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Overruling Statutory Precedents

WILLIAM N. ESKRIDGE, JR.*

Stare decisis, the rule that judicial precedents should be followed, has been considered by American courts to be more a rule of thumb than an iron-fisted command. While stare decisis emphasizes the continuity of law as a means to preserve public respect for judicial decisionmaking and to protect the reliance interests of persons and institutions, these values must sometimes yield to growth and change. Thus, an American court does not consider itself "inexorably bound by its own precedents, but, in the interest of uniformity of treatment to litigants, and of stability and certainty in the law . . . will follow the rule of law which it has established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions and that more good than harm would come by departing from precedent."¹

Last Term, the Supreme Court confronted these issues in several important cases of statutory interpretation.² The most controversial of these was Johnson v. Transportation Agency, Santa Clara County.³ Paul Johnson brought suit against the Transportation Agency for promoting an allegedly less qualified female applicant to road dispatcher instead of him. Johnson argued that he was discriminated against on the basis of sex, in violation of

title VII of the Civil Rights Act of 1964. The Agency contended that the applicant's sex could be considered pursuant to a voluntary affirmative action plan, similar to the one the Court had upheld against title VII attack in United Steelworkers v. Weber. The Court sustained the Agency's position, relying on Weber. Dissenting opinions by Justices White and Scalia argued that the voluntary preference was not appropriate under existing precedents and that, in any event, Weber should be overruled. The Court dismissed the latter argument in a footnote, and concurring opinions by Justices Stevens and O'Connor suggested that, whatever their doubts about the reasoning and result in Weber, they felt compelled to follow and apply the precedent because it was an authoritative construction of the Civil Rights Act. Justice Scalia responded that stare decisis concerns ought not save an opinion which he believed to be so problematic, but only Justice White and Chief Justice Rehnquist agreed.

In light of the modern, balanced vision of stare decisis, it seems odd that Justice Scalia's attack on Weber did not receive more attention from the Court. What makes this even more remarkable is that the Court has been increasingly willing to reexamine its precedents in constitutional cases. Why did the Court not apply the same liberal treatment to Weber? The answer lies, in part, with the three-tiered hierarchy of stare decisis the Court has created, at least in theory. Common law precedents enjoy a strong presumption of correctness. The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine. Statutory precedents, on the other hand, often enjoy a super-strong presumption of correctness. In some cases, the Court says it will overrule statutory precedents only under the most compelling circumstances, such as new constitutional developments. According to many judges and commentators, this heightened adher-

7. Id. at 1465 (White, J., dissenting); id. at 1474 (Scalia, J., with Rehnquist, C.J., dissenting).
8. Id. at 1450 n.7.
9. Id. at 1460 (Stevens, J., concurring); id. at 1465 (O'Connor, J., concurring in the judgment).
10. Id. at 1465 (White, J., dissenting); id. at 1473 (Scalia, J., with Rehnquist, C.J., dissenting).
11. See Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 Mich. L. Rev. 151, 152-55 (1958) (Court overruled prior precedents at least 90 times between 1810 and 1957, 60 of which involved constitutional precedents); Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 743 (1949) (Court overruled constitutional precedents 21 times between 1937 and 1949); Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 467 (Court overruled constitutional precedents 47 times between 1959 and 1979); see also Noland, Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years, 4 Val. U.L. Rev. 101, 112-31 (1969) (survey of precedents overruled by Warren Court and rationales on which Court relied).
ence to stare decisis "marks an essential difference between statutory interpretation on the one hand and [common] law and constitutional interpretation on the other." The purpose of this article is to examine critically and historically this super-strong presumption against overruling statutory precedents.

Part I traces the history of the super-strong presumption but raises a puzzle. Notwithstanding the rule, the Supreme Court has overruled or materially modified statutory precedents more than eighty times since 1961. The super-strong presumption is not just rhetoric, though, for the Court normally does not completely admit what it is doing, or goes to great length to explain its overruling of statutory precedents by reference to three exceptions which are arguably consistent with the primary theory underlying the super-strong presumption. Although I find the Court's exceptions incompletely persuasive, they do suggest that the super-strong presumption is not a blanket rule. A given statutory precedent is particularly vulnerable to modification or overruling if the Court's original discussion of the issues is procedurally unsatisfactory, if the statute being interpreted is generally worded and has not been the subject of extensive legislative tinkering, and/or if subsequent legislative developments have undercut the rationale of the decision and private parties have not extensively relied on it.

Part II argues that the Court should abandon the super-strong presumption against overruling statutory precedents and should adopt an "evolutive" approach, suggested by the Court's opinions overruling common law precedents, as well as some of the Court's earlier opinions overruling statutory precedents. Under the Court's approach in these cases, a statutory precedent should enjoy a strong presumption of validity and should not be overruled

simply because later Justices disagree with it. The normal strong presumption, however, may be rebutted by changed circumstances which render the statutory precedent not only inconsistent with original legislative expectations and evolving statutory policy, but indeed counterproductive to current policy. If the original reasons for the rule have disappeared or weakened, the rule has been persuasively criticized by judges and commentators, and practical experience suggests that the statutory goals are being undermined by the existing rule and can be better served by a new rule, the precedent should be overruled unless there has been substantial legislative or private reliance on the rule. Part II concludes with a rebuttal to the arguments that have been used to justify an unusually strict presumption of correctness for statutory precedents. In this article I do not question the relaxed presumption of correctness for constitutional precedents, nor do I reexamine the rule and policy of stare decisis generally.\footnote{14. For a recent exposition, see Schauer, Precedent, 39 STAN. L. REV. 571 (1987), and see also PRECEDENT IN LAW (L. Goldstein ed. 1986).}

The evolutive approach is explicated in greater detail through specific examples in part III, beginning with Johnson. Although Justice Scalia’s arguments against Weber are astute and not without power, they do not justify overruling the precedent, for rather conventional stare decisis reasons. There are a number of cases, however, in which the super-strong presumption seems to have saved precedents which ought to have been overruled under an evolutive approach. Several such cases are noted in part II, and I examine another in some detail in part III. Part III concludes with a line of cases that has recently culminated in an overruling of statutory precedent and that provides a good example of the evolutive approach proposed in this article.

