overruling is really "aggressive decision making" in disguise). For example, narrowing settled rules could be viewed as unduly activist or jurisprudentially aggressive, even if minimalism in the creation of new judicial rules is properly restrained. This Essay provides the focused argument necessary to show that the general virtues of minimalism do indeed carry over to narrowing.

80. See, e.g., Friedman, supra note 2, at 30–31 (finding it "dubious" that Court can collect information about the practical effects of its rules and "[m]ore likely" that Court narrows to gauge public opinion).

81. Cf. Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1552 (2000) ("The unworkability of precedent provides additional incentive for the judiciary to overrule it. But the converse does not necessarily follow: The mere fact of workability is not a strong argument in favor of retaining a precedent." (footnote omitted)).

None of this is to deny that narrowing can be inopportune, even when relevant precedent is ambiguous. In unusual cases, a prior ruling may be so harmful and obviously wrong that it makes sense to rip off the precedential band-aid by overruling without delay. And repeated acts of narrowing could leave a tattered, exception-riddled jurisprudence of needless complexity. Parties might even experience heightened anxiety in the wake of narrowing, as they wonder when the next shoe will drop.[82] Given all this, the Court must inevitably exercise judgment to determine whether to narrow in any particular instance. Yet these kinds of problems are the exception rather than the rule. When the Court occupies a preexisting precedential ambiguity, the results are rarely so bad as to be disastrous, so byzantine as to be unadministrable, or so uncertain as to cause existential angst.

3. *Candor.* — Candor means characterizing the law in a way that is consistent with the judge's subjective understanding. This value, too, can be justified in several ways.[83] Both tradition and the Constitution's oath requirements might be thought to instantiate a principle of official honesty, for instance.[84] Most commonly, though, defenders of judicial candor rest on functional arguments centered on the judicial opinion as a means of accountability.[85] Whereas other branches are elected, the judiciary is held to account through its published opinions. The legitimacy of judicial decisions thus appears to spring from their reason-giving character.[86] And a duty to supply reasons is reduced to a lawyer's game when the reasons are confabulated.

Narrowing might be compared with other practices that give effect to inferior interpretations of law. For example, stare decisis generally calls for deference to questionable readings of legal texts. And there is no candor problem in deferring to an agency's interpretation of a statute under *Chevron*, even when the court believes that a better reading is

82. Cf. Jill E. Fisch, The Implications of Transition Theory for Stare Decisis, 13 J. Contemp. Legal Issues 93, 107 (2003) ("Indeed, a court's decision to adhere to a shaky precedent that people expect to be overruled might frustrate reasonable expectations more than overruling the precedent.").

83. See generally Micah Schwartzmann, Judicial Sincerity, 94 Va. L. Rev. 987 (2008) (arguing judicial opinions must be sincere in order to maintain legitimacy); Shapiro, supra note 30 (discussing general duty of candor and arguments against complete candor).

84. Cf. Robert A. Leflar, Honest Judicial Opinions, 74 Nw. U. L. Rev. 721, 736 (1979) (describing and critically assessing the "tradition" that judges honestly justify their decisions).

85. See Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307, 1335 (1995) ("One of the most commonly articulated arguments in favor of judicial candor is that it provides an indispensable means to keep judges and courts accountable.").

86. See Rita v. United States, 551 U.S. 338, 356 (2007) ("Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution.").

available.[87] Likewise, acceptance of an inferior reading of precedent is candid when it openly rests on deeper principles of stare decisis. The Court need only acknowledge that its reading of precedent, while reasonable, may not be the strongest one available. Making this concession may be difficult for Justices who fear that it will be viewed as a sign of weakness. Indeed, readers who expect jurists to make aggressive arguments in support of their holdings may actually be more likely to accept narrowing when it is presented as an effort to distinguish or not extend.[88] Yet candor is often more persuasive than denial—particularly given that, as suggested in Part I, dissenting Justices call out purportedly "stealthy" curtailments of precedent for what they are. Consistent with that intuition, many narrowing decisions all but acknowledge their curtailment of precedent, as discussed in the Parts below. This point has gone underappreciated in part because credible arguments for narrowing can easily be mistaken for flimsy efforts at distinguishing. But that problem would evaporate if narrowing came to be recognized as the distinctive and legitimate jurisprudential technique that it is. In a world where narrowing had its own pedigree, the Court would be more willing and able to acknowledge its efforts at curbing precedent.

In sum, courts engaged in narrowing can accurately describe the ambiguous state of the law while also signaling that their interpretation reflects a sincere balance of competing judicial obligations. Narrowing can thus satisfy the most punctilious standards of judicial candor.[89]

4. *Fidelity.* — Fidelity means adherence to what has already been decided.[90] This basic precedential value has been justified in numerous ways. For example, fidelity may derive from historical practice or even be implicit in the Constitution's conception of judicial power, given the

87. Cf. Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27–28 (1983) ("[T]he court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity.").

88. See supra note 27 (discussing tendency to claim to distinguish or not extend even though Court is really narrowing); cf. Robert H. Klonoff & Paul L. Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials 22 (1990) (arguing audiences are greatly influenced by concessions, on theory that position can only be as strong as its advocate claims).

89. But see Schauer, *Miranda*, supra note 16, at 156 n.9 (arguing narrowing would be "a concern" if, contrary to fact, we lived "[i]n a world of great judicial candor").

90. By framing narrowing in terms of precedential ambiguity, this Essay brackets the age-old debate of exactly what constitutes a holding as opposed to a dictum. See, e.g., Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 957, 959–61 (2005) (noting that determining "whether an identified proposition is holding or dicta occupies a great deal of judicial attention" and proposing framework); Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161, 182–83 (1930) (summarizing suggested rules for identifying "the principle of a case"). A holding, however defined, can be narrowed.

ancient common-law tradition of stare decisis.[91] Alternatively, fidelity may stem from epistemic deference owed to prior decisionmakers.[92] When faced with disagreement between old and new jurists of comparable rank and aptitude, courts should typically avoid revisiting past decisions out of respect for their predecessors—and in order to conserve their own precedent-setting authority. Fidelity also fosters the obvious instrumental benefits of stabilizing the law and encouraging the formation of adjudicatory expectations.

But fidelity in the Supreme Court operates on two different levels. Given its authority to overrule precedent, the Court must be faithful not only to its own past decisions, but also to the Constitution, federal statutes, and other primary sources of law.[93] Cases involving legitimate narrowing put these different aspects of fidelity into conflict. The Court isn't faced with the simple choice to be faithful to the law or not. Rather, the Court faces a crisis of fidelity where all options necessitate compromise. Those who elide this point may do so because they do not share the narrowing Court's sense that primary sources of law cut against the precedent at issue. Indeed, critics are especially likely to lament narrowing when they believe that the narrowed precedent was entirely justified and supported by all relevant law. These critics really aren't objecting to nar-

91. See Jonathan F. Mitchell, Stare Decisis and Constitutional Text, 110 Mich. L. Rev. 1, 2–3 (2011) ("[T]he Constitution allow[s] the justices to rely on stare decisis in controversial cases . . . ."); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 754 (1988) (airing possibility "that the principle of stare decisis inheres in the 'judicial power' of [A]rticle III"); cf. Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 159 (2006) (arguing "Court should abandon adherence to the doctrine that it is free to overrule its own prior decisions"). But see Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 572 (2001) (citing "contestable foundations" of stare decisis); Thomas Healy, Stare Decisis as a Constitutional Requirement, 104 W. Va. L. Rev. 43, 50–51 (2001) (arguing stare decisis is neither "immemorial custom" nor constitutionally required); Paulsen, supra note 81, at 1538 ("[S]tare decisis is neither a doctrine of constitutional dimension nor a strict rule of law . . . .").

92. See, e.g., United States v. Morrison, 529 U.S. 598, 622 (2000) ("The force of the doctrine of *stare decisis* behind these decisions stems . . . also from the insight attributable to the Members of the Court at that time."); see also Akhil Reed Amar, The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 81 (2000) ("Even if [a Justice's] first reaction is that the precedent is wrongly decided . . . the very fact of the prior decision may persuade her that her first reaction is mistaken . . . ."); Lawson, supra note 64, at 10 ("Unlike legal deference, epistemological deference focuses on case-specific reasons for thinking that a particular actor is a good source of guidance . . . .").

93. For a classic statement, see William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949) (arguing a judge "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"); see also South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face.").

rowing as such. Rather, they are primarily concerned with obtaining the results that the critics themselves endorse as a matter of first principles.[94]

In addition to being multileveled, fidelity works both forward and backward in time. A precedent's entitlement to future fidelity, that is, must to some extent have been earned through its own adherence to principles of fidelity.[95] Consider, for example, cases in which the Court has afforded diminished precedential force to decisions involving procedural irregularities[96] or cursory analysis.[97] For a more familiar example, consider the distinction between holding and dictum, whereby later courts deny precedential force to unnecessary rulings by their predecessors.[98] When enforcing the rule against precedential dicta, later courts

94. For example, Justice Scalia's *Michigan v. Bryant* dissent criticized the Court for not "honestly overruling" Crawford v. Washington, 541 U.S. 36 (2004). 131 S. Ct. 1143, 1174–75 (2011) (Scalia, J., dissenting). Using language like Friedman's, Scalia feared that the Court might adopt "a thousand unprincipled distinctions without ever explicitly overruling *Crawford*." Id. Clearly, however, Scalia's lament also rested in large part on his view of first principles—or, as he put it, of "the procedures that our Constitution requires." Id. at 1176. Cf. Frederick Schauer, Has Precedent Ever Really Mattered in the Supreme Court?, 24 Ga. St. U. L. Rev. 381, 401 n.77 (2007) (lamenting arguments "that the Roberts Court is ignoring the precedents that the critic happens to prefer without acknowledging precedents going in the opposite direction").

95. Frederick Schauer has made the related point that precedent has a "forward-looking aspect" in that "the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand." Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 588–89 (1987).

