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2006

## Super Precedent

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Publication: *Minnesota Law Review*

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## Essay

# Super Precedent

Michael J. Gerhardt<sup>†</sup>

Stare decisis is not an inexorable command in constitutional adjudication, except when it is. The potential of stare decisis as an inexorable command came to public attention when Senate Judiciary Chairman Arlen Specter asked John Roberts during his confirmation hearings to be Chief Justice of the United States whether Roberts agreed there were “super-duper precedents” in constitutional law.<sup>1</sup> The nominee left open the possibility of there being such precedent, though he refrained from citing specific examples. In asking about “super-duper precedents,” Senator Specter was reputedly borrowing a notion of stare decisis initially recognized by Circuit Judge Michael Luttig, who once referred to *Roe v. Wade*<sup>2</sup> as having achieved “super-stare decisis” in constitutional law because of its repeated re-affirmation by the Court.<sup>3</sup>

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1. See Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, § 4 at 1 (“The term superprecedents first surfaced at the Supreme Court confirmation hearings of Judge John Roberts, when Senator Arlen Specter of Pennsylvania, the chairman of the Judiciary Committee, asked him whether he agreed that certain cases like *Roe* had become superprecedents or ‘super-duper’ precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn.”).

2. 410 U.S. 113 (1973).

3. *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376–77 (4th Cir. 2000); see also Rosen, *supra* note 1 (“An origin of the idea [of super precedent] was a 2000 opinion written by J. Michael Luttig, a judge on the United States Court of Appeals for the Fourth Circuit, who regularly appears on short lists for the Supreme Court.”).

In my contribution to this symposium, I explore the significance and coherence of Senator Specter's and Judge Luttig's notions of "super precedent." In particular, I agree (apparently with Chief Justice Roberts) that, at least as a descriptive matter, there may be something akin to "super precedent" in constitutional law. The notion of super precedent has something in common with "super-statutes," which William Eskridge and John Ferejohn have described as those statutes that "successfully penetrate public normative and institutional culture in a deep way."<sup>4</sup> Of course, constitutional precedents have different legal status than their statutory counterparts: the former may preempt or displace statutory decisions, and may only be overridden by constitutional amendment or by the Court reversing itself. While a super precedent begins as a single decision, it hardly ends there. Super precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law). Super precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law and lives through the subsequent activities of the other branches. Super precedents seep into the public consciousness, and become a fixture of the legal framework.<sup>5</sup> Super precedents are the constitu-

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4. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001).

5. Interestingly, Abraham Lincoln recognized something akin to super precedent. In the course of his debates with Stephen Douglas in their 1857 Senate race, Lincoln contrasted *Dred Scott v. Sanford* with other constitutional decisions deserving more respect from political leaders. He explained that

[j]udicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been, in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

Abraham Lincoln, Response to Douglas in Representatives' Hall in the Illinois State House (June 26, 1857), in *THE LIVING LINCOLN: THE MAN, HIS MIND, HIS TIMES, AND THE WAR HE FOUGHT, RECONSTRUCTED FROM HIS OWN WRIT-*

tional decisions whose correctness is no longer a viable issue for courts to decide; it is no longer a matter on which courts will expend their limited resources. Super precedents are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling.<sup>6</sup> Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.

The first three Parts of this Essay are descriptive. Each considers a principal form in which a Supreme Court precedent may assume the status of being “super” in American constitutional law. Part I examines super precedent in the form of foundational institutional practices, such as judicial review. The second Part examines super precedent in the form of foundational doctrine, which refers to Supreme Court decisions that govern, support, and define over time basic or general approaches to, or understandings of, certain classes of constitutional disputes. The Court’s standards for determining classical political questions are a salient example. Part III examines super precedent in the form of decisions on particular questions of constitutional law that are so well settled and enduringly accepted by the Court, other branches, and the general public (through societal acquiescence) that they are practically immune to reversal. After identifying several precedents that I believe clearly qualify as “super precedents,” I explore which others may not be super precedents and why, including *Roe v. Wade*.

The final Part is both theoretical and evaluative. Initially, I briefly address a handful of criticisms of super precedent as a theoretical construct. Second, I consider the implications that the phenomenon of super precedent pose for constitutional theory and practice. Super precedent poses a problem for constitutional theorists, as well as judicial nominees, who purport to be rigidly committed to construing the Constitution in terms of a single unifying concept. Thus, super precedent is important, as

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INGS 201, 201 (Paul M. Angle & Earl Schenck Miers eds., 1955).

6. I have argued elsewhere that judicial precedents that are deeply embedded into our legal system impose the greatest degree of path dependency, albeit narrowly, on subsequent constitutional adjudication. Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 951–52 (2005).

a practical matter, to the implementation of constitutional values.

As the last Part demonstrates, Supreme Court confirmation proceedings are a crucial forum for implementing, defending, and weakening constitutional precedent. The Senate Judiciary Committee and the Senate are gatekeepers in filtering out the constitutional views that senators want to see reflected on the Supreme Court. Consequently, super precedent provides a baseline for measuring whether nominees' judicial philosophies, or attitudes, fit within the constitutional mainstream. Super precedent is integral to the Court's operations because it is an aspect of the Court that endures in spite of changes in its composition. Super precedent marks the point at which the institutional values of stability, consistency, institutional and social reliance, and predictability in constitutional law become compelling, enduring, and fixed. Super precedent reflects, in short, what may be sacred in American constitutional law.

#### I. FOUNDATIONAL INSTITUTIONAL PRACTICES

The first kind of super precedent consists of longstanding Supreme Court decisions that establish what I call foundational institutional practices. These decisions create and maintain particular modes of operation or particular practices that become indispensable to the functioning of our government. The practices established by these precedents have become so well entrenched within our society, have been so repeatedly endorsed and supported by public institutions, and have been the source of so many other lines of decisions, that they may be undone only through the most extremely radical, unprecedented acts of political and judicial will.

A prime example of a foundational institutional practice is judicial review. Over the course of two hundred years, judicial review has become a permanent fixture of our constitutional order. Moreover, the scope of judicial review has grown, not shrunk, over time. While academics and some political leaders passionately argue against the institution of judicial review and advocate its abandonment altogether,<sup>7</sup> their calls remain

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7. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996) (arguing for the abolition of judicial review); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–53 (1999) (challenging judicial review); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 656–67 (2005) (arguing for the abandonment of judicial review in the context of affirmative action).

unfulfilled. Nor does there appear to be any chance, at least in the foreseeable future, that those calls will be heeded. There simply are no signs of any serious and sustained political and social movement to abandon judicial review altogether. Consider, for instance, that no Supreme Court nominee rejects the lawfulness of extensive judicial review, and that no one is appointed to the Court with a record of explicitly opposing the institution of judicial review to the Supreme Court.