I. OVERRULING STATUTORY PRECEDENTS: SUPREME COURT PRACTICE AND DOCTRINE

New to the Court, Justice Scalia may have been (understandably) taken aback by the Court’s dismissive attitude toward his reasoned arguments in Johnson. Indeed, the super-strong presumption against overruling statutory precedents is a very odd doctrine, if it can even be called that. Its exact origins are something of a mystery, its precedential support is shaky, and its uneven development and application have spawned a dizzying array of exceptions.

The Supreme Court in the nineteenth century occasionally suggested a hierarchy in which constitutional precedents would be treated with less defer-

\footnote{13. Easterbrook, supra note 12, and Maltz, supra note 12, argue that constitutional precedents should not be so easy to overrule. The author of the note cited supra note 12 argues for virtual abandonment of stare decisis limitations for constitutional precedents.}

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ence than statutory precedents, but not until the twentieth century did this suggestion mature into widely cited doctrine. In his celebrated dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, Justice Louis Brandeis defended relaxed stare decisis for constitutional precedents. Although “in most matters it is more important that the applicable rule of law be settled than that it be settled right,” Justice Brandeis observed that “in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its prior decisions.” Although he did not distinguish between common law and statutory precedents in his *Burnet* dissent, Justice Brandeis was notably reluctant to disturb statutory precedents, as his even more celebrated opinion for the Court in *Erie Railroad v. Tompkins* suggests. *Erie*, of course, overruled *Swift v. Tyson*, which had interpreted the Rules of Decision Act to permit federal courts to create general federal common law in diversity cases. Justice Brandeis noted, first, that new scholarship had argued that *Swift*’s reading of the Act was historically questionable and, second, that mischievous and unexpected policy consequences had resulted from *Swift*’s reading of the Act. Albeit fully persuaded of the precedent’s error, Justice Brandeis stated that this alone did not justify overruling *Swift*. “If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.”

Thus, *Burnet* stands for the proposition that constitutional precedents may be overruled more easily than either statutory or common law precedents. *Erie* can be read to support the proposition that established statutory prece-
students may be overruled only under the most compelling circumstances, as when there are constitutional doubts about the statute as interpreted. Presumably, common law precedents would continue to enjoy the normal stare decisis presumption. The Court pursued these suggestions in the oeuvre of Justice Brandeis and in the 1940s and thereafter formally relied on the super-strong presumption to protect vulnerable statutory precedents in a number of cases. In the process, several different rationales were set forth for the super-strong presumption. Generally, the rationales appealed to the emerging legal process concept that it is inappropriate for courts to create new legal rules when the legislature is more institutionally competent to act.

Thus, the Court suggested that a longstanding interpretation of a statute became “part of the warp and woof of the legislation,” which only Congress itself could change. In 1947, Professor Frank Horack expanded upon this argument and articulated it in separation of powers terms: After a judicial decision, “the statute to that extent becomes more determinate, or, if you will, amended to the extent of the Court’s decision. . . . Thus, if the Court in a second case changes its former interpretation the functional consequences of the change are legislative rather than judicial.” Though this argument sounds excessively mechanical, it has been accepted by a broad range of Justices in the last twenty-five years.

A related, but more functional, justification for the super-strong presumption is based upon legislative acquiescence. Chief Justice Harlan Stone was the most prominent exponent of this argument in the 1940s. He argued that if Congress does not amend the statute to overrule the statutory precedent, and especially if it reenacts the statute without changing the operative lan-


25. Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948). This argument had underpinnings in the vested rights cases of the nineteenth century. “After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.” Douglass v. County of Pike, 101 U.S. 677, 687 (1880).


guage, it is presumed that Congress “approves” of the interpretation. Such tacit congressional approval allegedly raises the normal presumption of a precedent’s correctness to the super-strong presumption for most statutory precedents. This argument has proved to be particularly robust in the 1970s and 1980s, and it was the majority opinion’s main response to Justice Scalia in Johnson.

Both the statutory amendment and the congressional acquiescence arguments rest in part on a third argument, based upon practical reliance. Once a statute is authoritatively interpreted by the Supreme Court, the argument goes, private parties will arrange their conduct to take account of the Court’s interpretation—that is what makes the Court’s interpretation effectively “legislative.” Similarly, it may be presumed that Congress itself relies upon the interpretation when it again focuses attention on the statute and reenacts or amends it; failure to overrule the Court’s interpretation signals legislative approval. A highly sophisticated form of the reliance argument was developed in Dean Edward Levi’s influential article on legal reasoning published in 1948. Dean Levi started with the proposition that each interpretation of a statute is like a keystone on which private conduct, future interpretations, and even legislative activity will presumptively build. Overruling an interpretation of the statute, therefore, will unsettle a vast cluster of public and private expectations. Hence, Dean Levi argued, statutory precedents should not be overruled unless they are unconstitutional.

The Court itself has never formally and thoroughly examined the arg-

28. Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940) (Stone, J.) (declining to alter application of Sherman Act to labor unions, since Congress was aware of controversy and did not legislate on the matter); Girouard v. United States, 328 U.S. 61, 70-76 (1946) (Stone, C.J., dissenting) (under Apex Hosiery rule, where statutory interpretation is publicized, failure of Congress to overrule it creates presumption of legislative approval); see James v. United States, 366 U.S. 213, 230-35 (1961) (Black, J., concurring in part and dissenting in part) (arguing in support of reaffirming Commissioner v. Wilcox, 327 U.S. 404 (1946), which held embezzled money not taxable income, since Congress chose not to enact contrary legislation in following 15 years); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam) (legislative acquiescence in precedent); Helvering v. Hallock, 309 U.S. 106, 130-32 (1940) (Roberts, J., dissenting) (congressional reenactment of statute Court has interpreted creates presumption of legislative approval of Court’s interpretation).

29. 107 S. Ct. at 1450-51 n.7.

30. See Horack, supra note 12, at 251 (“The correctness or incorrectness of the prior rule is less important than the fact that the members of society have acted upon it.”); see also Helvering v. Griffiths, 318 U.S. 371, 403 (1943) (because government and taxpayers rely on tax precedents “a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule”).

31. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) (“The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.”).


33. Id. at 523-40.
ments recounted above and has not established the super-strong presumption as settled doctrine. Instead, the Court or individual Justices rhetorically invoke strict stare decisis for statutory precedents from time to time, typically with a citation to Burnet,\(^3^4\) which by itself does not really support a super-strong presumption for statutory (as opposed to common law) precedents. In addition, the doctrine is often abridged. Three appendices to this article\(^3^5\) list cases in which the Court has explicitly or practically overruled important reasoning in its statutory precedents, from the 1961 Term through the 1986 Term of the Court. There have been more than eighty such overrulings in this period, a rather surprising number given the rhetoric. In only a small minority of those cases was a constitutional issue lurking in the background. The existence of so many decisions materially modifying or rejecting prior holdings in statutory precedents raises the question whether the Court really takes the super-strong presumption seriously.