96. See District of Columbia v. Heller, 554 U.S. 570, 623–24 (2008) (interpreting narrowly United States v. Miller, 307 U.S. 174 (1939), in part because it lacked oral argument and adversary briefing); Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (interpreting narrowly Ex parte Quirin, 317 U.S. 1 (1942), in part because Court "denied relief in a brief *per curiam* issued the day after oral argument concluded").

97. This point recently arose in *McCutcheon v. FEC*, where the plurality refused to resolve the case "merely by pointing to three sentences in [Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (per curiam),] that were written without the benefit of full briefing or argument on the issue." 134 S. Ct. 1434, 1447 (2014) (plurality opinion). The plurality then cited other cases in the same vein. Id. (noting Court in *Toucey* "depart[ed] from [l]oose language and sporadic, ill-considered decision" and in *Hohn* from decision "rendered without full briefing or argument" (quoting Hohn v. United States, 524 U.S. 236, 251 (1998); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 139–40 (1941)) (internal quotation marks omitted)).

98. E.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"); see also supra note 90 (referencing holding–dictum debate). Of course, the holding–dictum distinction is a subject of considerable debate, and some suggest it should be replaced with an alternative framework. See Randy J. Kozel, The Scope of Precedent, 113 Mich. L. Rev.

dismiss the intentions of their predecessors, who may very well have thought that they were issuing binding holdings with substantial implications. Yet the later courts do not exhibit infidelity by ignoring dicta.[99] Instead, it is the earlier court that has been unfaithful to even earlier-established norms of precedential conservatism. Early courts that paint with a broad brush seize interpretive authority that properly belongs to their successors. Because improper decisionmaking strains the intergenerational relationship on which precedent relies, the resulting decisions are less entitled to precedential respect. Precedential fidelity, like any other form of trust, must be earned.

Perhaps most importantly, narrowing can honor the duty of fidelity by candidly acknowledging the existence of preexisting precedential ambiguities. Critics of narrowing tend to overlook that judicial opinions—like statutes[100] or any other text—are frequently susceptible to a range of reasonable interpretations. Precedential ambiguity can arise, for example, from tensions within a single judicial opinion, from defeasible language capable of coexisting with exceptions,[101] and from the potential applicability of contestable interpretive doctrines such as the rule against dicta. Judges torn between precedent and first principles will check for these ambiguities in order to reconcile divergent aspects of fidelity.[102]

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(forthcoming 2014) (manuscript at 63-67) (on file with the *Columbia Law Review*) (advocating "analytical transparency" and "jurisprudential consistency").

99. A plurality of the Court aggressively deployed this precept in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014), which sharply narrowed Washington v. Seattle School District No. 1, 458 U.S. 457 (1982). The plurality identified a "broad reading of *Seattle*" supported by the case's text, *Schuette*, 134 S. Ct. at 1634, but rejected it based on first principles, practical problems, and principles stated in related lines of doctrine. E.g., id. (arguing *Seattle*'s "expansive language does not provide a proper guide for decisions and should not be deemed authoritative or controlling"); cf. id. at 1650 (Breyer, J., concurring in the judgment) (concluding, on other grounds, *Seattle* did not control). By contrast, four Justices found *Seattle* on point and so would either have overruled or followed it. See id. at 1641–42 (Scalia, J., concurring in the judgment) (overrule); id. at 1654 (Sotomayor, J., dissenting) (follow).

100. Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (discussing best and reasonable statutory readings in *Chevron* deference context).

101. See generally Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1838–42 (2012) (discussing defeasibility). Defeasibility frequently arises when a decision or legal principle tacitly rests on an unstated premise. See, e.g., infra text accompanying notes 115–116, 192–193, 220–222 (providing examples).

102. Of course, relevant ambiguity may not exist, such as when the precedent specifically addresses and rejects what might otherwise be a potential basis for narrowing. In recognizing this type of constraint, this Essay deviates from thin theories of precedent that allow prior cases to be set aside based on any ground consistent with their facts. Cf. Edward H. Levi, An Introduction to Legal Reasoning 2–4 (1949) (proposing thin theory of precedent).

Provided that relevant ambiguities can reasonably be found,[103] narrowing may represent the most faithful option available. Instead of sacrificing fidelity to either precedent or first principles, legitimate narrowing strives to honor both.

5. *Fit.* — Fit means preserving the overall coherence of legal doctrine. This value is often redundant with correctness, as courts gravitate toward the legal answer that best fits in with other principles. Under Ronald Dworkin's influential jurisprudential theory, for instance, fit is largely constitutive of correctness, and every legal argument can be framed as an argument about fit.[104] For the present purposes, however, fit has a more specific meaning. A court's decision to narrow typically begins by assessing whether the duties of correctness, fidelity, candor, and practicality counsel against adoption of the best available reading. Having reached that juncture, the court must then ask whether the precedent-as-narrowed comports with background principles of law.[105] That is the question of fit as that term is used here.

Narrowing frequently raises difficult questions of fit precisely because a narrowed precedent typically doesn't track any particular judge's preferred views of the law. Rather, narrowed precedents tend to emerge as a kind of compromise between divergent viewpoints—the one crystallized in precedent and the other reflected in the narrowing court's first-principles understanding of the law.[106] Thus, narrowing will rarely if ever result in a perfect fit between the narrowed precedent and background principles of law. Yet there is nothing remarkable about this, as it is in the nature of judicial decisionmaking to "work itself pure" only gradually.[107] Commentators may therefore have too much in mind when

103. See Shapiro, supra note 30, at 734 ("[T]here are times when a precedent cannot be distinguished away even under the narrowest approach consistent with fair argument . . . .").

104. See generally Ronald Dworkin, Law's Empire 225–75 (1986) (discussing "law as integrity"). Dworkin argued that even when "no single interpretation fits the bulk of the text," the judge must adopt the best available reading. Id. at 228–31. Notably, however, even Dworkin suggested that, consistent with a "strict theory of precedent," judicial decisions viewed as "mistakes" might be limited to their "enactment force"—that is, limited to their facts—while being stripped of their "gravitational force," or their ability to influence other legal outcomes or principles. Ronald Dworkin, Taking Rights Seriously 121–23 (1977).

105. Cf. Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting) ("The issue, however, is not whether court rules are 'mutable'; they assuredly are. It is not whether, in the light of 'various circumstances,' they can be 'modifi[ed]'; they assuredly can. The issue is whether, *as mutated and modified*, they must *make sense*." (alteration in original) (quoting id. at 441 (majority opinion))).

106. Cf. Cass R. Sunstein, Trimming, 122 Harv. L. Rev. 1049, 1067–68 (2009) (discussing how "precedent-respecting judges produce outcomes that they would not choose if they were writing on a clean slate" due to their first-principles views).

107. Cf. Omychund v. Barker, (1744) 26 Eng. Rep. 15 (Ch.) 23; 1 Atk. 22, 33 (Mansfield, J.) (describing "the common law, *that works itself pure* by rules drawn from the

they demand "a principled stopping point."[108] True, some halfway rulings and stopping points are indeed so arbitrary as to be impermissible. But few doctrinal compromises are perfectly "principled" in their own right, as measured against either first principles or the reasoning of prior precedent. Rather, doctrinal way stations simply represent the best option presently available. They are principled only when viewed within the context of a longer precedential journey.

What a narrowing judge needs, then, is not an ideal stopping point so much as an adequate one. Again, the touchstone should be reasonableness. If the court can reasonably view the narrowed precedent as consistent with background legal principles, then the narrowed precedent exhibits adequate fit. This important condition on legitimate narrowing is not necessarily captured by the already-discussed requirement that precedents must be reasonably interpreted. For example, a precedent may suggest self-limitations that, in hindsight, seem unreasonably ad hoc or that are directly foreclosed by later decisions. These problems give rise to an additional constraint on legitimate narrowing: The narrowed legal rule must be reasonably compatible with background law. Absent this condition, the narrowing cure would be worse than the precedential disease.

### B. *Narrowing as Avoidance*

Legitimate narrowing is the decisional-law analogue to the statutory-law canon of constitutional avoidance. When courts interpret either a precedent or a statute, they are looking at a document with legal force. But ambiguities in both types of document must be understood in light of more foundational legal principles. The canon of constitutional avoidance has made this point utterly banal in the context of statutory interpretation. Take the recent healthcare decision in *NFIB*,[109] where the Court confronted a federal law that for all the world appeared to create a penalty for individuals who failed to purchase health insurance. As anyone reading this Essay now knows, the Chief Justice concluded that the statute's express "penalty" provision could be read as a tax, thereby averting the need to reach a constitutional holding invalidating the law.[110] That kind of interpretive move is appropriate only if the statute being interpreted was ambiguous to begin with. Nobody believes that courts

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fountain of justice"); see also Lon L. Fuller, The Law in Quest of Itself 12–13 (1940) (noting possibility that judges may self-consciously "attempt to improve a tradition while transmitting it").

108. Friedman, supra note 2, at 31; see also id. at 11 ("The drawing of unpersuasive distinctions violates a cardinal principle of the rule of law.").

109. 132 S. Ct. 2566 (2012).

110. Id. at 2593–2601 (Roberts, C.J.).

have authority to rewrite crystal-clear legislative commands in order to salvage legislative policy from unconstitutionality.[111]

Legitimate narrowing takes place in much the same spirit. Courts have the authority to overrule their past decisions based on a finding of constitutional error, just as they have authority to invalidate statutes that are unconstitutional. But those drastic steps are properly reserved for last resort. Of course, some precedents are unambiguous and so are insusceptible to narrowing, just as some statutes are pellucid and so ineligible for avoidance. Most precedents, however, have play in the joints, creating room for narrowing.