I merely offer two examples of super precedents which provide (and are widely recognized as providing) support for the constitutional underpinnings of the institutional practice of judicial review. The first is *Marbury v. Madison*.<sup>8</sup> *Marbury* was one of the first, but hardly has been the last, instance in which the Supreme Court exercised judicial review over the constitutionality of a federal statute. While the Court's justifications for exercising judicial review (generally and in the particular circumstances of the case) have been questioned, the institution it sanctioned endures. The case has effectively become a political and legal icon as the foundation for the Court's exercise of judicial review generally and for lawfully subjecting high-ranking executive officials (including presidents) to the judicial process. As such, the Court repeatedly cites *Marbury* as authority for the exercise of judicial review of executive action and for the other branches' actions to limit or constrain judicial authority.<sup>9</sup> Countless other decisions by the Supreme Court (not to mention lesser judicial tribunals) rely on *Marbury*, for both what it says and what it has come to mean. The case is the standard citation in textbooks and treatises for the basic practice of judicial review. The decision has become legendary in the study of constitutional law, and students (from grade school to law school) as well as lawyers, judges, Justices, members of Congress, and presidents accept *Marbury's* recognition of the constitutional authority for judicial review as sacrosanct in American constitutional law. Societal acquiescence in *Marbury*, as a defense and authority for the exercise of judicial review of federal authorities, is deeply engrained in the public consciousness and the fabric of American law. Other public institutions have come to rely on its endurance for over two centuries. The sym-

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8. 5 U.S. (1 Cranch) 137 (1803).

9. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citing *Marbury*, 5 U.S. (1 Cranch) at 176, in an attempt to limit judicial authority); *United States v. Nixon*, 418 U.S. 683, 703 (1974) (citing *Marbury*, 5 U.S. (1 Cranch) at 177, for the exercise of judicial review in an executive official case).

bolic importance of the case, as it has been applied and repeatedly reinterpreted over more than two centuries, entrenches it more deeply into the foundations of American constitutional law. The fact that the decision has constantly been interpreted and reinterpreted over the years has not robbed it of its significance in constitutional law. To the contrary, the decision's symbolic importance reflects its enduring value in constitutional law. Moreover, the fact that the decision is fundamental to constitutional law in more than one way—as the Court's first elaborate defense of judicial review as well as one of its first rulings subjecting high-ranking executive officials to the judicial process—embeds it deeply into the fabric of constitutional law. Scholars can question *Marbury*, but overruling the case and particularly its recognition of the compatibility of the institution of judicial review with the Constitution is unimaginable (and would require expunging reliance on it in countless other courts, decisions, and settings).

The other example of a super precedent establishing or reinforcing the institution of judicial review is *Martin v. Hunter's Lessee*,<sup>10</sup> in which the Supreme Court recognized the constitutional necessity for the exercise of Supreme Court review over a state court judgment resting on interpretations of federal law.<sup>11</sup> As Oliver Wendell Holmes famously remarked with reference to *Martin*, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."<sup>12</sup> While it is reasonable to assume the public (and perhaps many lawmakers) are not familiar with *Martin* by name, they are familiar with, and widely accept, the fact that the Supreme Court may review the constitutionality of a state law in conflict with some federal law, state court judgment on federal law, or state actor's failure to comply with either the United States Constitution or other federal law. Every time the Court exercises judicial review over some state action, it reinforces *Martin* and extends its legacy. Presidents and members of Congress stand by the

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10. 14 U.S. (1 Wheat.) 304 (1816).

11. *Id.* at 379–80. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), is equally important for its recognition of the constitutional necessity for Supreme Court review over state criminal cases, 19 U.S. (6 Wheat.) at 264, 375–431.

12. OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295–96 (1920).

constitutional necessity for judicial review of state activity impinging on the federal Constitution or other federal laws. While *Michigan v. Long*<sup>13</sup> might have given state supreme courts options for maneuvering around *Martin*,<sup>14</sup> no Supreme Court decision has weakened its fundamental importance in constitutional law. And while state officials have sometimes resisted the logic and implications of *Martin*,<sup>15</sup> they have much more often accepted, as have federal officials, its fundamental premise as a permanent feature of American constitutional law.

## II. FOUNDATIONAL DOCTRINE

A second kind of super precedent consists of Supreme Court decisions establishing what I call foundational doctrine. Foundational doctrine refers to the support in case law for recognizing the existence and application of basic categories, kinds, or classes of constitutional disputes that endure over time.

A prime example of this kind of super precedent is the Supreme Court's decisions upholding the incorporation doctrine, which provides the basis for the Court's review of state action allegedly violating the guarantees of almost all of the first eight amendments. To be sure, Justice Clarence Thomas has urged his colleagues to reconsider the Court's decision making the Establishment Clause of the First Amendment applicable to the states via the Due Process Clause of the Fourteenth Amendment.<sup>16</sup> But, Justice Thomas stands alone in making this plea. And while the Court employed more than one standard for determining whether to incorporate a specific guarantee of the Bill of Rights,<sup>17</sup> the Justices uniformly accept the incorporation

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13. 463 U.S. 1032 (1983).

14. *Id.* at 1044 (holding that when state court decisions rest on federal law, the Court will infer that the state court believed that federal law required it to do so).

15. The most prominent example of this resistance can be seen in the Southern Manifesto. For a general discussion of the resistance to *Martin* during this period, see WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER, & STEPHEN MACEDO, *AMERICAN CONSTITUTIONAL INTERPRETATION* 271–384 (3d ed. 2003).

16. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. . . . But the Establishment Clause is another matter.”).

17. Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 571–72 (1998) (“Initially, the Su-

doctrine as it stands today—recognizing the incorporation of almost all of the individual guarantees in the first eight amendments of the Bill of Rights. They build on that doctrine every day. Whenever the Supreme Court reviews states' possible violations of one of the guarantees of the first eight amendments, it reinforces the incorporation doctrine. The bulk of First and Fourth Amendment jurisprudence, for instance, has been forged in cases involving the constitutionality of state, rather than federal, actions. Moreover, incorporation of most of the Bill of Rights makes judicial review of many other constitutional disputes possible. The incorporation doctrine does not dictate how the Court ought to resolve particular claims of state violations of incorporated liberties, but it provides the basis for judicial review of these claims. Consequently, it is easy to see why a landmark opinion such as *Mapp v. Ohio*<sup>18</sup> has become a super precedent. It recognized a principle that endures to this day—the incorporation of the Fourth Amendment's guarantee against unreasonable searches and seizures.<sup>19</sup> Moreover, it became the foundation on which most judicial review of Fourth Amendment claims takes place. Similarly, one of the last cases in which the Court upheld the incorporation of a specific constitutional guarantee, *Duncan v. Louisiana*,<sup>20</sup> may be a super precedent because it sealed incorporation doctrine at the same time it set forth an enduring framework for making sense of the Court's incorporation doctrine.

Another example of super precedent establishing foundational doctrine is the Supreme Court's case law establishing classical political questions as nonjusticiable. In *Marbury v. Madison*, Chief Justice Marshall recognized a distinction between a legal question, which a court may decide, and a political question, which is left to the final decision-making of some

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preme Court used the fundamental fairness approach to protect certain individual rights against state action. Later, the Court adopted the selective incorporation approach and applied the precise language of portions of the Bill of Rights against the states. Finally, although the total incorporation doctrine has never been accepted by a majority of the sitting members of the Court, the historical arguments made in favor of total incorporation provide an intellectual foundation for the application of the majority of the Bill of Rights against the states.”).