I believe that it does. To begin with, in only twenty-six instances (or one per Term) has the Court explicitly repudiated both the reasoning and the result of a statutory precedent. In the remainder of the cases, the Court only implicitly overruled the statutory precedent, or overruled important reasoning in the precedent and not the result. Indeed, in a significant number of cases the Court has refused seriously to consider overruling or narrowing statutory precedents that might have been vulnerable had they been common law or constitutional precedents.\(^3^6\)

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\(^3^5\) The three appendices include decisions in which the Supreme Court: (1) expressly stated it was overruling a statutory precedent (appendix A); (2) implicitly overruled a statutory precedent (appendix B); and (3) expressly disapproved important reasoning in statutory precedents, which the Court characterized as dicta (appendix C). I have not included cases in which the Court "qualified" or "reinterpreted" a statutory precedent, unless it was a pretext for implicitly overruling it. Although such decisions certainly indicate erosion of the precedent's authority, they should not be counted unless the Court is practically replacing its reasoning with a new interpretation of the statute. See Blaustein & Field, supra note 11, at 152-59 (similar but more conservative approach used for listing decisions overruling constitutional precedents).

\(^3^6\) In addition to cases discussed in detail later in this article, see United States v. Johnson, 107 S. Ct. 2063 (1987) (reaffirming and expanding upon Feres v. United States, 340 U.S. 135 (1950), even though Court has repudiated most of precedent's reasoning and interpretation is at odds with statutory text); NLRB v. International Longshoremen's Ass'n, 473 U.S. 61 (1985) (reaffirming National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967), and later cases, which held contractual work preservation rules valid under National Labor Relations Act (NLRA) as long as not oriented primarily to secondary objectives); Jacksonville Bulk Terminals v. International Longshoremen's Ass'n, 457 U.S. 702, 723 n.23 (1982) (refusing to overrule Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1972), which prohibited federal court injunctions against work stop-
When the Court does admit that it is overruling a statutory precedent, it often claims that the case fits one of the three main exceptions to the super-strong presumption which have been posited by various Justices in the last thirty years. This proliferation of exceptions demonstrates that the Court is willing to go beyond the Brandeis-Levi exception for statutory precedents overtaken by mounting constitutional problems, but it is unclear how far these "escape hatches" dilute the super-strong presumption. While no one of the exceptions satisfactorily predicts when the Court is likely to reconsider statutory precedents, a rough descriptive paradigm of what the Court does can be created out of the three exceptions. The willingness of the Supreme Court to reconsider statutory precedents depends upon: (1) the thoroughness of the Court's consideration of the issue in the precedent; (2) the degree to which Congress has left development of the statutory scheme to the courts; and (3) the degree to which the precedent has generated public and private reliance. The remainder of this part analyzes these three exceptions.

A. THE PROCEDURALIST EXCEPTION

Unlike Justice Brandeis, Justice Felix Frankfurter was more than willing to reconsider statutory precedents even when no constitutional issue was posed. But he was also sensitive to traditional stare decisis concerns for
continuity in the law and the public and private reliance on the Court's directions, and he was aware that Congress itself sometimes relied on the Court's statutory precedents. Justice Frankfurter's opinions suggest a significant exception to the super-strong presumption when the statutory precedent is procedurally flawed due to poor briefing or inadequate deliberation by the Court. “[T]he relevant demands of stare decisis do not preclude considering for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration.”

This “proceduralist exception” to the super-strong presumption is very appealing, because it posits that what the Court is overruling is not a “true” precedent, in that it does not reflect rational consideration and deliberation by the Court. If the earlier decision is not a true precedent, it is not part of the warp and the woof of the law, and the Court is not abridging reasonable private or legislative expectations in overruling the decision. The proceduralist exception thus mirrors the legal process rationales for the super-strong presumption.

Justice Frankfurter's proceduralist exception has been the most frequently invoked explanation when the Court has overruled its statutory precedents. There are at least three different situations in which such proceduralist theory has been invoked. These instances are of great interest, both because the Court uses proceduralist rhetoric as a way around the super-strong presumption against overruling statutory precedents, and because the Court often strains the procedural history of the precedent to invoke the exception.

First, the Court will often overrule or disapprove of dicta—statements in statutory precedents which are not necessary to the decision of the case and therefore not thoroughly briefed or considered by the Court. Indeed, it has become almost a routine occurrence for the Court in recent years to “clean up” stray dicta (much of it probably penned by wayward law clerks) in later decisions. This is troubling in several respects. Statements in Supreme expressions of Justice Frankfurter's views, see Toucey v. New York Life Ins. Co., 314 U.S. 118, 140-41 (1941) (refusing to view congressional silence as acceptance of ill-reasoned precedents); Helvering v. Hallock, 309 U.S. 106, 119 (1940) (stare decisis “is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience”).

38. Commissioner v. Estate of Church, 335 U.S. 632, 676-87 (1948) (Frankfurter, J., dissenting).
Court opinions later declared to be dicta are often quite reasonably treated as authoritative by lower courts, private parties, and Congress. By characterizing earlier statements as dicta, the Court seems at times almost too willing to shift directions frequently; this is not only at odds with the super-strong presumption, but also with the goal of orderly development of the law underlying normal stare decisis. The Court sometimes seems to use this rationale as a backhanded method to narrow precedents a majority does not like.

An example of this phenomenon is the Court's odd vacillation concerning the reach of state action immunity to the antitrust laws created by *Parker v. Brown*. After years of experience with the immunity, the Court in *Cantor v. Detroit Edison Co.* found *Parker* inapplicable in most cases in which the antitrust defendants are private parties, rather than state actors. Although there was no majority opinion on this issue, five Justices explicitly narrowed *Parker*, but without overruling it (the defendants in *Parker* were state actors). Hence, the Justices proclaimed themselves faithful to stare decisis concerns, because they were at most disavowing dictum. Yet that is debatable. As outraged concurring and dissenting opinions demonstrated, *Parker* had held that the antitrust laws were not meant to compromise the state's power to create regulatory programs. This holding becomes almost nonsensical if private actors regulated by the state can be sued, even if state actors cannot.

