

PRECEDENT

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Abstract: Precedent is and remains central to common law, but is neither fixed in stone, a mechanical rule to follow, nor fundamentally “binding.” In interesting yet often neglected ways, precedents may not only be expressly but implicitly overruled, abandoned or circumvented (without saying so), so as to render them no longer “good law”, or undercut by simply whittling them down to size, only then to subsequently reaffirm them.

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The importance of precedent lies in ostensibly promoting certainty, stability, and predictability in the law.¹ Still, precedents are neither self-enforcing nor fixed in stone. Many questions remains when the issue is precedents, as Michael J. Gerhardt² writes.

¹ HANSFOR, Thomas G.; SPRIGGS II, James F. *The politics of precedent on the U.S. Supreme Court*. New Jersey: Princeton University Press, 2006, at p. 5. “Political scientists, legal scholars, and practicing lawyers commonly recognize that precedent is one of the central components of the American legal System. By precedent, we mean the legal doctrines, principles, or rules established by prior court opinions”.

² GERHARDT, Michael J. *The power of precedent*. New York: Oxford University Press, 2008, at p. 3. “When the 81st – or 181st – justice of the United States Supreme Court writes an opinion on an issue about which his predecessors have written, does he care that they wrote? Does he feel absolute freedom to write whatever he pleases, as if he were writing on a blank slate? Does he merely manipulate the Court’s

Precedents are and remain central to English³ common law. The leading commentator, Sir William Blackstone, in his *Commentaries on the English Common Law* (1770s),⁴ contended that prior decisions which were later overturned were simply not law in the first place. Rather, they were imperfect approximations (by human judges) of authoritative and controlling universal principles—in divine and scientific terms; that is say, they were in accord with “*the laws of Nature and Nature’s God*”.⁵ If prior decisions were misinterpretations or imperfect approximations, they are therefore correctly discarded.

Precedents are, of course, not self-executing. Lower courts are expected to follow⁶ and abide by them in the resolution of actual factual claims and competing interests.⁷ But, nonetheless, they may be distinguished from a case at hand, as well as in anticipation of their eventually being overthrown.

Occasionally two precedents may come into such deep conflict (real or contrived) that they may be said to be insufficiently distinguishable or reconcilable, and therefore one of them must be abandoned.

Precedents also may prove so malleable in the face of the pressures of technological and societal changes that they become not merely outdated but so unworkable that they cannot be salvaged and must be overruled.

The application of the Fourth Amendment’s bar against “*unreasonable searches and seizure*,” for example, was initially held, in *Olmstead v. U.S.* (1928),⁸

precedentes to support his preferred result, or does he defer to what his predecessors wrote on the subject before him? Does, or should, he care about what his colleagues or successors think about what he writes?”.

³ See, CROSS, Rupert; HARRIS, J. W. Harris. *El precedente en el Derecho inglés*. Traducción de M^a Angélica Pulido. Madrid: Marcial Pons, 2012.

⁴ Sir BLACKSTONE, William. *Commentaries on the English Common Law*. Oxford: Clarendon Press, 1776, v. 1-4.

⁵ The United States Declaration of Independence (1776). See also, BLACKSTONE, William. *Commentaries on the English Common Law*. Oxford: Clarendon Press, 1776, v. 1, ch. 2.

⁶ SCHAUER, Frederick. *Thinking like a lawyer: a new introduction to legal reasoning*. Cambridge, Massachusetts; London, England: Harvard University Press, 2009, at p. 37: “The core principle of decision-making according to precedent is that courts should follow previous decisions – that they should give the same answer to legal questions that higher or earlier courts have given in the past”.

⁷ HANSFORD, Thomas G.; SPRIGGS II, James F. *The politics of precedent on the U.S. Supreme Court*. New Jersey: Princeton University Press, 2006, at p. 19. “Legal reasoning and *stare decisis* operate as inductive processes. Law develops as judges draw general principles from specific prior cases and determine how to apply those rules to new factual circumstances [...]”.