18. 367 U.S. 643 (1961).

19. *Id.* at 655 (declaring all evidence obtained in violation of the Fourth Amendment inadmissible in state court).

20. 391 U.S. 145, 147 (1968).

nonjudicial authority. In *Luther v. Borden*,<sup>21</sup> the Court found that claims brought under the Constitution's Guaranty Clause are nonjusticiable,<sup>22</sup> a judgment that endures to this day. Just as importantly, *Luther v. Borden* is famous for recognizing the classical political question doctrine, which treats as nonjusticiable matters committed by the Constitution to other authorities' final decision-making.<sup>23</sup> That understanding of the political question doctrine endured until the Court, in an opinion by Justice Brennan, revised it in *Baker v. Carr*.<sup>24</sup> In that case, the Warren Court "clarified" the political question doctrine to include several prudential criteria for determining political questions.<sup>25</sup> *Baker's* articulation of the political question doctrine has been followed by courts ever since. Thus, *Baker v. Carr* is a super precedent because it not only set forth the enduring test for determining nonjusticiable political questions but also recognized the justiciability of constitutional challenges to gerrymandering.

Powerfully supporting this reading of *Baker* are the dozens of post-1962 voting and school desegregation cases, where the Court has affirmed or required federal court civil rights injunctions in the face of strong popular and official opposition. Even more dramatic have been the orders entered in other institutional reform litigation, especially

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21. 48 U.S. (7 How.) 1 (1849).

22. *Id.* at 47.

23. *Id.* ("[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.").

24. 369 U.S. 186 (1962).

25. *Id.* at 210–11 ("We have said that 'In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.' The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine." (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939))).

in the many lawsuits seeking structural reform of state prison systems.<sup>26</sup>

If that were not enough, *Baker* and its progeny provided the foundation for the Supreme Court's review of the dispute over the Florida vote count in the presidential election of 2000. As a practical matter, it was practically impossible to claim the dispute in *Bush v. Gore*<sup>27</sup> was nonjusticiable, given the Court's numerous other opinions, beginning with *Baker*, allowing judicial review of election disputes.

### III. FOUNDATIONAL DECISIONS

This brings us to what is in all likelihood the most controversial form of super precedent. It consists of particular Supreme Court decisions on discrete questions of constitutional law that (1) have endured over time; (2) political institutions repeatedly have endorsed and supported; (3) have influenced or shaped doctrine in at least one area of constitutional law; (4) have enjoyed, in one form or another, widespread social acquiescence; and (5) are widely recognized by the courts as no longer meriting the expenditure of scarce judicial resources. After examining several precedents that conceivably qualify as super precedents in the form of foundational decisions, I explain why several other well-known but persistently controversial precedents are not super precedents. I explain what these decisions need to demonstrate to attain the special status of "super precedent" at some future point in constitutional law.

#### A. ILLUSTRATIONS OF FOUNDATIONAL DECISIONS AS SUPER PRECEDENT

While I believe it is possible to identify more than a few examples of super precedent in the form of foundational decisions, I discuss only a few for the sake of brevity. To begin with, an excellent example of a foundational decision super precedent is *Knox v. Lee* (or, the *Legal Tender Cases*).<sup>28</sup> Though not widely known by name outside constitutional law circles, the American people are very familiar with the outcome of this decision, because they live with it, and take advantage of it, every day. Whatever the merits of the Supreme Court's decision in *Knox v.*

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26. DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1201 (3d ed. 2003).

27. 531 U.S. 98 (2000).

28. 79 U.S. (12 Wall.) 457 (1871).

*Lee*, its decision to uphold the constitutionality of paper money<sup>29</sup> has become a super precedent. The possibility of overturning the decision—and of returning to a world without legal tender—is simply unthinkable. There has been extraordinary social, political, and economic reliance on this decision in both the public and private sectors. Indeed, no one—not even scholars who believe the case was wrongly decided—seriously believes the decision ought to be revisited. The prospect of the social, political, and economic disaster that would result from its overruling makes it a permanent fixture in American constitutional law.

Bill Eskridge's and John Ferejohn's provocative work on super-statutes suggest other possible examples of super precedent.<sup>30</sup> In particular, they suggest that the Civil Rights Act of 1964,<sup>31</sup> the Sherman Antitrust Act of 1890,<sup>32</sup> and the Endangered Species Act of 1973<sup>33</sup> are examples of "super-statutes."<sup>34</sup> Each of these federal statutes has long been widely accepted into the public consciousness, and each provides the framework and support for other legislation.<sup>35</sup> One does not have to agree with Eskridge and Ferejohn that each of these statutes has quasi-constitutional status<sup>36</sup> in order to appreciate that the constitutional decisions supporting these grand pieces of legislation qualify as super precedents. These decisions each: (1) established fundamental institutional frameworks or principles in constitutional law; (2) have been consistently supported by national political leaders for decades; (3) provide support for additional case law and legislation; and (4) enjoy widespread public support or societal acquiescence. Consequently, they have become deeply entrenched in our legal system.<sup>37</sup> It is not important that the public is unaware of the particular names of the cases supporting these pieces of landmark legislation. What is important is that the precedents supporting these laws are as deeply ingrained in our society as the legislation they up-

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29. *Id.* at 80.

30. *See* Eskridge & Ferejohn, *supra* note 4.

31. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2000)).

32. 15 U.S.C. §§ 1-2 (2000).

33. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C. (2000)).

34. *See* Eskridge & Ferejohn, *supra* note 4, at 1231-46.

35. *See id.* at 1216-17.

36. *Id.* at 1217.

37. *See id.* at 1215-17.

hold. Each time a president renews these laws, expands them, signs others like them into law, praises them, and looks to them as models for other laws, they become more deeply entrenched in our culture, our laws, and our society. Political institutions, social movements, economic forces, and the American people have heavily invested in the byproducts of these decisions. Nothing short of a constitutional revolution could make the undoing of these precedents possible.

*Brown v. Board of Education*<sup>38</sup> is a case in point. Initially, the Warren Court's unanimous decision to strike down state-mandated segregation in public schools provoked considerable backlash, particularly in the South.<sup>39</sup> As Michael Klarman and others have shown, state-mandated segregation in public schooling did not truly come to an end until national political leaders fell behind *Brown* in the late 1950s, particularly through politically and socially significant legislation such as the 1964 Civil Rights Act and the 1965 Voting Rights Act.<sup>40</sup>

*Brown* may not have reached "super" status, though, until the Court systematically struck down state-mandated segregation in public facilities other than schools, the Court acknowledged its foundational status, and it became virtually required for Supreme Court nominees to declare their acceptance of it as a condition for their confirmation by the Senate. Robert Bork's nomination to the Court foundered in part because of his candid criticism of *Brown*.<sup>41</sup> While Clarence Thomas rebuked the Court to some extent for its decision in *Brown*, he did not signal in his Supreme Court confirmation hearings any agenda or intention to abandon or weaken it. Nor, more importantly, did Justice Thomas suggest he would call into question the landmark legislation *Brown* and its progeny arguably spawned,<sup>42</sup>

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38. 347 U.S. 483 (1954).

39. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 396–98 (2000).

40. Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 241–43 (1991).

41. Snyder, *supra* note 39, at 468 ("Responding to a softball question from Senator Thurmond about this apparent conflict, Bork admitted that 'as a matter of original intent, I am not at all sure that segregation was not intended to be eliminated.'" (quoting *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 132 (1987))).

42. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 489 (1991) ("I have no agenda to change existing case law. That is not my predisposition, and it is not the way that I approach my job.")

including the 1964 Civil Rights Act and the 1965 Voting Rights Act. Had he called these laws into question, he might have been rejected. But, he was reluctant to do so, no doubt in part because he understood that to reject these laws would have been political suicide. Subsequent nominees, including Chief Justice John Roberts and Justice Samuel Alito, have declared unambiguously their fidelity to *Brown* and to the landmark legislation, and thus the precedents upholding them, embedding it deeply into American culture, society, and constitutional law.<sup>43</sup>

It would be a mistake to assume all super precedents support liberal policies. For instance, the *Civil Rights Cases*,<sup>44</sup> decided in 1883, are, in all likelihood, a super precedent. The decision recognized a basic principle of constitutional law—that the Fourteenth Amendment prohibits only state action<sup>45</sup>—that endures to this day. The Court has re-affirmed that principle in several other cases, most recently in *United States v. Morrison*.<sup>46</sup> Thus, the Court has extended the principle set forth in the *Civil Rights Cases* for more than a century, and the principle applies to all constitutional doctrine. The Court has repeatedly fashioned other constitutional doctrine with the state-action requirement in mind, and Congress has similarly fashioned other legislation with the principle of the *Civil Rights Cases* in mind.

Similarly, the Court's opinion in *Washington v. Davis*<sup>47</sup> is a super precedent. The Supreme Court has steadfastly stood by the principle set forth in the case,<sup>48</sup> and built many other equal protection decisions on it until it became an essential, enduring part of the Court's framework for equal protection law.

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(statement of Judge Clarence Thomas)).

43. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144, 167–68, 262–63 (2005) (statement of Judge John Roberts) [hereinafter *Roberts Confirmation Hearing*]; U.S. Senate Judiciary Committee Holds a Hearing on Judge Samuel Alito's Nomination to the Supreme Court, <http://jurist.law.pitt.edu/alitoday2.php> (Jan. 10, 2006) (transcript at 58) (statement of Judge Samuel Alito) [hereinafter *Alito Confirmation Hearing*].

44. 109 U.S. 3 (1883).

45. *Id.* at 6.

46. 529 U.S. 598, 599–600 (2000).

47. 426 U.S. 229 (1976).

48. *Id.* at 239 (holding that a law or official act, without regard to whether it reflects a racially discriminatory purpose, is not unconstitutional solely because it has a racially discriminatory impact).

Yet another super precedent is the well-known separation-of-powers decision of *Youngstown Sheet and Tube Co. v. Sawyer*.<sup>49</sup> Chief Justice Roberts almost said as much in his confirmation hearings,<sup>50</sup> and Justice Alito expressed similar sentiments in his hearings.<sup>51</sup> Indeed, Supreme Court Justices for years have given special deference to the concurring opinion of Justice Jackson in that case. Members of Congress routinely cite *Youngstown* in separation of powers discussions.<sup>52</sup> They, too, tend to defer to Justice Jackson's concurrence, often referencing it in confirmation hearings. Presidents similarly have pledged fidelity to *Youngstown*, frequently citing Jackson's concurrence as authority. Jackson's concurrence has become popular because it provides a roadmap for lawmakers to follow.

#### B. SEPARATING SUPER PRECEDENT FROM INFAMOUS PRECEDENT

No simple or conclusive test exists to identify super precedent. Some cases may be quite well known because of the controversy that they have generated—*Lochner v. New York*<sup>53</sup> and *Dred Scott v. Sanford*<sup>54</sup> are but two examples—while other lesser known cases may have achieved special status precisely because they no longer generate any controversy. The extent of a precedent's notoriety does not lead inexorably to the conclusion that it is so deeply entrenched in our legal system as to be effectively immune to reconsideration.

We might be able to agree in the abstract that foundational decisions may be precedents fixed in the public consciousness and constitutional doctrine, but we should avoid supposing this element is the *sine qua non* of a super precedent. Notoriety is a factor whose legal significance needs to be carefully measured. Consider, for instance, whether *Miranda v. Arizona*<sup>55</sup> is a super

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49. 343 U.S. 579 (1952).

50. *Roberts Confirmation Hearing*, *supra* note 43, at 370 ("I agree with the basic proposition that the President's authority is at its greatest when he has the support of Congress." (statement of Judge John Roberts)).

51. Alito Confirmation Hearing, *supra* note 43, at 8 (statement of Judge Samuel Alito, responding affirmatively to Sen. Arlen Specter's question: "I want to . . . ask you first if you agree with the quotation from Justice Jackson's concurrence in the *Youngstown Steel [S]eizure* case about the evaluation of presidential power").

52. *See, e.g., id.* (statement of Sen. Arlen Specter).

53. 198 U.S. 45 (1905).

54. 60 U.S. (19 How.) 393 (1856).

55. 384 U.S. 436 (1966).

precedent. The case has long had its critics, but a series of factors—the Court’s re-affirmation of the decision in *Dickerson v. United States*,<sup>56</sup> its persistent backing and long-standing support from law enforcement authorities (for roughly four decades) and from political leaders around the country, and the public’s recognition and awareness of *Miranda*—all have given *Miranda* iconic status within the law. Moreover, it extends the Court’s doctrine opposing legislative attempts to overturn its constitutional decisions and directives on what it to do in constitutional adjudication. The difficulty with characterizing *Miranda* as a super precedent is that the Supreme Court has recognized a number of exceptions weakening (some say, eviscerating) *Miranda*.<sup>57</sup> While the decision endures symbolically in the public consciousness, it does not endure with the same robustness it first had. It retains limited special status in constitutional law, even in its weakened state.<sup>58</sup>

Another decision that arguably has some of the qualities of a super precedent is *Wickard v. Filburn*.<sup>59</sup> Notorious as it is in some circles, it endures. It is one of several decisions establishing the New Deal’s constitutional foundations.<sup>60</sup> Unanimously decided, it was reaffirmed by the Court in *United States v. Lopez*.<sup>61</sup> Indeed, Chief Justice Rehnquist clearly went out of his way to reconcile the Court’s decision in *Lopez* with *Wickard* and

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56. 530 U.S. 428, 432 (2000).

57. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (striking down the police practice of first obtaining a confession without giving *Miranda* warnings, then issuing warnings and obtaining the confession again, but permitting this practice if the *Miranda* warnings delivered midstream are “effective enough to accomplish their object”); *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (creating a public safety exception to the *Miranda* warnings); *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (holding that *Miranda* safeguards come into play only when a person in custody is subject to either express questioning or its functional equivalent); *Harris v. New York*, 401 U.S. 222, 224–26 (1971) (allowing statements made before *Miranda* warnings for the purpose of impeaching defendant’s credibility).