The *Cantor* approach to stare decisis strikes me as disingenuous and guaranteed to produce confusion in the lower courts. It was also unsuccessful. In yet another volte-face, the Court has hastily, albeit stealthily, retreated from *Cantor*. A unanimous Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* denied antitrust immunity for a state program requiring wine producers to establish resale price schedules, a result consistent with *Cantor*; but the Court, in contrast to *Cantor*, focused on the

41. 317 U.S. 341 (1943).
42. 428 U.S. 579 (1976).
43. The plurality opinion in *Cantor* found *Parker* inapplicable to cases in which the defendant is a private party. *Id.* at 585-92 (opinion of Stevens, J., with Brennan, White & Marshall, JJ.). A fifth Justice applied a balancing test to determine whether private parties are entitled to *Parker* immunity. *Id.* at 609-12 (Blackmun, J., concurring in the judgment).
44. *Id.* at 585-92 (opinion of Stevens, J.) (analyzing *Parker*); see *id.* at 613 n.5 (Blackmun, J., concurring in the judgment) (arguing for narrowing *Parker*).
45. *Id.* at 603-05 (Burger, C.J., concurring in the judgment and concurring in part); *id.* at 614-17 & n.4 (Stewart, J., dissenting).
degree of state regulation, not on the nature of the parties. Some lower courts continued to follow Cantor, however—until Southern Motor Carriers Rate Conference, Inc. v. United States, in which the Court used a Midcal analysis, focusing on the degree of state regulation, to conclude that the private defendants subject to state regulation were entitled to antitrust immunity. The effect of the Court's decision is to overrule the reasoning in Cantor, which is at odds with the super-strong presumption. Southern Motor Carriers simply avoided that problem by substantially ignoring Cantor and only disapproving of "questionable dicta." The Court's vacillation from Cantor to Southern Motor Carriers shows how the proceduralist exception can conceal substantial shifts in the Court's approach to statutes.

Southern Motor Carriers illustrates a second situation in which Justice Frankfurter's proceduralist exception is applicable. The Court may overrule a statutory precedent which is inconsistent with other statutory precedents, particularly if the former also seems to reflect a lack of careful briefing and consideration by the Court. Like the exception for dicta, the exception for inconsistent precedents is plausible enough but can be manipulated to mask the Court's reevaluation of statutory policy. Also, once one realizes that the Court's interpretations of a statute will often run in several different directions, this exception suggests the difficulty of realizing the goals of the super-strong presumption against overruling statutory precedents.

An example of this phenomenon is the Court's interpretation of title VI of the Civil Rights Act of 1964. Title VI states that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Judging the legality of educational practices that allegedly deprived non-English speaking Chinese children of an equal education, Lau v. Nichols interpreted title VI to prohibit policies having a discriminatory effect on participants in federally assisted education. Four years later, Regents of the University of California

47. Id. at 102-06.
49. Id. at 57 n.21.
50. Easterbrook, supra note 12, argues that stare decisis should not be rigidly applied, in part because institutions making choices by majority vote will generate logically inconsistent results over time unless later expressions of the voters' will are given priority. See Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802 (1982) (arguing that some inconsistency in the Supreme Court's decisions is both inevitable and desirable). When precedents clash, adherence to stare decisis often requires that one be overruled.
54. Five Justices joined the opinion for the Court, which found administrative regulations bar-
v. Bakke interpreted title VI to prohibit only practices that violate the fourteenth amendment, i.e., intentional discrimination.

Five years after that, in Guardians Association v. Civil Service Commission, the Court had to decide whether employment tests having a disparate impact on Hispanic applicants for positions with the New York City Police Department could violate title VI, in the absence of a showing of intentional discrimination. The Court split three ways on the issue, with each group of Justices relying on stare decisis! Four Justices would have overruled Lau entirely, on the ground that it did not engage in any serious analysis of the legislative history of title VI and that the subsequent Bakke majority had decisively undercut Lau. Four Justices would have overruled Lau insofar as it held that title VI originally prohibited discriminatory effects as well as discriminatory intent, but would have reaffirmed it insofar as it upheld the validity of the administrative regulations implementing and interpreting title VI. Only one Justice sought to reconcile the two precedents. Justice White interpreted title VI to prohibit discriminatory effects on disadvantaged minorities which were the main object of title VI’s concerns (Lau), but to prohibit only intentional discrimination against majority groups (Bakke).

Guardians Association is the nightmare example of the super-strong presumption against overruling statutory precedents. Although Justice White’s reconciliation of Lau and Bakke may seem most consistent with the strict rule against overruling statutory precedents, no other Justice adopted it. Eight Justices voted to overrule Lau entirely or partially, yet after all the dust clears it is Lau’s rule of discriminatory effects that prevails over Bakke’s rule of discriminatory intent, because five Justices agreed that title VI’s discriminatory effects regulations were valid. That, too, seems anomalous: How can the statute itself be decisively interpreted to prohibit only intentional discrimination, while the implementing regulations prohibit discriminatory effects as well?

ring discriminatory effects to be consistent with title VI. Id. at 567. Justice White simply concurred in the result. Id. at 569. Three Justices concurred in the result, based on their view that whatever was prohibited in title VI, the regulations were a valid exercise of delegated administrative lawmaking. Id. at 571 (Stewart, J., with Burger, C.J. & Blackmun, J., concurring in the judgment).

56. Id. at 287 (Powell, J.); id. at 328 (opinion of Brennan, J., with White, Marshall & Blackmun, JJ.).
58. Id. at 610-11 (Powell, J., with Burger, C.J. & Rehnquist, J., concurring in the judgment); id. at 612-15 (O'Connor, J., concurring in the judgment).
59. Id. at 615-24 (Marshall, J., dissenting); id. at 639-42 (Stevens, J., with Brennan & Blackmun, JJ., dissenting).
60. Id. at 589-91.
61. The apparent answer is that there are two different statutory provisions. Section 601 of the Civil Rights Act of 1964 sets forth substantive standards, arguably barring only intentional discrimination. 42 U.S.C. § 2000d (1982). Section 602 delegates rulemaking authority to executive depart-
A third situation in which Justice Frankfurter's proceduralist exception may be applicable is when "new" legislative history has been uncovered that undermines a rule created by old precedents. Again, the rationale for the super-strong presumption is arguably inapplicable when the precedent is grounded upon inaccurate information. Again, however, this exception is subject to manipulation, as illustrated in *Monell v. Department of Social Services*.