It turns out that the Chief Justice's opinion in *NFIB* exemplifies not just statutory avoidance, but also precedential narrowing. Perhaps the strongest precedent in support of the Affordable Care Act was *Wickard v. Filburn*,[112] which affirmed federal regulation of wheat that a farmer had both grown and consumed on his own farm. Because "[t]he farmer in *Wickard* was at least actively engaged in the production of wheat," the Chief Justice reasoned, "the Government could regulate that activity because of its effect on commerce."[113] By contrast, the Government's theory—that people who don't purchase health insurance nonetheless affect interstate commerce—"would effectively override [*Wickard*'s] limitation."[114] But something very important was missing from the Chief's effort to distinguish *Wickard*—namely, any relevant quotation from *Wickard* itself. This omission was no accident, for nothing in *Wickard* indicated that it turned on the farmer's already being "actively engaged" in commerce. Indeed, the Chief's reading sat uneasily with other language in the opinion.[115] So if the "limitation" that the Chief Justice identified was present in *Wickard* at all, it was only latently so. The limitation stemmed not from precedent itself, but rather from the combination of a precedential ambiguity and the Chief's view of first principles.[116]

If anything, legitimate narrowing is *more* defensible than constitutional avoidance. Cases applying the canon of constitutional avoidance typically rest on a claim about legislative intent. They assert that Congress

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111. See, e.g., United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479–80 (1995) (noting Court's "obligation to avoid judicial legislation" when engaged in constitutional avoidance).

112. 317 U.S. 111 (1942).

113. *NFIB*, 132 S. Ct. at 2588 (Roberts, C.J.); see also id. at 2643 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

114. Id. at 2588 (Roberts, C.J.).

115. Id. at 2621 (Ginsburg, J., dissenting) ("'[F]orcing some farmers into the market to buy what they could provide for themselves' was, the [*Wickard*] Court held, a valid means of regulating commerce." (first alteration in original) (quoting *Wickard*, 317 U.S. at 128–29)).

116. See Sachs, The Uneasy Case, supra note 16, at 24–25 (arguing before *NFIB* that *Wickard* was susceptible to narrow interpretation).

wouldn't deliberately cross into or even approach the zone of unconstitutionality without using clear language.[117] But Congress is frequently happy to ignore difficult constitutional questions, thereby leaving them to the courts. This fact has a normative analogue, as legislators and others have increasingly come to think that the separation of powers reflects an interpretive division of labor, such that the political branches are *supposed* to leave constitutional interpretation to the third, most expert branch.[118] None of these concerns applies when avoidance principles are directed at judicial decisions. If earlier courts were concerned about anything, they were concerned about getting it right. Therefore, it is hardly far-fetched for a later court to assume that its predecessor's loose or overbroad language may have been a slip. As one court put it, "[S]ometimes even excellent Homer nods."[119] And this reasoning fully accords with even the most zealous theories of judicial supremacy in matters of constitutional interpretation.

Legitimate narrowing also doesn't raise the core legitimacy problem with the constitutional-avoidance canon. A court that engages in avoidance uses ambiguity to change the operative meaning of a legislative enactment—quite possibly in a way that the legislature never considered.[120] So, despite its passive-sounding name, statutory avoidance can be quite an active enterprise and, indeed, can blur the line between the "judicial Power" and impermissible judicial legislation.[121] But narrowing is different. Insofar as a prior holding was a proper subject of judicial interpretation, it necessarily follows that subsequent *re*interpretations of that holding are likewise within the proper scope of the judicial power.

117. See, e.g., Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). For a taste of the literature, see generally Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003 (1994) (outlining underlying justifications for avoidance doctrine and suggesting more limited application of canon); Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71 [hereinafter Schauer, *Ashwander* Revisited] (arguing costs of constitutional avoidance can exceed benefits); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945 (1997) (outlining development of modern canon of avoidance); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549 (2000) (explaining canon of avoidance reflects enduring public values).

118. Justice Scalia, for example, has made this point. See Stuart Taylor, Jr., The Tipping Point, 32 Nat'l J. 1810, 1811 (2000) (quoting Scalia's belief that "Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution").

119. Consol. Rail Corp. v. United States, 896 F.2d 574, 579 (D.C. Cir. 1990) (internal quotation marks omitted).

120. See, e.g., Schauer, *Ashwander* Revisited, supra note 117, at 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

121. U.S. Const. art. III; §§ 1–2; see supra note 111 (noting Court's duty to avoid judicial legislation when engaged in constitutional avoidance).

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In general, legitimate narrowing occurs when courts reasonably interpret their own erroneous precedents in a way consistent with other legal principles. This test is much more permissive than what is typically expected to justify overruling.[122] It is also more permissive than what leading critics of "stealth overruling" would allow. For example, Friedman centrally objects to *United States v. Patane*, which held that *Miranda* violations don't require suppression of evidentiary fruits.[123] According to Friedman, *Miranda* was "clear beyond peradventure" that it required suppression of physical evidence, in addition to unwarned testimony.[124] To wit, *Miranda* noted that a prosecutor "may not use" unwarned statements.[125] Yet that statement can easily be read as limited to the unwarned statements themselves.[126] And earlier cases had already carved out exceptions to *Miranda*'s supposedly categorical rule of suppression.[127] Finally, even Friedman found it "contestable" that only *Miranda*'s "dicta" contradicted *Patane*.[128] Given all this, *Patane* fell within a precedential ambiguity. Moreover, *Patane* contradicted no other legal principle. So if the *Patane* Court was correct in its first-principles view of the merits (perhaps because *Miranda* had been wrongly decided), then its decision to narrow was also legitimate—even if doing so ran against the best reading of precedent. In this respect, *Patane* is hardly alone. As shown below, legitimate narrowing is frequent, even common.

## III. EXPERIMENTAL NARROWING: *FLAST V. COHEN*

One Supreme Court decision has been narrowed more than any other. In *Flast v. Cohen*,[129] the Court created an apparently sweeping exception to its well-established rule against taxpayer standing. Yet,

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122. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (discussing factors to be considered before "Court reexamines a prior holding").

123. 542 U.S. 630, 644 (2004); see Friedman, supra note 2, at 22 (explaining Court in *Patane* held "fruits of an un-Mirandized statement are admissible").

124. Friedman, supra note 2, at 16.

125. Id. (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

126. Friedman also noted that the *Miranda* dissenters asserted that the majority required suppression of "fruits." See id. at 16 & n.69 (citing *Miranda*, 384 U.S. at 500 (Clark, J., dissenting)). But "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." United States v. Travers, 514 F.2d 1171, 1174 (2d Cir. 1974) (Friendly, J.). Notably, the *Patane* dissenters didn't rely on the passage from *Miranda* on which Friedman relies. See *Patane*, 542 U.S. at 646 (Souter, J., dissenting); id. at 648 (Breyer, J., dissenting).

127. See, e.g., Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding rule of suppression does not apply where suspect who previously responded to "unwarned yet uncoercive questioning" later confessed after receiving warning).

128. Friedman, supra note 2, at 22.

129. 392 U.S. 83 (1968).

through decades of rulings, Justices who suspected that *Flast* was wrongly decided have reduced the decision to a shadow of its former promise. This Part uses *Flast* and its patricidal progeny as a case study in how and why narrowing takes place. *Flast* arguably supplies a prime example of the most obvious reason to narrow a precedent—namely, the belief that the precedent is wrong to its very core. But that is not to say that *Flast* will eventually be overruled. Having experimented with both more and then less taxpayer standing, the Court may have narrowed *Flast* down to what it will regard as an equilibrium point, where the reasons to retain a precedent are counterbalanced by opposing reasons to engage in additional narrowing or to overrule.

### A. *Narrowing Transformations*

*Flast v. Cohen* afforded federal taxpayers standing to challenge a congressionally authorized spending program that allegedly violated the Establishment Clause.[130] Initially hailed as a watershed, *Flast* prompted commentators to foresee the quick demise of the general rule against taxpayer standing.[131] Those predictions were eminently reasonable. Indeed, *Flast*'s test for taxpayer standing was written very broadly, such that it could easily support taxpayer standing to vindicate any constitutional right.[132] But that potential breadth was not to be. Instead, the Supreme Court has limited *Flast* at almost every opportunity. The first decisions in this vein came down just a few years after *Flast* itself. A trial court had cited *Flast* as proof that the Court was abandoning *all* standing requirements.[133] Rejecting that sweeping view, the Court narrowed *Flast* to Establishment Clause claims.[134] Later, the Court went further, finding

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130. Id. at 106.

131. E.g., Kenneth Culp Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 601 (1968) (explaining "narrow" holding in *Flast* was that taxpayers have standing in connection with any claim regarding a "specific" constitutional right, not just any Establishment Clause claim (internal quotation marks omitted)); see also Richard M. Re, Relative Standing, 102 Geo. L.J. 1191, 1231 & n.237 (2014) ("*Flast* was originally recognized as a first step toward entirely overruling the bar on taxpayer standing . . . ."); The Supreme Court, 2010 Term—Leading Cases, 125 Harv. L. Rev. 172, 178 (2011) (noting original understanding of *Flast* "as an Establishment Clause exception to the rule against adjudicating generalized grievances").

132. *Flast*, 392 U.S. at 102–03.

133. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 213 (1974) (quoting D.C. District Court's proposition that standing "'has now been almost completely abandoned'" (quoting Reservists Comm. to Stop the War v. Laird, 323 F. Supp. 833, 839 (D.D.C. 1971), aff'd, 495 F.2d 1075 (D.C. Cir. 1972), rev'd sub nom. *Schlesinger*, 418 U.S. 208)).

134. See United States v. Richardson, 418 U.S. 166, 173 (1974) (finding no taxpayer standing to sue under Statement and Account Clause in light of "narrowness" of *Flast*); id. at 180 (Powell, J., concurring) (expressing desire to "go further than the Court and . . . lay to rest the approach undertaken in *Flast*"); see also *Schlesinger*, 418 U.S. at 227–28 (finding

no taxpayer standing even when Establishment Clause violations had been alleged.[135] By then—fewer than twenty years after it was decided—*Flast* was much diminished and, indeed, was already being mourned.