58. Undoubtedly, the fact that the constitutional scholar who mapped out a strategy for undoing *Miranda* lost his cause, but is now a federal district judge obliged to follow *Miranda*, further entrenches it in constitutional law. See Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898 (2001). Cassell was sworn in as a U.S. District Court judge for the District of Utah on July 2, 2002. University of Utah, S.J. Quinney College of Law, Faculty and Administration, <http://www.law.utah.edu/faculty/bios/cassellp.html> (last visited Apr. 2, 2006).

59. 317 U.S. 111 (1942).

60. *Id.* at 128–29.

61. 514 U.S. 549, 554–57 (1995).

to emphasize that the Court in *Lopez* was not reconsidering or overturning any of its prior Commerce Clause decisions.<sup>62</sup> The Court's recent decision in *Gonzales v. Raich*<sup>63</sup> further reinforced *Wickard*. Nevertheless, Justice Thomas clearly disagrees with the reasoning in *Wickard*,<sup>64</sup> and Chief Justice Roberts refused in his confirmation hearings to acknowledge *Wickard* as firmly or irrevocably settled. Instead, Roberts suggested that the question decided in *Wickard* could come back before the Court.<sup>65</sup> While it may be premature to call *Wickard* a super precedent, it comes closer than perhaps *Miranda* does. Indeed, it comes closer to being super precedent with each day that passes and with each piece of legislation Congress passes—and the Court upholds—in its mold.

Yet another decision that may have some qualities of a super precedent is *Griswold v. Connecticut*.<sup>66</sup> Despite the fact that the Justices recognized as many as five different theories for recognizing a marital right of privacy in *Griswold*,<sup>67</sup> and although some conservative scholars continue to pillory the decision,<sup>68</sup> *Griswold* has become entrenched in constitutional law in a number of subsequent decisions. Moreover, Supreme Court nominees over the past few decades have realized that accepting *Griswold* smooths their path to the Court. It has been no

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62. *Id.* at 559–60.

63. 125 S. Ct. 2195, 2206–08 (2005).

64. *Id.* at 2235–37 (Thomas, J., dissenting).

65. *Roberts Confirmation Hearing*, *supra* note 43, at 261–63 (“But I would say that because [*Wickard*] has come up again so recently in the *Raich* case that it’s an area where I think it’s inappropriate for me to comment on my personal view about whether it’s correct or not . . . . Nobody in recent years has been arguing whether *Marbury v. Madison* is good law. Nobody has been arguing whether *Brown v. Board of Education* was good law. They have been arguing whether *Wickard v. Filburn* is good law.” (statement of Judge John Roberts)).

66. 381 U.S. 479 (1965).

67. Justice Douglas found a right to privacy in the “penumbra” of the enumerated rights of the Bill of Rights. *Id.* at 484. Justice Goldberg found a right to privacy in the Ninth Amendment. *Id.* at 491 (Goldberg, J., concurring) (“[S]ince 1791 [the Ninth Amendment] has been a basic part of the Constitution . . . . To hold that a right so basic and fundamental . . . as the right of privacy in marriage may be infringed because that right is not guaranteed in . . . the first eight amendments . . . is to ignore the Ninth Amendment . . .”). Justices Harlan and White based their opinion on the Due Process Clause. *Id.* at 500 (Harlan, J., concurring).

68. Robert Bork, for example, has acknowledged his disagreement with the decision. See Linda P. Campbell, *Thomas Supports a Right to Privacy: Reply Surprises Democrats; Judge Won't Discuss Abortion*, CHI. TRIB., Sept. 11, 1991, at A1.

accident that Justices David Souter and Samuel Alito picked Justice John Marshall Harlan as one of the Justices whom they admired most, no doubt because of the eloquence and narrowness of his concurrence in *Griswold*.<sup>69</sup> Chief Justice Roberts, too, accepted *Griswold*, albeit narrowly defined.<sup>70</sup> The Senate's rejection of Robert Bork's nomination to the Court was grounded in part on his candid acknowledgment that *Griswold* was wrongly decided.<sup>71</sup> Neither Justice Scalia nor Justice Thomas openly criticized *Griswold* in their respective confirmation hearings,<sup>72</sup> and Chief Justice Roberts further acknowledged in his confirmation hearings not only eighty years' worth of decisions supporting a marital right of privacy but also the absence of any agenda, or inclination, to undo the decision.<sup>73</sup>

If *Griswold* were not yet a "super precedent" for some reason, it may be a consequence of sharp disagreements over its extension to other realms, especially in the context of abortion (though it has been recognized by the Court as part of the foundation of the Court's relatively longstanding recognition of a constitutionally protected right to traditional marriage). Justices and others who support the outcome in *Roe v. Wade*<sup>74</sup> may be eager to give *Roe* "super precedent" status, but the persistent condemnation of *Roe*, particularly by national political leaders—including Presidents Reagan, George H.W. Bush, and George W. Bush, as well as a current majority of the United States Senate—undermines its claim to entrenchment.

#### IV. THE IMPLICATIONS OF SUPER PRECEDENT FOR SUPREME COURT PRACTICE AND DESIGN

In this Part, I consider the utility of introducing the notion of super precedent into constitutional analysis. First, I briefly address several criticisms of the theoretical construct of super precedent. Second, I examine the significance of super prece-

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69. See *id.*; Alito Confirmation Hearing, *supra* note 43, at 129 ("[Y]ou've expressed admiration for . . . Harlan") (statement of Sen. Charles Schumer).

70. See *Roberts Confirmation Hearing*, *supra* note 43, at 565–66 (statement of Judge John Roberts, responding to written questions from Sen. Diane Feinstein).

71. See Campbell, *supra* note 68.

72. *Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. (1996); Campbell, *supra* note 68.

73. See *Roberts Confirmation Hearing*, *supra* note 43, at 207 ("I agree with the *Griswold* court's conclusion that marital privacy extends to contraception and availability of that." (statement of Judge John Roberts)).

74. 410 U.S. 113 (1973).

dent as a crucial mechanism for implementing constitutional values.

#### A. RESPONSES TO FIVE CRITICISMS

At least five criticisms may be leveled against importation of the concept of super precedent into constitutional law. First, Professor Randy Barnett argues against recognizing any prior Supreme Court decisions as super precedent on the ground that it would immunize at least some questions of constitutional law from ever being reconsidered.<sup>75</sup> The danger is that declaring something as super precedent makes it off limits for criticism or correction. He suggests that the Court always needs to have the freedom to reconsider its precedents whenever it deems reconsideration appropriate.<sup>76</sup>

The principal difficulty with this criticism is that super precedent plays an important function in constitutional law. Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence. Securing the permanence of some decisions extends all of the institutional values advanced by fidelity to precedent, including the preservation of stability and scarce judicial resources. Moreover, judicial closure on some constitutional questions ought not to be confused with the extent of a precedent's constraining effect on subsequent adjudication. Merely designating something as super precedent does not preclude scholars from questioning a judicial decision (as some scholars still do, for instance, with respect to the Court's incorporation doctrine) or developing a sustained attack on seemingly settled constitutional doctrine. The point is that a super precedent is the culmination of sustained support from political leaders and the federal judiciary generally, including the Court, over time. The enduring support is the (short) answer to Professor Barnett's concerns.