⁸ *Olmstead v. United States*, 277 U.S. 438 (1928). See, HARTMAN, Gary; MERSKY, Roy M; TATE, Cindy L. *Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States*. New York: Facts on File, 2004. About the decision, at p. 347: “Five members of the Supreme Court, in an opinion written by Chief Justice William Taft, affirmed the decision of the court of appeals. The Court cursorily rejected the defendants’ argument that their Fifth Amendment rights had been violated in that they had been forced to testify against themselves when the phone lines were tapped: ‘There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones’. Opinion Available in: <<https://www.law.cornell.edu/supremecourt/text/277/438>>. Access in: Feb. 27, 2018.

not to apply to warrantless searches and seizures conducted by means of wiretaps. Chief Justice William Howard Taft in his opinion⁹ dismissed a claim to the contrary on the basis of the common law prerequisites for establishing an illegal search and seizure—namely, (a) that there was an actual trespass on private property and (b) the seizure of tangible materials. Wiretapping, of course, entails neither. Justice Louis D. Brandeis in dissent contended that the common law had evolved to recognize man’s spiritual nature and an individual’s right of privacy.¹⁰ His dissent was an appeal to the wisdom of some future understanding and to the creation of a new guiding precedent. Almost 40 years later, in *Katz v. U.S.* (1964),¹¹ the Court indeed expressly overturned *Olmstead’s* doctrine of “constitutionally protected areas” and substituted a new framework. *Katz* held that the amendment “protects people, not places” and turns on their and society’s “reasonable expectations of privacy.”

Moreover, some precedents may not stand the test of time and, instead of being overturned, simply abandoned without a court saying so, and no longer followed or applied. Two illustrative examples are: *Buck v. Bell*(1927),¹² held that the government may sterilize “feebleminded” men and women without violating their liberty under the due process of law. That holding is most certainly no longer good law. Likewise, in *Korematsu v. U.S.* (1944),¹³ during World War II, the Court

⁹ See, GREENBERG, Ellen. *Supreme Court explained*. New York: W. W. Norton, 1997, at p. 41. “Opinion: A judge’s written explanation of a decision of the court or a majority of the judges”.

¹⁰ *Olmstead*, supra., Brandeis, J., dis. op. . See also WARREN, Samuel; BRANDEIS, Louis D. The right of privacy. *Harvard Law Review*, v. 4, n. 5, p. 193-220, Dec. 15, 1890.

¹¹ *Katz v. United States*, 389 U.S. 347 (1967). See, HARTMAN, Gary; MERSKY, Roy M; TATE, Cindy L. *Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States*. New York: Facts on File, 2004. About the decision, at p. 340: “Justice Stewart delivered the opinion of the Court, which held that the FBI violated the Fourth Amendment. Although judging in favor of Katz, the Court noted that he misconstrued the issues. Justice Stewart stated, ‘[T]he Fourth Amendment protects people, not places’. Katz’s argument about a ‘constitutionally protected area’ did not persuade the Court. Justice Stewart noted, ‘[I]ndeed, we have expressly held that the Fourth Amendment governs not only seizure of tangible items, but extends as well to the recording of oral statements overheard without any ‘technical trespass under ... local property’. Recognizing that the Fourth Amendment was not limited only to physical searches and seizures, the Court held that ‘[t]he Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment”. Opinion Available in: <<https://supreme.justia.com/cases/federal/us/389/347/case.html>>. Access in: Feb. 27, 2018.

¹² *Buck v. Bell*, 274 U.S. 200 (1927). Opinion Available in: <<https://www.law.cornell.edu/supremecourt/text/274/200>>. Access in: Feb. 27, 2018.

¹³ *Korematsu v. United States*, 323 U.S. 214 (1944). See, HARTMAN, Gary; MERSKY, Roy M; TATE, Cindy L. *Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States*. New York: Facts on File, 2004. About the decision: “The perceived possibility of a Japanese invasion of the West Coast was enough for the Court’s majority to justify ordering American citizens to abandon their homes and surrender to military authorities”. Opinion Available in: <<https://supreme.justia.com/cases/federal/us/323/214/case.html>>. Access in: Feb. 27, 2018.

upheld the internment of Japanese-Americans, even if the loyalty of particular individuals was not in question. That precedent remains far from precedential.

So too, a Court may decline to overrule even exceptionally important precedents yet hold that they no longer apply in certain areas or to particular cases and controversies. The Court thereby sets aside questions about the continued application of those precedents in other fields. The Warren Court did that in holding (but without overruling)¹⁴ ¹⁵ the doctrine of “separate but equal” no longer allied to dual public schools for blacks and whites. Rather than a sweeping ruling reversing *Plessy v. Ferguson* (1896),¹⁶ in *Brown v. Board of Education* (1954),¹⁷ the Court simply observed in *Brown* that *Plessy*’s doctrine of “separate but equal” no longer applied to the segregated public schools. Questions about racial segregation in other areas of public accommodations—hotels, restaurants, etc.—were thus left for another day.