Section 1 of the Civil Rights Act of 1871 (now known as section 1983) subjects "persons" to liability for depriving people of their federal constitutional and statutory rights under color of state law. The Court in *Monroe v. Pape* held that municipalities are not "persons" for purposes of the statute. Among other bases for this holding, *Monroe* relied on Congress' rejection in 1871 of the "Sherman Amendment" to the bill that became the Civil Rights Act. The amendment would have expressly subjected a municipality to liability for damage done by persons "riotously and tumultuously assembled."

*Monell* overruled *Monroe* on the issue of whether municipalities are persons under section 1 of the Civil Rights Act, based mainly upon an extensive reexamination of the legislative history. The Court concluded that the objections to the Sherman Amendment were not founded on a desire to immunize cities entirely, but instead on a belief that the amendment would have carried respondeat superior beyond constitutional bounds by subjecting cities to liability for acts of private citizens. *Monell* also relied on statements about section 1 by sponsors and supporters of the Act, and on the Federal Dictionary Act, to show that municipalities were usually included as "per-
ons” in the statutory parlance of 1871.71

The opinion of the Court in Monell puts the case within Justice Frankfurter’s proceduralist exception, though Monell overstates the case for Monroe’s error. Monroe in fact considered much of the evidence adduced by the Monell Court, including the Dictionary Act, which Monroe found inapplicable because corporate bodies were quite often held not to be “persons” under the Constitution in 1871.72 The primary direct evidence adduced by Monell that municipalities were intended to be “persons” under section 1983 was a statement by Representative Bingham that the Act ought to implement the fourteenth amendment’s duties against governmental entities, including cities. While supportive of Monell’s result, Bingham’s statements were not directed specifically at section 1 of the Act, and Bingham was not one of the House managers of the Act.73 It is curious that during the extensive congressional debate in 1871, no one else raised the possibility that section 1 would apply to municipalities.74 In short, while Monell made quite a plausible defense of its interpretation of section 1983, it hardly unearthed the sort of new and highly persuasive evidence that would have made it “‘beyond doubt from the legislative history of the 1871 statute that [Monroe] misapprehended the meaning of the [section].’”75

Justice Frankfurter’s proceduralist exception is clearly a popular justification for overruling statutory precedents. The Court will rely on it whenever possible—and sometimes even when not really possible. Cantor, Southern Motor Carriers, Guardians Association, and Monell suggest that the proceduralist exception is sometimes a makeweight for other reasons for overruling a statutory precedent. There are, indeed, many instances in which the Court’s overruling of statutory precedents has not been reasonably based upon proceduralist justifications invoked by the Court.76 Many of these

71. Monell, 436 U.S. at 688-89.
72. Monroe, 365 U.S. at 190-91; see Monell, 436 U.S. at 720 (Rehnquist, J., dissenting) (describing ambiguous nature of judicial decisions on application of various constitutional provisions to municipalities).
73. Monell, 436 U.S. at 721-22 (Rehnquist, J., dissenting).
74. See id.
cases, however, can be explained by a second exception to the super-strong presumption against overruling statutory precedents.

B. THE EXCEPTION FOR COMMON LAW AND CONSTITUTIONALIZED STATUTES

Dissenting in *Monroe*, in which he most completely developed his proceduralist exception, Justice Frankfurter also argued that statutes having constitutional dimensions, such as section 1983, might be more freely reinterpreted than ordinary statutes. Justice Frankfurter’s apparent rationale was that statutes intimately tied to constitutional developments ought to be reinterpreted as constitutional law evolves. Since the Court follows a more relaxed stare decisis role in constitutional cases, it should take similar liberties in reinterpreting those related statutes. This exception helps explain many of the Court’s overrulings of statutory precedents, and it has broadened into a


more important exception in recent years.

Like Justice Frankfurter, Justice John Paul Stevens takes stare decisis very seriously and is today the Justice most strongly committed to the super-strong presumption in statutory cases. Nonetheless, he has argued that the strict rule should be relaxed for statutes in which Congress has pretty much left the courts alone to develop the statutes in a common law fashion. Thus, in his dissenting opinion in Guardians Association, Justice Stevens stated that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation." In a footnote, Justice Stevens qualified this statement. "Like most, this proposition of law is not wholly without exceptions. Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common-law tradition." Justice Stevens cited section 1983 and the Sherman Act of 1890 as examples of such "common-law statutes."

The rationale for this exception for common law statutes is that when Congress has declared an important public policy in general, sweeping terms, and has essentially left the courts free to mold the contours of that policy, courts should engage in essentially a common law process of creating specific rules, and of rescinding those rules that over time prove unworkable or inconsistent with general policy. Just as administrative agencies that are delegated lawmaking responsibilities to fill statutory gaps are routinely allowed to change their interpretations of the statute, courts to which Congress has
implicitly given the responsibilities for filling in the details of common law statutes should also be given the leeway to experiment and overrule prior interpretations in a common law fashion.

About half of the cases in which the Court has explicitly overruled a statutory precedent in the last twenty-five years are decisions interpreting common law statutes. In most of those cases, Justice Stevens' exception for common law statutes explains the Court's action much better than does the proceduralist exception. *Cantor* (interpreting the Sherman Act) and *Monell* (interpreting section 1983) can be better explained by an exception for constitutionalized and/or common law statutes than by the proceduralist exception.

To take another example, in *Copperweld Corp. v. Independence Tube Corp.* the Court held that a parent corporation and its wholly owned subsidiary cannot be prosecuted for unlawful conspiracy pursuant to the Sherman Act. Although the Court did not explicitly mention the super-strong presumption against overruling statutory precedents, it strained to avoid the fact that rejection of the "intra-enterprise conspiracy doctrine" repudiated several Supreme Court precedents and forty years of Sherman Act doctrine. The Court engaged in a labored effort to invoke the proceduralist exception; it characterized the original statement of the doctrine as dictum and argued that Supreme Court decisions that had followed the doctrine could have been decided the same way on other grounds. The dissent,


85. *467 U.S. at 761-66.*

86. The intra-enterprise conspiracy doctrine had its origin, albeit in dictum, in *United States v. Yellow Cab Co.*, 322 U.S. 218, 227-28 (1947): "The test of illegality under the [Sherman] Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." The doctrine thus announced was the basis for the Court's holding in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116 (1948); *United States v. Griffith*, 334 U.S. 100, 109 (1948).