How did this happen? The realpolitik answer is that changing political winds altered the Court's composition, and *Flast* consequently lost majority support on the Court.[136] One might add that, from a doctrinal standpoint, *Flast*'s loose reasoning made it a soft target for critics, both on and off the Court. But there is another important explanation: *Flast* was deliberately designed to be susceptible to reinterpretation, including narrowing. Consider *Flast*'s famous (or infamous) two-part test for taxpayer standing: "First, the taxpayer must establish a logical link between [her taxpayer] status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."[137]

Whatever else is true about this test, one thing is clear: It's ambiguous. Perhaps *any* legislatively funded activity qualifies under the first prong, and perhaps *any* "constitutional infringement" satisfies the second. Given those premises, *Flast* would become a font of almost limitless standing to sue the government. The Court surely envisioned that possibility, and Justice Douglas expressly endorsed it.[138] But some of the Justices were uncomfortable with such a massive doctrinal shift.[139]

In an apparent effort to accommodate these cross-cutting anxieties, the near-unanimous *Flast* Court held that its open-ended "nexus" test was satisfied based on narrow circumstances—namely, a federal spending statute that allegedly infringed the Establishment Clause.[140] In other words, the *Flast* Court reached a supermajoritarian compromise by packing its decision with ambiguity. This approach created the possibility that *Flast*'s broad nexus test might be satisfied only rarely—if enough Justices cooled to the taxpayer standing project. And so it has come to pass.

*Flast* presents an especially interesting case of narrowing precisely because it was so obviously written as a tentative first step toward

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no taxpayer standing to sue under Incompatibility Clause and asserting *Flast* established taxpayer standing only "under certain limited circumstances").

135. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 488–90 (1982).

136. Cf. Dworkin, Supreme Court Phalanx, supra note 2 (arguing recent conservative appointees undermined *Flast* by deciding *Hein* "on partisan grounds").

137. *Flast*, 392 U.S. at 102–03.

138. Id. at 107 (Douglas, J., concurring) (arguing Court should overturn bar on taxpayer standing "here and now"). Remarkably, Justice Douglas also predicted that the *Flast* nexus test was not "durable" and would "suffer erosion." Id.

139. See id. at 114 (Stewart, J., concurring) (identifying limits to majority's holding); id. at 115 (Fortas, J., concurring) (same).

140. Id. at 105–06.

revolutionizing an area of law.[141] If the Court had continued to feel that its foray into taxpayer standing had been a good idea, then *Flast* would have offered many potential avenues for extension. But *Flast* also came equipped with a range of express limitations that allowed its jurisprudential impact to be narrowed with time. The Court seems to have known that *Flast*'s precedential fate was uncertain and so composed an opinion that would be adaptable to the future. *Flast* was thus born as neither a landmark nor a fluke, but rather as an experiment in constitutional doctrine.

B. *Degrees of Narrowing*

Justice Scalia's divergent approaches in two recent *Flast* cases supply a particularly helpful illustration of how different constraints on legitimate narrowing might be applied. In both of these recent cases, the dissenting Justices advanced powerful arguments in favor of applying the principle of taxpayer standing established in *Flast.* And, in both cases, the Court declined to apply *Flast* largely based on limitations drawn from *Flast* itself. Yet Scalia joined the Court in only one of the decisions, thereby illuminating his views on the minimum conditions for narrowing. Scalia's apparent willingness to tolerate narrowing in some instances is surprising, since he is usually viewed as narrowing's most vocal opponent on the Court.[142]

The first case is *Hein*, where a plurality interpreted *Flast* not to apply to government expenditures lacking specific legislative authorization.[143] This limitation found ample support in *Flast*, which had arguably made such legislative authorization an express requirement for taxpayer standing.[144] Yet *Flast* supplied no reason for that apparently self-imposed limit, and it is hard to see why legislative and executive expenditures would affect taxpayers differently. Thus, there was a strong argument that *Flast* should apply.[145]

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141. Another precedent in the vein of a tentative first step is United States v. Lopez, 514 U.S. 549 (1995). See supra note 78.

142. To see how Justice Scalia earned this title, see supra note 94 (describing Scalia's response to Court's narrowing in *Bryant*); infra note 146 and accompanying text (discussing Scalia's desire to overrule, rather than narrow, *Hein*); infra note 177 (highlighting Scalia's critique of narrowing in *Casey*); infra note 237 (quoting Scalia's objection to narrowing in *WRTL*). But see infra Part V.C (noting Scalia agreed to narrow *McCutcheon*); infra Part VI.B (explaining Scalia's efforts to narrow *Windsor*).

143. Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007) (plurality opinion).

144. *Flast*, 392 U.S. at 102–03 ("Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution.").

145. By contrast, Justice Kennedy wrote a separate concurrence expressing his belief that *Flast* was rightly decided and so does not appear to have engaged in narrowing. *Hein*, 551 U.S. at 616 (Kennedy, J., concurring).

Scalia had another idea. In a vigorous opinion joined by Justice Thomas, Scalia concurred in the judgment of the Court finding no taxpayer standing. But he reached that result by concluding that the Court should overrule, not narrow. Finding no doctrinally relevant reason to treat legislative and executive spending differently, Scalia opposed injecting such an inexplicable distinction into the case law—even though *Flast* itself had expressly contemplated that such a distinction might be drawn.[146] Having thus ruled out narrowing for lack of fit, Scalia squarely confronted the question whether the Court should overrule *Flast*. He believed that it should.[147]

The second case is *Winn*, where the Court held that *Flast* afforded standing to challenge government expenditures but not tax credits.[148] This limitation did not form part of *Flast*'s express criterion for taxpayer standing, but it did find textual support in *Flast*, as well as in related cases.[149] Even members of the *Flast* majority sometimes distinguished expenditures from tax benefits.[150] Moreover, *Winn* adduced a doctrinally relevant distinction: Only expenditures caused an "injury in fact" by redistributing objecting taxpayers' personal funds, whereas tax credits represent decisions not to tax at all.[151] *Winn* could thus be viewed as *Hein*'s mirror image, in that there was a weaker case that *Flast* meant to draw the asserted distinction and a stronger case that the limitation was defensible in its own right.

That different mix of variables made a difference in Scalia's eyes. Again joined by Thomas, Scalia joined the majority opinion. In a brief,

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146. Id. at 618 (Scalia, J., concurring in the judgment) (accusing plurality of fostering "creation of utterly meaningless distinctions").

147. Id.

148. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011).

149. See id. at 1446 (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006)) (stating *Flast* injury entails extraction of funds).

150. See Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 690–91 (1970) (Brennan, J., concurring) ("'[I]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches . . . .'" (quoting Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development (pt. 2), 81 Harv. L. Rev. 513, 553 (1968))); see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 504–05 n.15 (1982) (Brennan, J., dissenting). But see Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 380 n.5 (1985) (Brennan, J.) (characterizing two cases involving tax benefits, including Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 762 (1973), as taxpayer standing cases heard under *Flast*), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

151. *Winn*, 131 S. Ct. at 1447; see also Patrick T. Gillen, A *Winn* for Originalism Puts Establishment Clause Reform Within Reach, 21 Wm. & Mary Bill Rts. J. 1107, 1108 (2013) ("I do not believe that *Flast* needs to be overruled in order to address the serious problems the decision has created; it simply needs to be limited along the lines suggested by *Winn*.").

separate concurrence, Scalia again explained that *Flast* was "misguided," an "anomaly," and "irreconcilable" with Article III.[152] Nonetheless, Scalia found it proper to join the Court instead of (as in *Hein*) insisting that *Flast* immediately be overturned. Noting that the *Winn* "majority and dissent struggle with" how best to interpret *Flast*, Scalia found it sufficient that the majority arrived at its result by "applying *Flast* rather than distinguishing it away on unprincipled grounds."[153] Scalia then appended to this statement a pointed "*Cf.*" cite to his *Hein* concurrence in the judgment.[154]

Scalia's *Winn* concurrence appears to address the conditions for legitimate narrowing. First, Scalia indicated that *Flast* was ambiguous by noncommittally gesturing toward the principal opinions' "struggle" to apply it.[155] Second, he explained that the *Winn* majority had identified a "principled" limit on *Flast*, rendering its reading permissible.[156] Scalia thus appears to have concluded that in *Winn*—unlike in *Hein*—the Court's limitation was not just a reasonable interpretation of *Flast*, but also consistent with background principles of law. This conclusion casts Scalia's well-known repudiations of narrowing[157] in a different light. Far from inveighing against narrowing as such, Scalia may instead have been lamenting instances of narrowing that, in his eyes, failed to meet the requirement of fit.[158] In this respect, the difference between Scalia and his colleagues may simply be a matter of emphasis or degree.[159]

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Even now, after nearly fifty years of narrowing, there may be additional grounds for limiting *Flast*. Consistent with its repeated focus on "congressional" expenditures, for instance, *Flast* may not apply to state expenditures.[160] Perhaps the prospect of drawing that additional limit will be too much, and the Court will conclude that *Flast* should finally be overturned.[161] But that outcome isn't inevitable. *Flast* has now been narrowed to such a degree that it will only rarely find application and, in those circumstances, the arguments for its retention will be at their

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152. *Winn*, 131 S. Ct. at 1450 (Scalia, J., concurring).

153. Id. at 1449–50.

154. Id. at 1450.

155. Id. at 1449–50.

156. Id. at 1450.

157. See supra note 142 (noting Justice Scalia's adverse reactions to narrowing).

158. Justice Scalia has often emphasized the importance of fostering coherent principles of law. See supra note 105 (discussing Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting)).

159. See infra Part V.C (discussing Justice Scalia and *McCutcheon*); infra Part VI (discussing Scalia and *Windsor*).

160. See Flast v. Cohen, 392 U.S. 83, 102–03 (1968).

161. Cf. infra Part V (discussing narrowing to overrule).

zenith. Having been narrowed down to its core, *Flast* may at last have achieved a secure status in precedent.