Decisions may also remain precedential, but become so diminished by subsequent decisions and exceptions to their holdings that their rationales are

¹⁴ See more about the case at, O'BRIEN, David M. *Justice Robert H. Jackson's unpublished opinion in Brown v. Board: conflict, compromise, and Constitutional Interpretation*. Lawrence, Kansas: University Press of Kansas, 2017.

¹⁵ Here there are some divergences in doctrine about the subject. See, AASENG, Nathan. *You are the Supreme Court Justice*. Minneapolis: The Oliver Press, 1994, at p. 49. “‘Separate but equal’ has always been a ploy to keep blacks in a position of near-slavery that denies them meaningful roles in society. Arguing for the plaintiffs from four states and the city of Washington, D.C., Thurgood Marshall, head of the NAACP’s legal defense fund, insists that ‘the rule of *Plessy v. Ferguson* was conceived in error should be reversed’ because even if all facilities for blacks and whites were identical, the very nature of segregation is unequal”.

¹⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896). MCNEESE, Tim. *Plessy v. Ferguson: separate but equal*. New York: Chelsea House, 2007. A summary of the case at p. 109. “On May 18, 1896, the justices on the Supreme Court announced their decision. Nearly four years had passed since Homer Plessy had boarded a whites-only passenger car on the East Louisiana Railroad. With a count of seven to one, the majority of the court decided against Homer Plessy and in favor of the Separate Car Law, as well as other similar laws. The decision appeared to legitimize Jim Crow laws across the country”. Opinion Available in: <<https://supreme.justia.com/cases/federal/us/163/537/>>. Access in: Feb. 27, 2018.

¹⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954). MCNEESE, Tim. *Brown v. Board of Education: integrating America's schools*. New York: Chelsea House, 2007. A summary of the decision at pp. 112-113. “The announcement came at 12:52 P. M. on May 17, 1954. Before a group of reporters gathered in the Supreme Court’s press room, Chief Justice Warren began unfolding the court’s decision. He took time to go over the facts surrounding the case and how it had come finally before the Supreme Court. He spoke of the intent of the framers of the Fourteenth Amendment. He referred to *Plessy v. Ferguson*. He made it clear, however, that the decision was not simply based on history: ‘In approaching this problem, we cannot turn the clock back to 1868 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and present in American life throughout the Nation’. The Chief Justice continued speaking to those waiting to hear the court’s decision: ‘Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does’. Opinion Available in: <<https://www.law.cornell.edu/supremecourt/text/347/483>>. Access in: Feb. 27, 2018.

fundamentally undermine. *Mapp v Ohio* (1961),¹⁸ for one, was highly controversial in holding that illegally-obtained evidence must be excluded at trials because it was obtained in violation of the Fourth Amendment's "exclusionary rule." Yet, in the following 20 years the Court carved out exceptions – such as "good faith" exception¹⁹ and the "inevitable discovery rule"²⁰ – that permit the use of illegally obtained evidence and thereby significantly cut back on the scope of *Mapp's* ruling. Furthermore, those exceptions were then extended to permit the use of illegally obtained evidence if police were relied on a defective warrant issued by a judge,²¹ or outdated or wrong information on outstanding warrants in a police department's data base.²²

Similarly, the "bright line rules" for police interrogations of criminal suspects, laid down in *Miranda v. Arizona* (1965),²³ are no longer bright or even clear as a

¹⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961). See, HARTMAN, Gary; MERSKY, Roy M; TATE, Cindy L. *Landmark Supreme Court cases: the most influential decisions of the Supreme Court of the United States*. New York: Facts on File, 2004. About the decision, pages 343-344: "In a decision written by Justice Tom Clark, the Court held for Mapp that evidence obtained by unconstitutional search was inadmissible, and reserved her conviction: 'We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court'. In Clark's reasoning, the Fourth and Fifth Amendment protections were 'incorporated' by the due process clause of the Fourteenth Amendment as enforceable against the states. To give the protections against unreasonable searches and coerced confessions practical effect, it is necessary to exclude illegally seized evidence from trial. Thus, Justice Clark found the exclusionary rule an essential part of both the Fourth and Fourteenth Amendments". Opinion Available in: <<https://supreme.justia.com/cases/federal/us/367/643/case.html>>. Access in: Feb. 27, 2018.