87. *467 U.S. at 761-66.*
however, pointed out that the Court had thoroughly considered the intra-
enterprise conspiracy doctrine, after briefing, on several occasions, and had
made the doctrine the explicit holding of no less than five precedents.\(^8\)

This squabble between the \textit{Copperweld} majority and dissenters is unil-
 luminating and probably convinces no one that the Court is respecting stare
decisis. Instead, the best justification for eliminating the intra-enterprise con-
spiracy doctrine is the desirability of common law experimentation in the
context of the Sherman Act. The doctrine was part of the Vinson and War-
ren Courts' expansive approach to Sherman Act liability. That approach has
fallen into disfavor in the 1970s and 1980s, and no doctrine has received
more persuasive scholarly criticism than the intra-enterprise conspiracy doc-
trine.\(^8\) The central criticism is that the doctrine vests unrealistic signif-
icance in the fact of separate incorporation: A company and its internal
divisions cannot conspire under the Sherman Act, but a company and func-
tionally equivalent subsidiaries can. The intra-enterprise conspiracy doctrine
only encouraged companies to fold their subsidiaries back into the parent
corporation to prevent Sherman Act prosecution.\(^9\) Moreover, the Justice
Department after the 1960s declined to rely on the doctrine.\(^9\) Given the
increasingly apparent problems with the intra-enterprise conspiracy doctrine,
the Court overruled it, much as a common law court would overrule outmoded
rules of contributory negligence.\(^9\)

\textit{Copperweld}'s reluctance to rely on Justice Stevens' exception for common
law statutes suggests that the exception does not enjoy the virtually unques-
tioned legitimacy of Justice Frankfurter's proceduralist exception, which
\textit{Copperweld} unpersuasively tried to invoke. It is also striking that Justice
Stevens himself wrote the dissenting opinion in \textit{Copperweld} and stated:
"'[W]e must bear in mind that considerations of stare decisis weigh heavily
in the area of statutory construction, where Congress is free to change the
Court's interpretation of its legislation.'"\(^9\) Justice Stevens has taken a simi-

\(^{88}\) Id. at 778-84 (Stevens, J., with Brennan & Marshall, JJ., dissenting); see supra note 86 (citing
cases).
\(^{89}\) See 467 U.S. at 766 n.12 (citing critical commentary).
\(^{90}\) See Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, 416 F.2d 71 (9th Cir. 1969) (after
Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), leading case following intra-
enterprise conspiracy doctrine, parent corporation involved simply converted subsidiary into unin-
\(^{91}\) \textit{Copperweld}, 467 U.S. at 777 & n.25.
\(^{92}\) Note that the criticisms of the intra-enterprise conspiracy doctrine do not compel eliminating
it entirely. The Court could have created a rebuttable presumption that parent and wholly owned
subsidiaries are operated under common management and, hence, incapable of Sherman Act con-
sspiracy. (Quite often a parent and a wholly owned subsidiary will be independently operated.)
\textit{Copperweld} may be a case in which stare decisis concerns were too readily displaced and in which
the new rule may have as many problems as the old one.
\(^{93}\) \textit{Copperweld}, 467 U.S. at 784 (Stevens, J., dissenting) (quoting Illinois Brick Co. v. Illinois,
431 U.S. 720, 736 (1977), which refused to overrule prior interpretations of Sherman Act).
lar position in other cases reaffirming arguably incorrect interpretations of old civil rights statutes. His apparent ambivalence about his own exception extends to the Court as a whole. Notwithstanding Copperweld and Monell, the Supreme Court often applies the same very strict stare decisis analysis to Sherman Act and section 1983 precedents as it does to other statutory precedents. Indeed, the most frequently criticized example of excessively strict stare decisis for statutory precedents is a series of decisions interpreting the Sherman Act.

In Federal Baseball Club v. National League, decided in 1922, the Supreme Court held that the American and National Leagues of baseball could not be sued under the Sherman Act, because the business of “giving exhibitions of base ball . . . [is a] purely state” affair and therefore not interstate commerce regulated by the Sherman Act. Within a few decades, however, baseball became big interstate business, with lucrative radio contracts, and soon bore scant resemblance to the local exhibitions described in Federal Baseball. At the same time, the Supreme Court's concept of “interstate commerce” came to embrace much activity that had previously been considered local. Nonetheless, when the Court reexamined Federal Baseball thirty years later, in Toolson v. New York Yankees, Inc., it refused to overrule the obsolete precedent, because the sport had been left to develop exempt from the antitrust laws, and the Court believed that such a major change in antitrust policy ought to come from Congress.

In the next two decades, the Court, over the objection of dissenting Ju-


96. Id. at 357.


98. See, e.g., United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944) (insurance business, when conducted across state lines, is interstate commerce subject to Sherman Act; overruling Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869)).

99. 346 U.S. 356 (1933) (per curiam).

100. Id. at 357.
OVERRULING STATUTORY PRECEDENTS

pices invoking stare decisis, refused to extend *Federal Baseball* to any other professional athletic activity.\(^{101}\) Lower courts grew increasingly restive with a statutory precedent that Judge Jerome Frank dubbed an “impotent zombie” in 1949\(^ {102}\) and that Judge Henry Friendly in 1970 found “extremely dubious” in light of the enormous revenues professional baseball derived from interstate television broadcasts.\(^{103}\) Commentators expressed growing hostility to the anomaly; one observed as early as 1962 that professional baseball was well aware that its adventitious exemption from Sherman Act liability might soon come to an end.\(^ {104}\)

Many observers thought the end was near in 1971, when the Court agreed to review a decision following *Federal Baseball* and *Toolson*. The Court once again surprised, and dismayed, the pundits when it reaffirmed *Federal Baseball* in *Flood v. Kuhn*.\(^{105}\) The Court recognized that the antitrust exemption for baseball is “an anomaly” and “an aberration,” but at least “an established one” entitled to full stare decisis effect because of congressional acquiescence.\(^ {106}\) “If there is any inconsistency or illogic in all this,” the Court candidly confessed, “it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.”\(^ {107}\)

*Flood v. Kuhn* is an almost comical adherence to the strict rule against overruling statutory precedents, particularly considering that the Sherman Act has developed essentially through a common law process. If the proceduralist exception were the only basis for overruling statutory precedents (short of constitutional problems), then *Flood v. Kuhn* would make sense, but (as I have demonstrated above) there are simply too many cases in which the Court has overruled statutory precedents, such as *Monell* and *Copperweld*, which have just as impressive procedural credentials as the precedents upheld in *Flood v. Kuhn*. We are, therefore, still searching for coherence in the Court’s approach to statutory precedents.