## IV. NARROWING RULES

This Part discusses *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[162] *Boumediene v. Bush*,[163] *Arizona v. Gant*,[164] and *Miller v. Alabama*[165] in order to advance three interrelated claims. First, the Court sometimes narrows not because the precedent at issue arrived at an erroneous outcome (as with Justice Scalia and *Flast*, for instance), but rather because it was decided on an overbroad ground. The Court frequently solves this problem by narrowing rules. Second, the Justices often support or oppose narrowing by appealing to certain conditions on legitimate narrowing. Thus, the Court already seems to be guided by what might be called "narrowing rules"—that is, a set of implicit narrowing doctrines. Finally, narrowing often leads to liberal results.[166] The many left-of-center commentators who lament the Roberts Court's penchant for narrowing should therefore recognize that, to use the parlance of our times, narrowing rules.[167]

### A. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Casey*, the Supreme Court was asked to overrule *Roe v. Wade*, which had applied a trimester-based analysis to invalidate state abortion restrictions.[168] *Casey* emphasized the importance of stare decisis in order to defend *Roe*,[169] but that line of reasoning obscured a deep irony. Instead of reaffirming *Roe*'s actual trimester-based analysis, the controlling plurality in *Casey* adopted a new "undue burden" inquiry that afforded governments somewhat greater ability to regulate abortions.[170] The Court explained that this result affirmed "the essential holding of

162. 505 U.S. 833 (1992).

163. 553 U.S. 723 (2008).

164. 556 U.S. 332 (2009).

165. 132 S. Ct. 2455 (2012).

166. See infra Part V.B (discussing Justices' resistance to *Citizens United*).

167. See supra note 2 and accompanying text. Friedman notes "that stealth overruling does not inherently carry any particular ideological valence" and provides pre-Roberts Court examples of liberal narrowing. Friedman, supra note 2, at 12–13 (noting, for example, that post-*Brown v. Board of Education* "series of per curiam decisions striking down segregation in other contexts were nothing but pure fiat, a point made repeatedly in their wake"); see also Schauer, *Miranda*, supra note 16, at 156 n.9 (adducing other historical examples and noting he "would not be surprised to find that supporters of *Plessy* had, from 1938 until the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), lamented the 'stealth overruling' of *Plessy*").

168. 410 U.S. 113 (1973).

169. See 505 U.S. 833, 854–61 (1992).

170. Id. at 874 (plurality opinion).

*Roe*."[171] And by specifically preserving only *Roe*'s "essential" holding, the plurality drew a contrast with the discarded trimester framework, which it called "unnecessary."[172] The plurality also drew attention to *Roe*'s underappreciated recognition of the government's "important and legitimate interest in potential life."[173] Based on these premises, the plurality arrived at the startling conclusion that a "logical reading of the central holding in *Roe*" actually required "abandon[ing] the trimester framework" that *Roe* itself had famously created.[174]

Many readers have found *Casey*'s treatment of precedent schizophrenic. Despite spending many pages extolling the virtues of stare decisis, the plurality ended up substantially rewriting *Roe* and expressly overturning two post-*Roe* decisions.[175] It is tempting to say that the *Casey* plurality simply overruled *Roe* and replaced it with the new undue-burden–viability analysis.[176] In fact, the *Casey* dissenters made that point, and forcefully.[177] "*Roe* continues to exist," the principal dissent wrote, "but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[178] But that description overlooks the jurisprudential continuity that *Casey* both accomplished and drew sustenance from. The truth is that the *Casey* plurality *did* find precedential support in *Roe*. By repudiating the trimester framework, the plurality enforced the jurisprudential norm against overbroad holdings. At the same time, the *Casey* plurality propelled critical features of the *Roe* decision into the future—indeed, into the present day. In this way, the *Casey* plurality may have exhibited fidelity to the only parts of *Roe* that deserved it.

*Casey* illustrates narrowing's ability to strengthen precedent while bending it. When the Court heard argument in *Casey*, many observers thought it likely that *Roe* would be overruled.[179] Instead, as we have seen,

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171. Id. at 845–46 (majority opinion).

172. Id. at 872–73 (plurality opinion).

173. Id. at 871 (quoting *Roe*, 410 U.S. at 163) (internal quotation marks omitted).

174. Id. at 873.

175. Id. at 878, 881–82, overruling City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

176. See supra note 31 (noting view that narrowing is akin to overruling).

177. In his dissent, Justice Scalia effectively ridiculed narrowing as a form of stare decisis. In particular, Scalia "confess[ed] never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version" of stare decisis. 505 U.S. at 993 (Scalia, J., dissenting). Scalia then offered a caricature of narrowing: "I wonder whether, as applied to *Marbury v. Madison*, for example, the [plurality's] new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts." Id. (citation omitted).

178. Id. at 954 (Rehnquist, C.J., dissenting).

179. See, e.g., David Margolick, Seeking Strength in Independence, Abortion-Rights Unit Quits A.C.L.U., N.Y. Times (May 21, 1992), http://www.nytimes.com/1992/05/

*Casey* negated *Roe*'s rigid trimester framework in favor of a more flexible standard that permitted somewhat greater regulations. Whether this decision was pro- or antiabortion rights largely depends on the applicable baseline of comparison. If the baseline is the rule and reasoning announced in *Roe*, then *Casey* may have constricted abortion rights. But if the baseline accounts for *Roe*'s highly vulnerable precedential status in the late 1980s and early 1990s, then *Casey* deserves its place among the few most important pro-abortion-rights decisions ever issued. And that, in fact, is how it has generally been received.[180] *Casey* may even have been a net improvement for abortion rights, in that the undue-burden test arguably created an outlet for democracy in an area where democracy needed to be heard.[181] *Casey* is thus a plausible example of how narrowing a legal principle can secure it.[182]

### B. Boumediene v. Bush

In *Boumediene*, the Supreme Court held that the writ of habeas corpus extended to the alien detainees held at Guantánamo Bay, Cuba.[183] That result seemed inconsistent with the World War II-era decision *Johnson v. Eisentrager*, which had declined to extend the writ to aliens detained in Germany after the conclusion of hostilities there.[184] On its face, *Eisentrager* seemed to turn on a simple rule: The Great Writ does not run to aliens held outside the territorial United States. For instance, the *Eisentrager* majority was aware of "no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[185] And *Eisentrager* followed that remark with a categorical statement: "Nothing in the text of the

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21/us/seeking-strength-in-independence-abortion-rights-unit-quits-aclu.html (on file with the *Columbia Law Review*) (noting "abortion-rights advocates expect[ed] the Court to either overturn or to greatly weaken" *Roe*).

180. See, e.g., Neal Devins, How *Planned Parenthood v. Casey* (Pretty Much) Settled the Abortion Wars, 118 Yale L.J. 1318, 1322 (2009) ("*Casey* settled the abortion wars [in part because it] helped create an environment in which the Supreme Court is unlikely . . . to overturn *Roe* . . . .").

181. See Robert Post & Reva Siegel, *Roe* Rage: Democratic Constitutionalism and Backlash, 42 Harv. C.R.-C.L. L. Rev. 373, 429 (2007) ("*Casey* authorizes the Court to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition.").

182. Notably, *Roe*'s author wasn't interested in narrowing for the sake of reducing conflict. See *Casey*, 505 U.S. at 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (declaring "woman's right to reproductive choice" is fundamental liberty that "need not seek refuge at the ballot box").

183. 553 U.S. 723, 732 (2008).

184. 339 U.S. 763, 781 (1950).

185. Id. at 768.

Constitution extends such a right, nor does anything in our statutes."[186] The United States relied on this precedent when it chose to hold suspected terrorists and Taliban fighters in Guantánamo.[187] For the four *Boumediene* dissenters, this was more than enough to deny the Guantánamo detainees' demand to file writs of habeas corpus. As Justice Scalia put it in his vehement dissent, "*Eisentrager* thus held—*held* beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."[188]

The *Boumediene* majority approached these issues very differently. At the outset, the majority framed the precedential inquiry in terms of ambiguity. "True," the majority acknowledged, *Eisentrager* appeared to state a categorical rule based on territorial sovereignty.[189] But the majority denied that this language was "proof positive that the *Eisentrager* Court adopted a formalistic, sovereignty-based test."[190] Already, the majority had established a favorable criterion for success: Only "proof positive" from *Eisentrager* could bind the current Court. The majority then adduced three reasons for its narrow reading. First, *Eisentrager* discussed other factors besides territoriality, and the Court did not "accept" that this language was dicta.[191] Second, it was "far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense."[192] Therefore, *Eisentrager* was "not inconsistent with" the current Court's approach.[193] Third, the majority said that it "cannot accept" the government's reading because doing so would place *Eisentrager* in "considerable tension" with other decisions, and "[o]ur cases *need not* be read to conflict in this manner."[194]

Each of the majority's three arguments addressed an issue of precedential ambiguity. According to the Court, *Eisentrager* mentioned supporting factors that could be read as necessary conditions, employed ambiguous terms, and sat uneasily alongside other precedents. Thus, the majority's announced aim wasn't to enlist *Eisentrager* as affirmative support, but rather to highlight the case's ambiguities in a way that made

186. Id.

187. See Jonathan M. Hansen, Guantánamo: An American History 310–12 (2011) (recounting Bush Administration deliberations on whether to locate detainees at Guantánamo and noting their belief that *Johnson v. Eisentrager* likely precluded habeas corpus there).

188. *Boumediene*, 553 U.S. at 835 (Scalia, J., dissenting).

189. Id. at 762 (majority opinion).

190. Id.

191. Id. at 762–63. The dissent responded that these factors were offered to show that "the case before the Court represented an *a fortiori* application of the ordinary rule." Id. at 837 (Scalia, J., dissenting).

192. Id. at 763 (majority opinion).

193. Id. at 763–64.

194. Id. at 764 (emphasis added).

it susceptible to narrowing. *Boumediene*'s rhetoric reflected its substance, underscoring both the existence of ambiguity ("far from clear," "not inconsistent," "need not be read")[195] and the Court's choice to exercise discretion ("we do not accept," "[w]e cannot accept").[196] The dissenters bitterly complained of the majority's "failed attempt to distinguish *Eisentrager*,"[197] but the majority wasn't engaged in distinguishing. Instead, its precedential analysis was a textbook example of narrowing.