¹⁹ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984). SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013, at p. 468. "A decision modifying the exclusionary rule (*United States v. Leon*, 468 U.S. 897, 905 (1984)) stated that the Court had 'power' to base its decision on either the only question presented in the petition, which it did, or (as suggested in Justice Stevens' dissent, 468 U.S. at 962) on a different theory not briefed or argued in the Supreme court but that would have avoided a novel constitutional argued in the Supreme Court but would have avoided a novel constitutional holding. The case thus indicated that, in determining whether to consider issue not raised in a petition, the Court not only has broad discretionary power, but that it can exercise its discretion so as to permit it to decide the issue wants to decide". Opinion Available in: <<https://supreme.justia.com/cases/federal/us/468/897/case.html>>. Access in: Feb. 27, 2018.

²⁰ *Nix v. Williams*, 467 U.S. 431 (1984). Opinion Available in: <<https://supreme.justia.com/cases/federal/us/467/431/case.html>>. Access in: Feb. 27, 2018.

²¹ See, *Massachusetts v. Shepard*, 468 U.S. 981 (1984). SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013, at p. 279. Opinion Available in: <<https://supreme.justia.com/cases/federal/us/468/981/>>. Access in: Feb. 27, 2018.

²² See *Arizona v. Evans*, 514 U.S. 1 (1995), SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013; and *Herring v. United States*, 555 U.S. 135 (2009). Opinion Available in: <<https://www.law.cornell.edu/supct/html/93-1660.ZO.html>>. Access in: Feb. 27, 2018.

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966). See, VAN METER, Larry A. *Miranda v. Arizona: the rights of the accused*. New York: Chelsea House, 2007. A summary of the case at p. 92. "When Chief Justice Earl Warren read the Supreme Court's decision on the case of *Miranda v. Arizona* in 1966, it was clear that the nation's highest court wasn't merely reversing a conviction in a routine case: it was dramatically changing law enforcement in the United States. From that point on, the privileges granted to a defendant in a courtroom – the right to counsel, the right to due process, and the right not to witness against oneself –

result of the Court's reinterpretation of them.²⁴ Contrary to *Miranda*, the Court no longer requires police to give the exact warnings of suspects' rights to remain silent and to have the presence of an attorney during questioning.²⁵ Moreover, the Court sanctioned the use of "police trickery"²⁶ and undercover agents to elicit incriminating confessions.²⁷

In addition, precedents may be *said* to hold up, even when in fact they don't, and much of their analysis has been eroded or rejected outright in subsequent cases. For instance, in the opinion for the Court in *Planned Parenthood of Southeastern Pa. v. Casey* (1992),²⁸ a plurality reaffirmed the "essence of *Roe v. Wade*" (1973).²⁹ *Roe* had held that restrictions on a woman's right to have an abortion³⁰ are subject to the "strict scrutiny" test, the highest standard of review. The Court also advanced a "trimester" approach to balancing a woman's interests against those of the government in restricting access to abortion services. On that basis set forth in *Roe*, for almost two decades the Court struck down numerous regulations aimed at restricting access to abortion clinics.³¹ In ruling contrariwise,

were now extended to the police nation". Opinion Available in: <<https://supreme.justia.com/cases/federal/us/384/436/case.html>>. Access in: Feb. 27, 2018.

- ²⁴ For further discussion, see O'BRIEN, David M. *Constitutional law and politics: civil rights and civil liberties*. 10. ed. New York: W. W. Norton, 2017, ch. 8, pp. 1.031-1.039.
- ²⁵ See, e.g., *Duckworth v. Egan*, 492 U.S. 195 (1989). Opinion Available in: <<https://supreme.justia.com/cases/federal/us/492/195/case.html>>. Access in: Feb. 27, 2018; and *Florida v. Powell*, 130 S.Ct. 1195 (2010), SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013, at p. 220. Opinion Available in: <<https://www.law.cornell.edu/supct/html/08-1175.ZS.html>>. Access in: Feb. 27, 2018.
- ²⁶ See, e.g., *Harris v. New York*, 401 U.S. 222 (1971). Opinion Available in: <<https://supreme.justia.com/cases/federal/us/401/222/case.html>>. Access in: Feb. 27, 2018.
- ²⁷ *Arizona v. Fulminante*, 499 U.S. 279 (1991), SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013, at p. 230. Opinion Available in: <<https://www.law.cornell.edu/supct/html/89-839.ZO.html>>. Access in: Feb. 27, 2018.
- ²⁸ *Planned Parenthood of Southeastern, Pa. v. Casey*, 505 U.S. 833 (1992), at pp. 735, 883, 898 and 908. SHAPIRO, Stephen M. *et al. Supreme Court practice*. 10. ed. Arlington: Bloomberg BNA, 2013. Opinion Available in: <<https://www.law.cornell.edu/supremecourt/text/505/833>>. Access in: Feb. 27, 2018.
- ²⁹ *Roe v. Wade*, 410 U.S. 113 (1973). See, HITCHCOCK, Susan Tyler. *Roe v. Wade: protecting a woman's right to choose*. New York: Chelsea House, 2007. A summary of the decision on page 69. "At 10 a.m. on Monday, January, 1973, the Supreme Court released its verdict in the case of *Roe v. Wade*. The news sped over wires. The Court found in favor of the appellee, Jane Roe. 'Our conclusion that Art. 1196 [the Texas statute forbidding abortion] is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall', the court decision read. In fact, the decision meant that the laws against abortion in nearly every state in the Union had been deemed unconstitutional and therefore without any holding power". Opinion Available in: <<https://supreme.justia.com/cases/federal/us/410/113/case.html>>. Access in: Feb. 27, 2018.
- ³⁰ To learn more about the case, see: FAUX, Marian. *Roe v. Wade: the untold story of the landmark Supreme Court Decision that made abortion legal*. New York: Cooper Square Press, 2001.
- ³¹ See O'BRIEN, David M. *Constitutional law and politics: civil rights and civil liberties*. 10. ed. New York: W. W. Norton, 2017, at p. 1.254-1.258.