The second criticism is the apparent impossibility of determining the requisite length of time that a judicial precedent must endure before it may be designated as a super precedent

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75. See Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1238-47 (2006).

76. *Id.*

in constitutional law. The problem with super precedent is that time alone is not a reliable measure of the special status of at least some precedents in constitutional law.

I agree that time alone is not the measure of a precedent's attainment of special status in constitutional law. Moreover, I concede the impossibility of determining a minimum length of time for a precedent to endure before it may be called a super precedent. It is of course impossible to know what will happen years or centuries from now. No one can prove that the Court will refrain from reconsidering for all time some decisions which we think are firmly settled. Nevertheless, focusing on the longevity of a precedent misses the point. Longstanding precedents, especially in important cases, are rarely overturned in a single bound. A case that can credibly be characterized as a super precedent is distinctive in part because it is so deeply engrained in constitutional law that it cannot be reconsidered—much less overturned—without considerable excavation. In practice, this means that if and when the time ever came to reconsider super precedent it would only occur after persistent warnings and attacks (both on and off the Court). *Plessy v. Ferguson*,<sup>77</sup> for example, was not simply left untouched in a shrine until the Court began to dismantle the decision in the 1950s. To the contrary, it was attacked systematically in a series of lawsuits brought by the NAACP, culminating in *Brown*.<sup>78</sup> Similarly, the so-called right to contract recognized in *Lochner v. New York*<sup>79</sup> was not only overruled *sub silentio* a few years later<sup>80</sup> but the right to contract it recognized was the target of a good deal of litigation for decades.<sup>81</sup> Important cases tend not to disappear in the absence of concerted, sustained efforts to overrule them. The time required for precedents to become deeply entrenched and immune to reconsideration is less important than the fact that persistent challenges are indicia of the failure of precedents to achieve super precedent status.

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77. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

78. 347 U.S. 483.

79. 198 U.S. 45 (1905), *implicitly overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

80. *See West Coast Hotel Co.*, 300 U.S. at 397–98.

81. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 921 (1952); *Nebbia v. New York*, 291 U.S. 502 (1934); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled in part by West Coast Hotel Co.*, 300 U.S. at 388–400.

The third criticism follows from the second. It maintains that it is difficult, if not impossible, to prove the existence of a super precedent. If it were possible that any precedent, no matter how fixed at a given point in time, could conceivably be subject to reconsideration, then it makes no sense to declare something as a super precedent. The status, after all, is apparently subject to change, not to mention the exasperating difficulty of not being able to demonstrate once and for all that a particular decision qualifies as a super precedent.

This criticism misses the mark. Very few cases are likely to qualify as super precedents. We can only be sure whether something qualifies as a super precedent after we verify the convergence of a number of factors in support of a particular decision. The important point is that the factors are relatively clear. The challenge in demonstrating something as a super precedent is ensuring that all relevant factors are in fact present and fixed.

The fourth criticism is that many of the cases we call super precedents—*Brown*, for instance—appear not to have had fixed meanings over time. In constitutional adjudication, the Court often redefines, reinterprets, and modifies its prior decisions. Thus, many cases apparently fail to qualify as super precedents because the initial decision—or, at least what the Court said in it about the Constitution—has not endured intact.

The fact that a precedent's meaning has not remained narrowly fixed is, however, not necessarily an indication it has failed to achieve the status of a super precedent. Every judicial precedent has the potential to perform many functions in constitutional law. What matters is whether a precedent continues to perform at least one of these basic functions, which include (but are not limited to) constraining subsequent litigation, political symbolism, framing the Court's agenda, facilitating a public dialogue on constitutional meaning, educating the public (or others) about the Constitution, implementing constitutional values, and chronicling or clarifying constitutional history. A super precedent needs to perform only one of these functions, not all of them.

The fifth criticism is that there appears to be no doctrinal support for the notion of super precedent. I agree that the Court has not recognized the concept of super precedent and that the Court is unlikely ever to do so. But, it is safe to say that the Court talks about some prior decisions as if they had such status. There are cases that the Court treats as if they

were super precedents, and *Marbury*<sup>82</sup> is just one example. Moreover, the point is not whether the Supreme Court expressly has used the magic words “super precedent” to describe some of its decisions. The point is that super precedent is the culmination of a series of constitutional decisions both on and off the Supreme Court. A single factor is not enough, at least in my judgment, to establish something as a super precedent. But, the absence of a single factor may be enough to deprive a decision of the status of being a super precedent. Becoming a super precedent requires the convergence of a number of factors, including consistent support from national political leaders as well as the Court for a particular constitutional judgment. Thus, a closer look at the confirmation process for Supreme Court Justices as one forum for expressing such support may be in order.

#### B. THE IMPLICATIONS OF SUPER PRECEDENT FOR CONSTITUTIONAL THEORY AND PRACTICE

As Daniel Farber has suggested and as I have argued elsewhere, a fundamental tension exists between respect for precedent and inflexible adherence to a judicial philosophy of original understanding.<sup>83</sup> Supreme Court and other judicial nominees got into trouble in the 1980s and 1990s because, as Henry Monaghan has pointed out, considerable constitutional doctrine is not based on and is fundamentally irreconcilable with original understanding.<sup>84</sup> The most rigorous originalist must acknowledge this doctrine as all wrongly decided, and intellectual integrity requires they vote to overturn any decision they deem as wrongly decided. Originalists, at least the most rigorous ones, have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law. Strict adherence to originalism requires some upheaval in constitutional law.

A possible explanation for the existence of the three different kinds of super precedent is that each reflects, in a different way, the intricate network effects of multiple judicial and po-

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82. 5 U.S. (1 Cranch) 137 (1803).

83. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 25 (2002).

84. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724–27 (1988).

litical practices and decisions. Once other institutions invest in, and rely upon, particular judicial practices and decisions, these practices and decisions become more deeply ingrained in our legal system. The more ingrained a particular judicial practice or decision, the more difficult it becomes to undo. As layers become deeply embedded and encrusted, the more immune they become to judicial excavation.<sup>85</sup> Of course, why some rather than other judicial practices and decisions become deeply ingrained remains a difficult question. Because these appear to be network effects, it is useful to examine the network within which the Justices operate.

The construction of the Supreme Court is the consequence of a series of political choices by national political leaders. The Court tends to be what political leaders make it. Thus, it is interesting to note that three successive Republican appointees as Chief Justice—Warren Burger, William Rehnquist, and John Roberts—were each appointed to help lead the Supreme Court away from what it had become under an earlier Chief Justice, Earl Warren. Yet, much of the Warren Court’s jurisprudence endures, in spite of the fact that in the 36 years since Earl Warren left the Supreme Court, Republican presidents have appointed 11 of 13 Justices.<sup>86</sup> A theory worth pondering is whether, in spite of the rhetoric of these presidents, political circumstances have made it impossible for them to achieve their professed agendas. Political circumstances have conceivably made the appointments of Justices with radical views regarding *stare decisis* impossible. Let me put the point a different way. When some conservative commentators cite the three or four decisions they most would like to see overruled, they often cite such cases as *Roe v. Wade*, *Lemon v. Kurtzman*,<sup>87</sup> and *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>88</sup> These are of course Burger, not Warren, Court decisions, while the

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85. This tracks Barry Friedman’s and Scott Smith’s notion of the sedimentary Constitution. See generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

86. U.S. Supreme Court Justices, <http://www.oyez.org/oyez/portlet/justices/chrono> (last visited Apr. 2, 2006) (offering links to brief biographies of each Supreme Court Justice).