### C. Arizona v. Gant

*Gant* supplies one of the Court's most complex and interesting treatments of precedent, even apart from its apparent reliance on narrowing. To simplify the situation, *Gant* involved a precedent (actually three precedents, but—again—we are simplifying[198]) that defined the government's authority to search the passenger compartments of an automobile after arresting the vehicle's driver. This key precedent was *New York v. Belton*, and it appeared to establish a bright-line rule: The arrest of a driver authorized the police to search the car's interior compartment.[199]

However, Justice Stevens's *Gant* majority construed *Belton* much more narrowly. According to Stevens, the compartment of an automobile could be searched only if the police reasonably feared that the driver might reach into the car to withdraw a weapon.[200] To buttress this reading, Stevens spent several pages reviewing the facts and even the briefing in *Belton*.[201] The point of all this work was to show that a narrow reading of *Belton* was reasonable—no small feat, since that reading had been squarely rejected by the dissent in *Belton*, almost all lower courts since *Belton*,[202] the Supreme Court's later decisions,[203] and even a majority of Justices in *Gant* itself.[204] Of special note, Justice Scalia—who provided the critical fifth vote for the *Gant* majority—specifically refused to "acced[e] to what seems to me the artificial narrowing of those cases."[205]

Ultimately, Stevens's effort at narrowing failed to create sufficient ambiguity in *Belton* to garner a majority, so he resorted to a separate juris-

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195. Id. at 763–64.

196. Id. at 762, 764.

197. Id. at 835 n.3 (Scalia, J., dissenting).

198. The other cases were Chimel v. California, 395 U.S. 752 (1969), and Thornton v. United States, 541 U.S. 615 (2004).

199. New York v. Belton, 453 U.S. 454, 460 (1981).

200. Arizona v. Gant, 556 U.S. 332, 343 (2009).

201. Id. at 339–41.

202. See id. at 342 (noting broader reading of *Belton* was "predominant" in lower courts).

203. See, e.g., *Thornton*, 541 U.S. at 617.

204. *Gant*, 556 U.S. at 351 (Scalia, J., concurring); id. at 355 (Alito, J., dissenting).

205. Id. at 354 (Scalia, J., concurring).

prudential technique: horse trading. Scalia joined Stevens's opinion, even though he disagreed with its interpretation of precedent, because he believed that doing so would move the law closer to what he believed to be correct as a matter of first principles.[206] In return, the majority altered its rule in a way that only Scalia believed to be more correct.[207] As a result of this apparent bargain, the Court ended up establishing a hybrid rule that literally no Justice entirely agreed with *either* as a matter of precedent *or* as a matter of first principles.

The dissenting opinions in *Gant* each rested on one of the conditions for legitimate narrowing. First, the principal dissent by Justice Alito argued that the majority erred by adopting an unreasonable interpretation of *Belton*. For example, the dissent asserted that the "precise holding in *Belton* could not be clearer."[208] Given this lack of ambiguity, Alito concluded that the Court was improperly overruling *Belton* without so much as attempting to meet the criteria for doing so.[209] Alito's argument is best read as an effort to foreclose the possibility of legitimate narrowing by showing that *Belton* couldn't reasonably be read in the way that the majority desired.[210] And, as noted, that line of attack was quite plausible, particularly in view of the fact that, again, five Justices in *Gant* itself actually rejected the Court's interpretation.

Second, Justice Breyer dissented separately to supply a somewhat different view of the case. As he saw it, *Belton* "is best read as setting forth a bright-line rule" inconsistent with the majority's reading.[211] Breyer then emphasized reliance interests. In particular, Breyer was concerned that the bright-line "*Belton* rule has been followed not only by this Court . . . but also by numerous other courts."[212] Breyer framed his point in terms of whether *Belton* was properly "overruled," but his opinion amounted to a reflection on legitimate narrowing. As noted, Breyer wrote that *Belton* was "best read" as a bright-line rule—not, as Alito argued, that such a reading was clearly required. And Breyer's focus on reliance can be understood as a practicality argument. Apparently conceding that *Belton*

206. See id. (explaining "[n]o other Justice . . . shares my view that the application of *Chimel* . . . should be entirely abandoned" but rejecting dissent's position as "greater evil"); see also id. at 353 (proposing Court overrule *Belton* because it was "badly reasoned and produces erroneous (in this case unconstitutional) results").

207. See id. at 343–44 (majority opinion) (adopting Justice Scalia's proposed rule even though it did "not follow from *Chimel*" or majority's own analysis).

208. Id. at 357 (Alito, J., dissenting).

209. See id. at 358 (arguing "Court has substantially overruled *Belton* and *Thornton*" and, therefore, "must explain why its departure from the usual rule of *stare decisis* is justified").

210. See id. at 357 ("[T]he opinion of the Court . . . curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out in the *Belton* opinion . . . .").

211. Id. at 354 (Breyer, J., dissenting).

212. Id.

could reasonably be read in the way the Court proposed, Breyer argued that doing so would conflict with other precedents and pull the proverbial rug out from under the police.

### D. Miller v. Alabama

In *Miller*, juveniles convicted of murder argued that their life-without-parole sentences violated the Eighth Amendment.[213] But an earlier decision, *Harmelin v. Michigan*,[214] provided a strong reason to reject that claim. In *Harmelin*, a defendant had argued that a mandatory term of years was unconstitutional because mandatorily imposed.[215] The Court denied relief on the basis of a plausible argument from history. In short, *Harmelin* reasoned that mandatory prison sentences could not have been a concern of the Eighth Amendment or its drafters because mandatory sentences were unobjectionable at the Founding.[216] In applying that broad reasoning, *Harmelin* stated a comparably broad rule: "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"[217] This statement constituted a holding, as normally defined.[218] And, by its terms, it applied to the facts in *Miller*. So *Miller* could have been an easy, even trivial case. Given *Harmelin*'s holding that the mandatory nature of a particular sentence cannot create an Eighth Amendment violation, it logically follows that the mandatory nature of a particular *juvenile* sentence likewise cannot create an Eighth Amendment violation. Read at face value, *Harmelin* would govern *Miller* in the same way that every general rule governs a specific factual circumstance. Q.E.D.

Yet *Miller* rejected that straightforward reasoning, and, per Justice Kagan, aptly called the government's reliance on *Harmelin* "myopic."[219] To feel bound by *Harmelin*'s broad statement would have meant attending only to what was close at hand and readily ascertainable. But a good judge looks beyond the most obviously relevant case—not to ignore it, but rather to construe it in light of other legal principles that are more recent, fundamental, or correct. *Miller* reasonably concluded that *Harmelin*'s reasoning and conclusion weren't quite as sweeping as they first appeared. True, there was nothing in *Harmelin* itself to support a narrow reading of its rule and quite a bit to support a broad interpreta-

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213. 132 S. Ct. 2455, 2461, 2463 (2012).

214. 501 U.S. 957 (1991).

215. Id. at 961–62.

216. Id. at 995 ("As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century.").

217. Id. In arriving at this holding, the *Harmelin* Court expressly "refuse[d]" to "extend" cases invalidating mandatory capital sentences. Id.

218. See supra note 98 (distinguishing holding from dicta).

219. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

tion. Yet *Harmelin* hadn't specifically considered the question of juvenile punishments, and later cases had ascertained constitutionally relevant reasons to treat juveniles differently.[220] Furthermore, as *Miller* noted with only modest exaggeration, "[I]t is the odd legal rule that does not have some form of exception for children."[221] *Miller* could therefore say with a straight face that its holding "neither overrules nor undermines nor conflicts with *Harmelin*."[222]

The vote breakdown reflected *Harmelin*'s ambiguity and susceptibility to legitimate narrowing. Justice Scalia, the author of *Harmelin*, dissented in *Miller*. By contrast, Justice Kennedy, who had joined *Harmelin*, nonetheless felt comfortable joining the *Miller* majority. Meanwhile, the comprehensive dissents by Chief Justice Roberts and Justice Thomas used *Harmelin* in a way consistent with its susceptibility to legitimate narrowing. In other words, they marshaled *Harmelin* as support for their ultimate outcome—which, indeed, it was—while also avoiding any claim that *Harmelin* decisively controlled.[223] Indeed, all the dissenting opinions in *Miller* focused on the first-principles question of whether special Eighth Amendment rules for juveniles made sense.[224]

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In *Casey*, *Boumediene*, *Gant*, and *Miller*, the Court declined to adopt the best readings of precedent. Broader readings might have exhibited greater fidelity to past decisions—as the dissenting Justices persuasively argued. Yet the Court concluded that prior decisions had arrived at plausible results through overbroad and erroneous rationales. To mitigate these errors, the Court identified ambiguities in the relevant precedents, thereby creating room for reasonable disagreement as to how those precedents should apply to new facts. Moreover, the Court's narrowed readings accorded with background principles of law. And in resisting the Court's efforts at narrowing, the dissenting opinions sometimes pitched their critiques toward the kind of considerations that, this Essay contends, can render narrowing illegitimate. So even though narrowing wasn't always overtly discussed in these cases, it was present in them all. Without the concept of narrowing, we cannot fully understand how or why many of the Court's most important and contentious cases are decided.

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220. See id. (collecting cases).

221. Id. (emphasis omitted).

222. Id.

223. Id. at 2486 (Thomas, J., dissenting) ("*Harmelin*'s reasoning logically extends to these cases.").

224. Justice Alito's separate dissent in *Miller* didn't mention *Harmelin* at all. See id. at 2487–90 (Alito, J., dissenting).

## V. NARROWING TO OVERRULE: *CITIZENS UNITED*

The Roberts Court has been most thoroughly criticized for its decision in *Citizens United*,[225] which controversially overruled not one but two precedents.[226] On inspection, however, the story of *Citizens United* is a story of narrowing as much as it is a story of overruling. Indeed, the lesson of the Court's recent campaign-finance cases is that narrowing and overruling naturally go hand in hand to form a continuous method of gradually eradicating erroneous decisions.[227] In short, courts can and should engage in legitimate narrowing until they reach a point when they can do so no more. At that juncture, it comes time either to overrule or reaffirm the previously narrowed precedent. The current majority of the Court has already proceeded through that jurisprudential cycle, and the *Citizens United* dissenters now seem poised to begin it anew.