\(^ {102}\) Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949).


\(^ {104}\) Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 947 (1962).


\(^ {106}\) Id. at 282-83.

\(^ {107}\) Id. at 284.
C. THE RELIANCE EXCEPTION

The Supreme Court, in *Patsy v. Board of Regents*, applied a balancing test to determine whether the super-strong presumption against overruling statutory precedents should be relaxed in a section 1983 case. Writing for the Court, Justice Thurgood Marshall considered (1) whether the precedent represented a departure from prior decisions, (2) what reliance interests had accumulated around the precedent, (3) whether the legislative history of the statute undermined the precedent, and (4) whether subsequent statutory developments built upon or detracted from the principle(s) indicated by the precedent. Two of the considerations invoked in *Patsy* (departure from prior decisions and legislative history) reflect Justice Frankfurter's proceduralist exception, but the other two reflect a different type of inquiry: How have private parties and Congress responded to the precedent? If Congress and private persons have relied upon and come to accept the precedent, the super-strong presumption applies with full force. But if Congress has been hostile to the precedent, and private parties have been chary of relying on it, then why should the strict rule apply at all?

This “reliance exception” is consonant with the theoretical underpinnings of stare decisis generally and the super-strong presumption in particular. Where private parties have over time shaped their relations around a precedent’s rule, it is considered presumptively unfair to change the precedent retroactively, and courts will not do so without strong reason. Where Congress itself has relied on a precedent, the precedent may be entitled to a super-strong presumption of correctness. Contrariwise, if Congress has clearly not relied on the precedent, it is only entitled to normal stare decisis protection.

The reliance exception also helps explain many cases not satisfactorily explained by the proceduralist exception and the exception for common law statutes. For example, the reliance exception represents a plausible way to reconcile the Supreme Court’s contrasting results in *Monell* and *Flood v. Kuhn*, both of which involved thoroughly considered precedents interpreting common law statutes. Notwithstanding *Monroe’s* interpretation of section 1983, local bodies had been sued as the real parties in interest in some cases, often apparently with their acquiescence. If local officials were being sued in any event, it appears that the local governments themselves often did not object to being included as defendants; private reliance on *Monroe* was mixed. Indeed, Congress was aware of *Monroe’s* practical shortcomings. At least one bill was introduced to overrule *Monroe* (it did not pass), and

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109. Id. at 501 & n.3 (citing *Monell*, 436 U.S. at 695-701).
110. *Monell*, 436 U.S. at 663 & nn.5-6; id. at 696; id. at 711 (Powell, J., concurring).
when Congress enacted the Civil Rights Attorney’s Fees Awards Act of 1976\textsuperscript{112} the drafters of one Senate report realized that the burdens of counsel fees in section 1983 cases would often be borne by “State or local bodies.”\textsuperscript{113}

Reaction to \textit{Toolson} was strikingly different. From the 1920s on, baseball evolved under an umbrella of immunity from antitrust prosecution, and some thought that subjecting it to such regulation in the 1970s would have jarring effects, especially if such regulation ended the reserve clause (at issue in \textit{Flood}). More important, the legislative reaction was fairly acquiescent. The Subcommittee on Study of Monopoly of the House Judiciary Committee held immediate hearings on the principal alleged anticompetitive practice—the reserve clause—and urged no action to modify \textit{Toolson}, because “the overwhelming preponderance of the evidence established baseball’s need for some sort of reserve clause.”\textsuperscript{114} Between \textit{Toolson} and \textit{Flood v. Kuhn} at least fifty bills were introduced in Congress regarding the applicability of the antitrust laws to athletic events; all of the bills that passed at least one of the legislative chambers sought to expand rather than contract baseball’s exemption!\textsuperscript{115} In short, unlike \textit{Monell}, where local government defendants only sometimes relied on their immunity and Congress had indirectly recognized that, the Court in \textit{Flood} encountered strong reliance arguments (especially surrounding the reserve clause) and congressional acquiescence in baseball’s peculiar immunity.

The reliance exception also provides a justification for a number of other Supreme Court decisions that have overruled statutory precedents.\textsuperscript{116} For example, in \textit{United States v. Lane}\textsuperscript{117} the Court held that misjoinder of defendants in a criminal case, in violation of rule 8 of the Federal Rules of Criminal Procedure, only requires reversal of the convictions if the misjoin-
The Court effectively overruled *McElroy v. United States*, decided in 1896, which had interpreted a prior version of the statute to require reversal of criminal convictions whenever there was misjoinder of defendants.

Although *McElroy* was a carefully considered statutory precedent, the Court had few qualms about overruling it, because people do not rely on criminal procedure rules in planning their everyday affairs and because Congress had enacted legislation that moved away from the precepts of *McElroy*. In 1919, Congress enacted a "harmless error" statute providing that on appeal courts were to ignore "errors or defects which do not affect the substantial rights of the parties." In addition, the Court itself adopted rule 52(a) of the Federal Rules of Criminal Procedure, which provides that any error in criminal trials "which does not affect substantial rights shall be disregarded." Technically these statutes did not overrule *McElroy*, because the precedent had grounded its per se rule on the proposition that misjoinder is inherently a violation of a "substantial right." But the approach of the subsequent statutes represented legislative and judicial preference for an ad hoc, case-by-case approach and, hence, was inconsistent with the per se approach of *McElroy*.

Like the others, the reliance exception by itself does not explain most of the cases in which the Supreme Court has been willing in the last quarter century to overrule statutory precedents. But the three exceptions explicated by the Court cumulatively describe the occasions in which the Court is most likely to consider overruling or modifying statutory precedents. The Court is most willing to reconsider reasoning in a statutory precedent when the reasoning is not strictly necessary to the holding or when it otherwise reflects less than thorough deliberation by the Court, when the underlying statute is a generally worded one whose details have generally been worked out by the judiciary, and/or when the reasoning is undermined or at least not supported by subsequent legislative deliberation and extensive private reliance. Conversely, the Court is least willing to reconsider a statutory precedent whose holding was carefully considered and reasoned, which interprets a provision of a detailed statutory scheme, and which has on the whole generated acquiescent discussion in Congress or (better yet) subsequent legislation and private activity grounded upon the validity of its interpretation.