Casey discarded the “strict scrutiny” test and “trimester”³² analysis, in spite of reaffirming *Roe*. When doing so the Court substituted an “undue burden” test for evaluating restrictions on abortion, and upheld precisely the kinds of regulations that had been previously struck down under *Roe*.³³

Conversely, the scope of holdings may become so broadly extended in later cases that their precedential value becomes overshadowed to the point of virtual abandonment. In other words, those precedents are relegated to an earlier legal era’s historical relics. Arguably, this has occurred with early rulings on the First Amendment’s guarantee for the freedom of speech and press.³⁴ Subsequent rulings significantly transformed and surpassed them in building a broad system of “freedom of expression” – extending the amendment’s protection to symbolic

³² See, HITCHCOCK, Susan Tyler. *Roe v. Wade: protecting a woman’s right to choose*. New York: Chelsea House, 2007, on p. 72-73. “By dividing a pregnancy into trimesters, the court had a way to balance the privacy rights of women with the state’s responsibility for protecting individuals. There was no clear definition of viability, though, either in the written decision

³³ See and compare the holdings in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); See, VAN METER, Larry A. *Miranda v. Arizona: the rights of the accused*. New York: Chelsea House, 2007. A summary of the case at p. 14: “The Webster decision limited abortion rights without clearly defining those limits. As a result, state legislators were left with the task of drafting statutes that would pass constitutional scrutiny in future cases. For at least the near future, however, Webster’s legacy appears to be a renewal of abortion as a political issue on the state and local levels”. See either: *Planned Parenthood of Southeastern, Pa. v. Casey*, supra, and *Planned Parenthood of Central Missouri v. Danforth*. About the last one, see, VAN METER, Larry A. *Miranda v. Arizona: the rights of the accused*. New York: Chelsea House, 2007. About some notes of the decision, at pp. 6-7: “On direct appeals from the decision of the three judge district court, the U.S. Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Justice Blackmun, it was held, expressing the unanimous view of the Court, that (1) the viability definition provision, which reflected the fact that the determination of viability, varying with each pregnancy, was a matter for the judgment of the responsible attending physician, was not unconstitutional, since it did not circumvent the permissible limitations on state regulation of abortions, (2) the pregnant woman’s consent provision was not unconstitutional since the state could validly require a pregnant woman’s prior written consent for an abortion to assure awareness of the abortion decision and its significance, and (3) the recordkeeping and reporting provisions were not constitutionally offensive in themselves and imposed no legally significant impact or consequence on the abortion decision or on the physician-patient relationship; expressing the view of six members of the Court, that (4) the spousal consent provision was unconstitutional, since the state, being unable to regulate or proscribe abortions during the first stage of pregnancy when a physician and patient make such decision, could not delegate authority to any particular person, even a pregnant woman’s spouse, to prevent abortion during the first stage of pregnancy, (5) the first sentence of the standard of care provision was unconstitutional, since it impermissibly required a physician to preserve the life and health of a fetus, whatever the stage of the pregnancy, and this provision was not severable from the rest of the standard of care provision and, expressing the view of five members of the Court, that (6) the parental consent provision was unconstitutional, since the state did not have the constitutional authority to give a third party an absolute, and possible arbitrary, veto over the decision of a physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent, and (7) the saline amniocentesis prohibition provision was unconstitutional since it failed as a reasonable regulation for the protection of maternal health, being instead an unreasonable or arbitrary regulation designed to inhibit the vast majority of abortions after the first 12 weeks of pregnancy”. Opinion Available in: <<https://supreme.justia.com/cases/federal/us/492/490/>>. Access in: Feb. 27, 2018.