### A. *Before*

Begin with the years leading up to *Citizens United*. By early 2006, Chief Justice Roberts and Justice Alito had both been confirmed. At that time, the leading campaign-finance precedent was *McConnell v. FEC*, a major decision that had affirmed the facial constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA).[228] In arriving at that conclusion, *McConnell* had relied on the 1990 decision in *Austin v. Michigan State Chamber of Commerce*, which had approved restrictions on the rights of corporations and unions to make political contributions.[229] Because *McConnell* had been a 5-4 decision and its author, Justice O'Connor, had been replaced by Alito, many wondered if the broad holdings in *McConnell* and *Austin* would survive.

These predictions promptly found corroboration in the 2007 decision *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*).[230] Recognizing that *McConnell* had previously addressed a facial challenge to BCRA, the

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225. See, e.g., Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 583–84 (2011) (criticizing *Citizens United* for its rigidity and for amplifying doctrinal incoherence); supra note 44 and accompanying text (quoting President Obama).

226. See infra Part V.A (discussing cases preceding *Citizens United*).

227. Some commentators appear to recognize that narrowing to overrule can be legitimate or even obligatory, given sufficiently fundamental disagreement with the doctrinal status quo. See, e.g., Jack M. Balkin, Living Originalism 9 (2011) ("If the New Deal settlement was thoroughly illegitimate, courts should find ways to . . . chip away at existing understandings, and ultimately overturn [it] . . . .").

228. 540 U.S. 93, 204–07 (2003).

229. 494 U.S. 652, 654–55 (1990); see *McConnell*, 540 U.S. at 204–09 ("We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth . . . that have little or no correlation to the public's support for the corporation's political ideas.'" (quoting *Austin*, 494 U.S. at 660)).

230. 551 U.S. 449 (2007).

Court concluded that no precedent controlled the as-applied claim asserted in *WRTL*.[231] Chief Justice Roberts drew a "distinction between campaign advocacy and issue advocacy," such that the latter was constitutionally protected from regulation, even if it fell within BCRA's ambit.[232] The Chief Justice then characterized the protected category of "issue advocacy" rather broadly, so that it encompassed the speech at issue before the Court.[233] Three other Justices concurred in the judgment to express their desire to overturn *McConnell* and *Austin*.[234] And the remaining four Justices dissented on the ground that the regulated party before the Court was engaged in regulable campaign advocacy.[235] *WRTL* didn't overrule prior campaign-finance decisions, but it dealt them a serious blow.[236] Due to *WRTL*, a great deal of campaign-related expression that Congress wanted to proscribe had become immune to regulation. It was not a coincidence that the *WRTL* dissenters consisted of all four remaining Justices who had voted for *McConnell*. Indeed, members of the majority coalition went so far as to say that *McConnell* had effectively been overruled.[237]

B. *During*

The Chief Justice's willingness to engage in narrowing came to an abrupt end in *Citizens United*. Confronted with an as-applied challenge that could not seriously be described as anything other than "campaign advocacy," the Court was again asked to narrow *McConnell* and *Austin*. In particular, the Court was asked to rule, based on the canon of constitutional avoidance, that BCRA's prohibition on electioneering activity didn't apply to video-on-demand productions, even though the statute expressly encompassed "broadcast, cable, or satellite" communications.[238] That approach would have called for a medium-by-medium assessment of whether the First Amendment applied, creating a Swiss-cheese regulatory regime. This problem became vivid when *Citizens United* was reargued. Then-Solicitor General Kagan conceded that BCRA

231. Id. at 456–57 (Roberts, C.J.).

232. Id.

233. Id. at 470 (concluding WRTL's ads qualified as issue advocacy in part because they focused on legislative issue and "convey[ed] information and educate[d]").

234. Id. at 483–84, 489–90, 499–504 (Scalia, J., concurring in the judgment).

235. Id. at 525 (Souter, J., dissenting).

236. See, e.g., Heather Gerken, An Initial Take on *Citizens United*, Balkinization (Jan. 21, 2010, 12:08 PM), http://balkin.blogspot.com/2010/01/initial-take-on-citizens-united.html (on file with the *Columbia Law Review*) (explaining *WRTL* "had already substantially limited Congress's power to restrict independent corporate expenditures, and all *Citizens United* did was take the final step").

237. This, of course, was Justice Scalia. See *WRTL*, 551 U.S. at 499 n.7 (Scalia, J., concurring in the judgment) ("[S]even Justices . . . agree that the opinion effectively overrules *McConnell* without saying so.").

238. 2 U.S.C. § 434(f)(3)(A) (2012).

should not apply to "books."[239] By contrast, "pamphlets" were properly regulated.[240] As Michael McConnell has written by way of understatement, "[T]his was not a comforting reformulation."[241]

Remarkably, the *Citizens United* dissent also argued in favor of narrowing. In particular, Justice Stevens argued that the Court should narrow (and not overrule) past decisions that permitted significant campaign-finance regulation, while simultaneously expanding the scope of countervailing precedents that protected campaign speech.[242] This precedent-focused argument for judicial restraint complemented the dissent's parallel argument that the Court's statutory interpretation should rest on constitutional avoidance.[243] But, as noted, the Chief Justice had strong reasons to reject these proposed efforts at narrowing as illegitimate.[244] That conclusion can be fleshed out in terms of the duties of correctness, fidelity, candor, fit, and practicality. As noted above, the narrowing that the dissent proposed would have impinged the duties of correctness, fidelity, and candor by creating entirely unsupported distinctions between video-on-demand and other functionally identical mediums of communication.[245] And it would have undermined fit and practicality by transforming the freedom of speech into a patchwork of essentially ad hoc judgments.[246]

### C. *After*

Critics of *Citizens United* have continued to endorse narrowing as a legitimate resistance strategy. Consider *American Tradition Partnership, Inc. v. Bullock*, which summarily reversed a Montana Supreme Court decision upholding a century-old state campaign-finance law.[247] According to the same five-Justice majority that decided *Citizens United*, "There can be no serious doubt" that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to

239. Transcript of Oral Argument on Reargument at 65, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf (on file with the *Columbia Law Review*).

240. Id. at 66 ("I think a—a pamphlet would be different. A pamphlet is pretty classic electioneering . . . ." (quoting Solicitor General Kagan)).

241. Michael W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412, 428 (2013).

242. *Citizens United*, 130 S. Ct. at 937–38 (Stevens, J., dissenting) (arguing Court could have "retain[ed] *Austin*" and "expanded the *MCFL* exemption").

243. See id.

244. Id. at 917 (Roberts, C.J., concurring).

245. See id. at 919 ("It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").

246. See id. at 921 (arguing dissent's adherence to precedent would "impede[] the stable and orderly adjudication of future cases").

247. 132 S. Ct. 2490, 2491 (2012).

meaningfully distinguish that case."[248] That basic point is hard to gainsay. Indeed, when the Supreme Court earlier stayed the decision below, none other than Justice Ginsburg, joined by Justice Breyer, expressly recognized that *Citizens United* was best read as controlling: "Because lower courts are bound to follow this Court's decisions until they are withdrawn or modified, . . . I vote to grant the stay."[249] In other words, during the stay proceedings a supermajority of Justices expressly stated that *Citizens United* was best read to apply to the Montana campaign-finance law (and none said otherwise). Given this consensus that there was on-point Supreme Court precedent, one might expect that the four dissenters in *American Tradition* would have rested solely on their desire to overrule *Citizens United*.

But that is not what happened. Instead, Breyer, joined by three of his colleagues, wrote that "even if I were to accept *Citizens United*, this Court's legal conclusion should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."[250] In other words, four Justices were prepared to make a Montana-only exception to *Citizens United*. Did these Justices really believe that *Citizens United*, which had invalidated a federal statute backed by thousands of pages of recent congressional and judicial findings regarding the corrupting influence of money, was best read not to apply to a one-hundred-year-old Montana statute? Of course not. Rather, Breyer and his colleagues were looking for any minimally plausible way to beat back an unwanted precedent, much as the Chief had done in *WRTL*.

Moving beyond the holding of *Citizens United* and the cases it overruled, the Roberts Court has now begun to narrow even older campaign-finance rulings. In particular, the plurality opinion in *McCutcheon v. FEC*[251] recently narrowed a portion of *Buckley v. Valeo*.[252] The *Buckley* Court had approved an aggregate-contribution limit similar to the more recently adopted limit at issue in *McCutcheon*. Nonetheless, the *McCutcheon* plurality believed that it had been "confronted with a different statute and different legal arguments," and so wasn't bound by

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248. Id.

249. Am. Tradition P'ship v. Bullock, No. 11A762 (U.S. Feb. 17, 2012) (statement of Ginsburg, J., joined by Breyer, J.) (order granting stay) (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U. S. 477, 484 (1989)), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/02/11A762_American_Tradition_v_Bullock_Order.pdf (on file with the *Columbia Law Review*). Justice Ginsburg may believe that only lower courts are disentitled to engage in narrowing. Cf. infra text accompanying notes 269–270 (citing Justice Scalia's call to lower courts to narrow from below).

250. *Am. Tradition P'ship*, 132 S. Ct. at 2491 (Breyer, J., dissenting).

251. 134 S. Ct. 1434 (2014).

252. 424 U.S. 1, 26–27 (1976) (per curiam).

*Buckley*.[253] In response, the four dissenting Justices cried foul, bluntly asserting: "Today a majority of the Court overrules" *Buckley*.[254] Meanwhile, Justice Thomas concurred in the judgment to oppose the plurality's narrowing and argue instead for overruling. As Thomas put it, "I regret only that the plurality does not acknowledge that today's decision, although purporting not to overrule *Buckley*, continues to chip away at its footings."[255] Much as in *WRTL*, the Court in *McCutcheon* was divided on the issue of whether narrowing was a legitimate interpretive move. Interestingly, Justice Scalia—narrowing's normal opponent—signed on to the plurality opinion in *McCutcheon*, thereby signaling his view that *Buckley* didn't have to be read as controlling.