87. 403 U.S. 602, 612–13 (1971) (establishing a three-pronged test for determining whether a government-sponsored message violates the Establishment Clause).

88. 469 U.S. 528, 546–47 (1985) (holding that the determination of state immunity from federal regulation does not turn on whether a particular governmental function is “integral” or “traditional”).

decisions that often provoke derision of the Supreme Court these days are such cases as *Lawrence v. Texas*<sup>89</sup> and *Roper v. Simmons*<sup>90</sup> (but not *United States v. Virginia (VMI)*,<sup>91</sup> *Romer v. Evans*,<sup>92</sup> or the older case of *Goldberg v. Kelly*<sup>93</sup>). As the Warren Court recedes into memory, its precedents become harder to extract. They become more calcified. As they become more calcified, they become more entrenched. As they become more entrenched, some continue down the path toward becoming super precedents.

The nominations of John Roberts, Harriet Miers,<sup>94</sup> and Samuel Alito are instructive. The Senate performs a critical function as a gatekeeper to filter out the views it wants to see reflected and those that it does not want to see reflected on the Court. Their respective confirmation proceedings reflected the Senate's perennial efforts to use its confirmation authority to weaken Supreme Court decisions with which it disagrees and strengthen those with which a critical mass of senators agree.<sup>95</sup> The respective journeys of these nominees through the confirmation process were different from those followed by the embattled judicial nominees of the 1980s and 1990s. John Roberts avoided controversy by rejecting fidelity to any particular theory of constitutional interpretation. Instead, he espoused a philosophy of "judicial modesty;" he likened judging to umpiring; and he called himself someone who liked "bottom-up" judging, which included a healthy degree of respect for stare decisis.<sup>96</sup>

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89. 539 U.S. 558, 578–79 (2003) (striking down the ban on sodomy).

90. 543 U.S. 551, 568 (2005) (finding the execution of minors unconstitutional).

91. 518 U.S. 515, 519 (1996) (considering the Virginia Military Institute's admissions policy).

92. 517 U.S. 620, 623–26 (1996) (finding Colorado's ban on protection to victims of sexual orientation discrimination unconstitutional).

93. 397 U.S. 254, 269–71 (1970) (holding that states must give a hearing to public aid recipients before the aid is ended).

94. Michael Fletcher, *White House Counsel Miers Chosen for Court*, WASH. POST, Oct. 5, 2005, at A1.

95. The dynamic works in both directions—the Senate helps to shape the Court and the Court influences how the Senate functions in confirmation proceedings (and other settings in which it renders constitutional judgments). On the important relationship between the Supreme Court's constitutional decision making and the constitutional activities of nonjudicial actors (including the President and the Congress), see Robert C. Post, *The Supreme Court Term: Foreword: Fashioning the Legal Constitution: Culture, Court, and Law*, 117 HARV. L. REV. 4 (2003).

96. See Jeffrey Rosen, *Answer Key*, THE NEW REPUBLIC, Nov. 21, 2005, at 16, 20.

Part of the brilliance of Roberts' descriptions of himself is that he invented new concepts with which to discuss judicial philosophy that had the multiple advantages of not appearing to be inconsistent with substantial amounts of constitutional law, of appealing to those evaluating him, and of not backing him into a corner on the cases likely to come before him over the next few decades.

Yet, Roberts, Miers, and Alito each owed their respective nominations to a president who had vowed not to make the mistakes of his Republican predecessors—namely President Reagan and his father—in appointing Justices who failed to fulfill the Republican agenda of overturning liberal decisions such as *Roe v. Wade*. President George W. Bush seemed determined to go further when he promised to nominate “strict constructionists” and people in the mold of Justice Antonin Scalia or Justice Clarence Thomas,<sup>97</sup> both of whom had made clear their desires to overrule the precedents long criticized by conservative scholars and activists. But, at least one problem President Bush and particularly his Supreme Court nominees encountered seems to have been super precedent. Nominees with public records of opposing the decisions that President Bush or others have wanted to undo encounter an insurmountable problem in the form of super precedent. The President avoided nominees with judicial philosophies that clearly would have led them to favor overruling not just arguably settled cases like *Roe* and *Griswold*, but more deeply entrenched decisions supporting the constitutionality of the New Deal, the Great Society, and landmark environmental legislation. The latter nominees had philosophies that would have appeared, in other words, to have led them to favor producing havoc or chaos in constitutional law. Someone who would seem to favor producing havoc or chaos in constitutional law is a hard sell not only to the Senate, but also the American people.

Chief Justice Roberts was a model for avoiding pitfalls in the confirmation process. It is possible he may have been too good a model. He constantly espoused respect for precedent throughout his hearings. He may or may not have been a firebrand when he worked in the Office of the Attorney General, the White House, or in Office of the Solicitor General, but he was not a firebrand when he appeared in front of the Senate

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97. See *Bush Nominates Alito to Supreme Court: Conservatives, Liberals Ready for Heated Debate*, CNN.COM, Oct. 31, 2005, <http://www.cnn.com/2005/POLITICS/10/31/scotus.bush/index.html>.

Judiciary Committee. He no doubt understands that President Bush would love to see him not only vote as Chief Justice Rehnquist did but also move the Court further to the right. Yet, John Roberts the nominee accepted some judicial decisions inconsistent with that political agenda, including those recognizing a marital right of privacy,<sup>98</sup> the framework for analyzing separation of powers conflicts,<sup>99</sup> the constitutionality of the 1965 Voting Rights Act,<sup>100</sup> and heightened scrutiny for gender classifications.<sup>101</sup> Roberts even acknowledged *Roe* as “settled law,” and recognized that overruling a precedent would be “a jolt to the legal system.”<sup>102</sup> One has to assume that some overrulings would produce more of a “jolt” to the system than others, and some might fatally electrocute the system. While Chief Justice Roberts suggested it was not unthinkable for the Supreme Court to overrule settled law, he made abundantly clear that his philosophy of judicial modesty is grounded, at least in part, on respect for what came before. Roberts acknowledged that predictability, stability, consistency, and reliance are values to be taken into account in constitutional adjudication, and it would seem to follow that these values ought to count in most cases.<sup>103</sup> It further follows that there may be at least some instances in which the values promoted by fidelity to precedent become compelling. A Court that overrules too many precedents not only sets a bad example for the Courts that follow (because it provides no incentive to respect the work of its predecessors), but also signals permission for other branches to view its decisions with the same lack of respect with which it views them. A healthy respect for precedent means learning to live with decisions with which you disagree. When Roberts went further to describe himself as a “bottom-up” kind of judge,<sup>104</sup> he signaled that his inclination is to decide cases incrementally and to infer principles from the records of the cases below. A bottom-up judge is willing to learn from experience, which necessarily means that a good deal of our experience has to be left in tact.