³⁴ For examples and further discussion, see O’BRIEN, David M. *Constitutional law and politics: civil rights and civil liberties*. 10. ed. New York: W. W. Norton, 2017, at pp. 408-453.

speech, speech – plus conduct, and non-speech conduct, for example, along with applying the amendment to new means of communication—from print to broadcasting, cable, the internet, and to other methods of mass communications unimaginable when the amendment was adopted in 1791 and later when the first rulings on the amendment were handed down in the early 20th century.³⁵

It perhaps also bears emphasizing that courts and judges tend to view statutory and constitutional precedents differently.³⁶ Statutory rulings are less likely to be reversed because Congress may override them by modifying or passing new legislation; whereas, constitutional rulings may be overturned only by a constitutional amendment,³⁷ which is exceedingly difficult.³⁸ When deciding whether to reconsider statutory rulings, the Court also considers how long ago a decision was handed down (the longer, the less likely to be discarded), whether it has proven unworkable, and whether its analysis led to problems that other branches could not resolve.

Furthermore, some justices distinguish between prior rulings dealing with economic issues and those bearing on civil rights and liberties, especially if decided by a bare (five to four) majority. Prior decisions dealing with economic interests and regulations are more reluctantly overturned because of the importance of settled societal expectations about economic relations and the potential for disrupting the economy as a result of upending a settled ruling. By contrast, precedents pertaining to civil rights and liberties with which a justice disagrees are not considered as binding, particularly if they turned on just one vote. Such precedents appear less weighty or worthy of deference because why should the vote of a single justice in the past preclude another (later) justice from voting to reverse an earlier decision which (in his or her view) was wrongly decided and turned on just one vote.

³⁵ For further discussion see O'BRIEN, David M. *Constitutional law and politics: civil rights and civil liberties*. 10. ed. New York: W. W. Norton, 2017, at pp. 454-687.

³⁶ See BAUM, Lawrence. *Ideology in the Supreme Court*. New Jersey: Princeton University Press, 2017, at p. 1. "When people talk about the U.S. Supreme Court, whether they are scholars, commentators, or interested observers, they regularly use the language of ideology. Decisions, justices, and the Court as a whole are described in terms of their liberalism or conservatism".

³⁷ See, Article V of the Constitution of the United States: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate". Opinion Available in: <https://www.senate.gov/civics/constitution_item/constitution.htm>.

³⁸ Besides the first ten amendments, the Bill of Rights ratified in 1791, there have been only seventeen additional amendments in 230 years.

Finally, based on the history of the Supreme Court,³⁹ rapid changes during a short period of time in the composition of a high bench may lead to a high number of reversals of prior rulings.⁴⁰ That occurred after Franklin D. Roosevelt's eight appointments and elevation of Justice Harlan F. Stone to the chief justice ship in the late 1930s and early 1940s. Once again, an usually high number of reversals occurred during the first few terms of the Rehnquist Court (1986-2005) due to its changing composition and move into more conservative directions with a majority demonstrating its willingness to reconsider liberal precedents with which it disagreed.

Precedente

Resumo: O precedente é e permanece sendo essencial para o *common law*, mas não é nem fixo como se escrito numa pedra fosse, uma regra mecânica a ser seguida, nem fundamentalmente “vinculante”. Em formas interessantes, ainda que muitas vezes negligenciadas, os precedentes podem não só ser expressamente, mas implicitamente revogados, abandonados ou contornados (sem que isso seja dito), de modo a torná-los não mais “boa lei”, ou enfraquecer simplesmente reduzindo-os ao tamanho, só então para posteriormente reafirmá-los.

Palavras-chave: Precedente. Suprema Corte. Superação.

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³⁹ See Bernard Schwartz, *A history of the Supreme Court* (New York, Oxford University Press, 1993).

⁴⁰ For further discussion of the Supreme Court's reversal of precedents, see O'BRIEN, David M. *Constitutional law and politics: civil rights and civil liberties*. 10. ed. New York: W. W. Norton, 2017, at pp. 133-135.

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