In sum, the Court's campaign-finance jurisprudence has been marked as much by narrowing as by overruling—and it is likely to remain that way for some time.

## VI. Aspirational Narrowing: *United States v. Windsor*

Judges who engage in narrowing are typically jurisprudential winners who triumphantly curb the excesses of the past. But, in rare cases, these roles are reversed, and narrowing ends up being undertaken, not by winners looking backward, but rather by losers looking forward. These cases suggest a variant on the old maxim: "He who narrows and runs away may live to narrow another day." Prime examples can be found in the opinions that dissented from the Court's recent decision in *United States v. Windsor*.[256]

### A. *Narrowing in Retreat*

The most obvious form of aspirational narrowing arises in concurring opinions, which frequently propose rationales that are narrower than the majority's. These separate writings suggest ways in which the Court might later cut back on unduly broad reasoning while maintaining fidelity to an earlier ruling's outcome or fundamental logic.[257] More interesting—and ambitious—are dissenting opinions that propose nar-

253. *McCutcheon*, 134 S. Ct. at 1447 (plurality opinion). The plurality also relied on the fact that the relevant passage in *Buckley* resembled a summary decision. See supra note 97 (referencing limited weight accorded to cases decided with cursory analysis).

254. *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).

255. Id. at 1464 (Thomas, J., concurring in the judgment).

256. 133 S. Ct. 2675 (2013).

257. Justice Stewart's influential *Flast* concurrence provides a good example. Flast v. Cohen, 392 U.S. 83, 114 (1968) (Stewart, J., concurring). Justice Breyer frequently writes in this genre. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1221–22 (2011) (Breyer, J., concurring) (narrowing majority's holding to specific balance of First Amendment values and personal interests); Bartnicki v. Vopper, 532 U.S. 514, 535–36 (2001) (Breyer, J., concurring) (same).

rowing while disagreeing with a current majority as to both reasoning and result.[258]

Last year's decision in *Windsor* supplies a good example. On its face, *Windsor* addressed and invalidated only Section 3 of the federal Defense of Marriage Act (DOMA), which excluded same-sex couples from federal marriage.[259] *Windsor*'s penultimate sentence expressly noted this limitation, thereby making clear that the Court had not yet invalidated state laws permitting only intersex marriage.[260] But much of *Windsor*'s reasoning suggested that same-sex marriage would soon become a constitutional necessity. *Windsor* could therefore be enlisted—or not—as a precedent favoring the creation of a constitutional right to same-sex marriage. The decision is fairly viewed as ambiguous as to this critical point.

Recognizing that *Windsor* could be read either broadly or narrowly, the dissenting Justices attempted to place their own spin on the decision. Surprisingly, however, these spins weren't in the same direction. In the principal dissent, Justice Scalia seized on the components of *Windsor*'s language and reasoning that supported a nationwide right to same-sex marriage. "How easy it is, indeed how inevitable," Scalia wrote, "to reach the same conclusion with regard to state laws denying same-sex couples marital status."[261] The majority's statement that it didn't reach beyond DOMA, Scalia said, was properly ignored as a "bald, unreasoned disclaimer[]."[262] All this was too much for the Chief Justice, who penned a solo dissent to refute Scalia's apparent view that *Windsor* controlled the Court's next big gay-rights decision.[263] After noting his disagreement with the majority's DOMA holding, the Chief Justice emphasized that "I think it more important to point out that its analysis leads no further."[264]

The Chief Justice's effort to "highlight the limits of the majority's holding and reasoning"[265] is an exercise in aspirational narrowing. It wasn't enough for the Chief to dissent now and hope to have the chance to narrow later. Rather, he wanted to set down a marker so as to encourage a later Court to minimize the error that (in the Chief's view) the pre-

258. Justice Breyer supplies examples here, too. See, e.g., Town of Greece v. Galloway, 134 S. Ct. 1811, 1838–39 (2014) (Breyer, J., dissenting). Remarkably, Breyer sought to minimize the dispute in *Town of Greece* through aspirational narrowing of both the majority opinion and the principal dissent. That is, Breyer suggested (i) that the Court's decision was "fact-sensitive" for various reasons and (ii) that the principal dissent was "consistent with" a judgment predicated "on the particular facts of the case." Id.

259. Defense of Marriage Act, § 3(a), 110 Stat. 2419, 2419 (1996), invalidated by *Windsor*, 133 S. Ct. 2675.

260. 133 S. Ct. at 2696 ("This opinion and its holding are confined to those lawful marriages [recognized by state law].").

261. Id. at 2709 (Scalia, J., dissenting).

262. Id.

263. Id. at 2696–97 (Roberts, C.J., dissenting).

264. Id. at 2696.

265. Id. at 2697.

sent Court had made. It remains to be seen whether this new twist on narrowing can succeed.

B. *Narrowing from Below*

Narrowing's most conspicuous appearance in *Windsor* has less to do with the Supreme Court than with the wider world of judicial decisionmaking. Perhaps sensing that he shouldn't too quickly surrender to the march of precedent, Justice Scalia qualified his belief that *Windsor* would "inevitabl[y]" create a constitutional right to gay marriage.[266] Instead, Scalia suggested that "lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples."[267] *Windsor* "can be distinguished in many ways," Scalia said, "[a]nd deserves to be."[268] Though insisting that "the real rationale of today's opinion" would require prompt nationalization of gay marriage, Scalia instructed that "[s]tate and lower federal courts should take the Court at its word and distinguish away."[269] Scalia's extraordinary invitation is best viewed as a call for lower courts to engage in narrowing. Consistent with that view, commentators instantly condemned Scalia's remarks.[270] Lower courts have likewise repudiated Scalia's plea for narrowing by almost uniformly citing *Windsor* (and even Scalia's own dissent) as support for a constitutional right to same-sex marriage.[271]

Yet Scalia's plea for narrowing was fundamentally different from anything discussed so far. Up to this point, the focus has been on the Supreme Court's horizontal narrowing of its own past decisions. Vertical

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266. Id. at 2709 (Scalia, J., dissenting).

267. Id.

268. Id.

269. Id.

270. Larry Tribe was one such critic:

> [C]alling on state and lower federal courts to treat the *Windsor* opinion as no broader than it claimed to be even as one charges the Court that penned [*Windsor*] with charting an unbreakable path to full same-sex-marriage rights is, at the very least, an exercise in jurisprudential cynicism.

Larry Tribe, DOMA, Prop 8, and Justice Scalia's Intemperate Dissent, SCOTUSblog (June 26, 2013, 2:24 PM), http://www.scotusblog.com/2013/06/doma-prop-8-and-justice-scalias-intemperate-dissent/ (on file with the *Columbia Law Review*).

271. See Richard Wolf, For Same Sex Marriage Pioneer, A Very Busy Year, Wash. Post (June 26, 2014), http://www.washingtonpost.com/national/religion/for-same-sex-marriage-pioneer-edie-windsor-a-very-busy-year/2014/06/26/171f8df2-fd52-11e3-beb6-9c0e896dbcd8_story.html (on file with the *Columbia Law Review*) (explaining *Windsor* "has influenced every court victory scored by the gay and lesbian community over the past 12 months—a remarkable string of 20 wins in a row that has increased to 19 the number of states with same-sex marriage"). One such example is Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013) (agreeing with Scalia's argument that *Windsor*'s federalism aspect cannot save state law prohibiting same-sex marriage), aff'd, 755 F.3d 1193 (10th Cir. 2014).

narrowing, however, is also possible. In other words, lower courts could narrowly construe decisions established by their precedential superiors. Such vertical narrowing by lower courts is plainly more objectionable than narrowing by the Supreme Court. Not only do lower courts lack the authority to overrule Supreme Court decisions,[272] but their localized efforts at narrowing also pose much greater risks of creating doctrinal fragmentation.[273]

Whether and when vertical narrowing can be legitimate will have to be the subject of future study. The important point for now is that Scalia attempted to open a new front in the battles over narrowing. Faced with dim prospects of success in their own Court,[274] the *Windsor* dissenters requested the support of lower-court judges who might stem the tide of change by narrowing from below.

## CONCLUSION

Precedent is often envisioned as a well-trodden path that the Court either follows or, in exceptional circumstances, abandons altogether. This simple picture is the darling of dissenting opinions and academic critics—two groups that are understandably inclined to view supportive precedent as an irrefutable trump card.[275] But the truth is more complicated. Even when case law leads toward a particular result, thoughtful Justices are reluctant to follow paths that seem wrong as a matter of first principles. So instead of either proceeding straight ahead or reversing 180 degrees, the Court often navigates the law by tacking one way or the other. In doing so, Justices consider not just the precedential maps provided by earlier decisionmakers, but also their own jurisprudential compasses. That is why the Court's best opinions and briefs argue on two parallel levels. They contend *both* that precedent supports them *and* that they would be correct even in the absence of decisional law. Advocates

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272. See supra text accompanying note 65 (discussing issues associated with narrowing from below); see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2025 (1994) ("A lower court must *always* follow a higher court's precedents."); cf. Frederic M. Bloom, State Courts Unbound, 93 Cornell L. Rev. 501, 502–03 (2008) (arguing state courts sometimes flout Supreme Court precedent).

273. See supra Part II.A.2 (discussing practicality issues).

274. As Justice Scalia himself put it, "[T]he view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion." *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

275. See, e.g., Webster v. Reprod. Health Servs., 492 U.S. 490, 537 (1989) (Scalia, J., dissenting) (listing only four precedential options: "to reaffirm," to overrule "explicitly," to overrule "sub silentio," and "to avoid the question"); supra note 26 (collecting similar academic sources). No mention of narrowing.

who neglect either of these two types of argument have made a grave mistake. For instead of following, extending, distinguishing, or overruling case law, the Court often employs a fifth, lesser-known technique: narrowing precedent.