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98. *Roberts Confirmation Hearing*, *supra* note 43, at 186 (statement of Judge John Roberts).

99. *Id.* at 382 (statement of Judge John Roberts).

100. *Id.* at 169 (statement of Judge John Roberts).

101. *Id.* at 190–91 (statement of Judge John Roberts).

102. Gwyneth K. Shaw, *Roberts: Roe ‘settled as precedent’*, *BALT. SUN*, Sept. 14, 2005, at 1A.

103. *See Rosen*, *supra* note 96, at 20.

104. *See id.*

Harriet Miers, in the short period in which she was a nominee to the Court, took pains to avoid appearing as if she favored any radical thinking, or results, in constitutional law. To be sure, she had no public record of radical opinions—indeed, she seemed to have few if any fixed opinions about constitutional law. This might have made her attractive as a nominee to President Bush—she might have been a nominee who was committed to ruling as he would have liked but who had no paper trail suggesting any such disposition. Interestingly, it was the President’s supporters who questioned her credentials most vigorously. They wondered, not too subtly, whether she would become the “obsequious instrument of [the President’s] pleasure,” as Alexander Hamilton once described the kind of nominee the Senate ought to reject.<sup>105</sup> She tried to answer the concerns of her critics with assurances that she believed judges needed to be “humble,” language that had been intended, no doubt, to echo Chief Justice Roberts. When Republican senators, among others, demanded to see some of her work as Chief White House Counsel in order to get a better idea of her ideological commitments and professional competence, the President refused on the basis of executive privilege. In the end, she withdrew her nomination to avoid jeopardizing the confidentiality of her work as Chief White House Counsel.<sup>106</sup>

In the immediate aftermath of Miers’ withdrawal, it was not clear whether, or why, the White House had failed to foresee that her nomination would have triggered opposition on ideological grounds from conservatives or requests for documents arguably protected by executive privilege. Whether the assertion of executive privilege was genuine or merely a pretext for her withdrawal, it is noteworthy that she based her withdrawal on her (and the President’s) adherence to a conventional position—protecting the confidentiality of the work product of the White House Counsel’s office.<sup>107</sup> Defending a nomination on the basis of a disregard for a fundamental principle of separation of powers—respect for executive privilege—would not have

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105. THE FEDERALIST NO. 76, at 426 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

106. Edward Epstein, *Miers Withdraws as Court Nominee*, S.F. CHRON., Oct. 28, 2005, at A1.

107. *Id.* (“I have steadfastly maintained that the independence of the executive branch be preserved and its confidential documents and information not be released to further a confirmation process,” [Miers] wrote in her withdrawal letter.”).

helped the nomination. The nomination would have become mired in fallout from the President's failure to demand respect for executive privilege in that setting.

Enter Judge Samuel Alito. Judge Alito's fifteen-year record on the federal court of appeals demonstrates, among other things, a variety of propensities, including deference to executive power and construing congressional powers narrowly.<sup>108</sup> As a lower court judge, he demonstrated respect for Supreme Court precedent. Yet, his record also included harsh criticisms of some Supreme Court precedents made while he was working for the Reagan Justice Department.<sup>109</sup> In his Supreme Court confirmation hearings, he repeatedly stressed that his personal views would play no role in his discharge of his duties as a Supreme Court Justice.<sup>110</sup> As a witness, he said as little as possible on most subjects. To the extent he addressed the subject, he expressed almost as much respect for *stare decisis* as Chief Justice Roberts did in his confirmation hearings.<sup>111</sup> While Justice Alito indicated his concerns that the Court's attempt to maintain a strict wall of separation between church and state has not always been coherent or workable,<sup>112</sup> he avoided that subject in his hearings. He hastened to reassure senators of his recognition of the right to privacy at least to the extent it was recognized in *Griswold*.<sup>113</sup> His supporters repeatedly praised his temperament and characterized him as a humble person—a man with a “great heart”—likely to appreciate and embody the

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108. See Rosen, *supra* note 96, at 18–20.

109. Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1.

110. See Alito Confirmation Hearing, *supra* note 43, at 29–32 (statement of Judge Samuel Alito, responding to questions and comments from Sen. Ted Kennedy); *id.* at 41–42 (statement of Judge Samuel Alito, responding to questions from Sen. Charles Grassley); *id.* at 93–101 (statement of Judge Samuel Alito, responding to questions from Sen. Jeff Sessions).

111. Alito Confirmation Hearing, *supra* note 43, at 3, 4, 6, 7, 28, 124, 128, 131, 133 (statements of Judge Samuel Alito).

112. Charles Babington, *Senators Praise Nominee's Candor: Alito Shows Willingness to Discuss Controversial Issues Facing Supreme Court*, WASH. POST, Nov. 5, 2005, at A7 (“Many liberal groups fear further erosion of the separation of church and state if the court shifts to the right . . . Sen. John Cornyn (R-Tex.) told reporters that Alito ‘did commiserate with me a little bit about the problems that the Supreme Court has had in coming up with a coherent body of law that is clear and can be easily applied, and can be predictable in a way that doesn’t discourage people from expressing their religious views.’”).

113. Alito Confirmation Hearing, *supra* note 43, at 2, 134 (statements of Judge Samuel Alito).

importance of humility and modesty in judging.<sup>114</sup> Throughout the hearings, Republican senators defending Alito discounted any possibility that his appointment could destabilize the Court, constitutional doctrine, or both.<sup>115</sup>

### CONCLUSION

John Roberts' confirmation as Chief Justice of the United States was historic for a number of reasons. Besides becoming the youngest Chief Justice since John Marshall was appointed in 1801 at the age of 45, Roberts' confirmation hearings featured some new terminology for describing judging and constitutional law. In particular, he did not dispute (at least expressly) that some prior decisions of the Court may be fairly described as super precedent because of their legal, social, and/or political importance. As a descriptive matter, it is possible to identify such precedent in constitutional law. Super precedents may have several distinctive features, including establishing basic frameworks or propositions of constitutional law; receiving repeated support and reinforcement by national political institutions, the Court, and societal acquiescence; and providing the foundation for the development of constitutional doctrine in one or more areas. Precedents with these features may come in such diverse forms as supporting foundational practices, foundational doctrine, and foundational decisions. In whatever form they come, however, they pose challenges to constitutional theorists, who must adjust their descriptive theories of the Court's operations to account for their functional status as super precedents. Moreover, the possible existence of super precedent provides a basis for future questioning of Supreme Court nominees, and perhaps even other judicial nominees. Super precedent may be an integral part of the Court that endures over time. It may thus become an important consideration in evaluating not only future Supreme Court nominees but also future efforts to reconfigure the institutional design or operations of the United States Supreme Court.

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114. *Roberts Confirmation Hearing*, *supra* note 43, at 546 (statement of Sen. Tom Coburn).

115. *See* Babington, *supra* note 112.