118. *Id.* at 449.
119. 164 U.S. 76 (1896).
122. *See* Chapman v. California, 386 U.S. 18, 22-23 (1967) (adopting a harmless error rule in criminal trials); Kotteakos v. United States, 328 U.S. 750, 774-77 (1946) (reversing criminal convictions based upon misjoinder but indicating in dictum that harmless error analysis is appropriate).
II. ABANDONING THE SUPER-STRONG PREJUMPON: AN EVOLUTIVE APPROACH FOR OVERRULING STATUTORY PRECEDENTS

Part I's descriptive analysis—the super-strong presumption and its array of exceptions—is a cumbersome approach to guide the Court's decision whether to overrule a statutory precedent. Though the Court's apparent approach has some internal coherence, it seems more and more like a Rube Goldberg machine, which I think mirrors the Court's practice in this area. That is, the anchoring idea (the super-strong presumption) has proven to be less than workable, and a series of elaborate improvisations (the array of exceptions) have been derived to keep it limping along.

Justice William Douglas suggested twenty years ago that statutory precedents ought to be reexamined more often, and scholarly commentators who have analyzed the Court's hierarchy of stare decisis have been critical of the unusual treatment of statutory precedents. The Court's experience with statutory precedents in the last twenty-five years, and the silly results the current approach sometimes generates—Flood v. Kuhn is a favorite—justify an abandonment of the super-strong presumption against overruling statutory precedents. Instead, the Court should use an "evolutive" approach, under which a statutory precedent might be overruled if its reasoning has been exposed as problematic and its results pernicious, and it has not broadly influenced subsequent lawmaking and private planning. Certain features of the evolutive approach are suggested by my analysis of the exceptions to the super-strong presumption. Specifically, I have developed the evolutive approach from the Supreme Court's decisions overruling its common law precedents, as well as several statutory cases in the 1960s and early 1970s, when the super-strong presumption was not followed very rigorously.


124. R. DICKERSON, supra note 12, at 253-54 (highly critical of traditional reasons for super-strong presumption); Easterbrook, supra note 12 (same); Maltz, supra note 12 (same).

125. For several years, I have taught Flood v. Kuhn in my Legislation class. On first reading the case, students are almost uniformly incredulous that the Court would so blithely perpetuate the "inconsistency and illogic of long standing." There is no need for me to criticize the decision, for it self-destructs in the students' minds. Instead, I spend up to one class period stressing the systemic values implicated in stare decisis and the arguable consistency in the Supreme Court's practice. Nonetheless, in four years of teaching Flood v. Kuhn, I have persuaded exactly one student that the decision represents a defensible approach to law.
A. AN EVOLUTIVE APPROACH TO OVERRULING STATUTORY PRECEDENTS

If one rejects the super-strong presumption for statutory precedents, it would be logical to apply normal stare decisis rules to such precedents. How would such an approach work at the Supreme Court level? Fortunately, we are not without practical guidance. The Court occasionally reconsiders its own common law precedents, especially in the field of admiralty.126 The Court's methodology in this small collection of cases is in striking contrast to its typical approach in statutory cases. The Court in these cases treats its common law precedents as presumptively valid but will overrule them if they no longer "fit" into the evolving legal terrain and are producing anomalous policy results.127 A precedent is ripe for reconsideration if it has yielded unexpected problems, or if critical legal or factual assumptions underlying the precedent have proved erroneous or have ceased to exist. The Court is unlikely to overturn a precedent which has become a building block on which the Court or Congress has relied to make further legal rules, or around which private reliance interests have gathered.

In United States v. Reliable Transfer Co.,128 for example, the Supreme Court overruled its precedent requiring equal apportionment of damages in admiralty when both vessels are partly at fault, because "subsequent history and experience have conspicuously eroded the rule's foundations."129 The Court followed what I would characterize as a three-step inquiry before it cast aside the precedent. First, the Court critically analyzed the precedent's reasoning. The Court examined the history and policy behind the equal apportionment rule and observed that the rule had been universally criticized by judges and commentators and had been abandoned in other Western maritime nations.130 The only policy rationale offered by the precedent was the difficulty in determining comparative degrees of negligence; years of modern experience with comparative negligence rules in other contexts had rendered


127. In explicating the "evolutive" approach described in this section, I have been influenced not just by the Court's decisions, but also by Dean Guido Calabresi's analysis and methodology in A COMMON LAW FOR THE AGE OF STATUTES, published in 1982, which has great relevance for any student of stare decisis.

129. Id. at 403.
130. Id. at 403-04.
that reasoning vulnerable.\textsuperscript{131} Second, the Court asked whether the old rule caused harm to modern policy, harm that could be undone by a new rule. The Court noted the unfairness of the equal apportionment rule, as well as the evasions of the rule by fictive exceptions and the widespread criticism of the rule by lower court judges.\textsuperscript{132} From this analysis, the Court concluded that the rule was no longer working and that a comparative negligence rule would be more consonant with modern policy. Third, the Court looked for public or private reliance (a classic stare decisis concern) on the precedent. The Court found none, in part because the equal apportionment rule is so silly.\textsuperscript{133} \textit{Reliable Transfer} also rejected the \textit{Flood v. Kuhn} argument that Congress is the better forum for such relief. "‘This Court . . . has not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation,’”\textsuperscript{134} the Court concluded.

In another admiralty case, \textit{Moragne v. States Marine Lines, Inc.},\textsuperscript{135} the Court overruled a 100-year-old precedent denying wrongful death recovery under admiralty law. The Court stated that the precedent rested upon outdated legal assumptions and was obsolescent public policy in light of overwhelming acceptance of the wrongful death cause of action at the state and federal level.\textsuperscript{136} The Court had no trouble demonstrating the “barbarous” nature of the old rule and its pernicious consequences.\textsuperscript{137} In the most intriguing part of the opinion, the Court reasoned that the stare decisis concerns of excessive litigation, reliance, and respect for the judiciary are not compelling when the proposed new rule is significantly more consistent than the precedent with the “primary rules of behavior” that social mores and public policy have fostered over time.\textsuperscript{138} “‘If the new remedial doctrine serves simply to reinforce and make more effectual well-understood primary obligations, the net result of innovation may be to strengthen rather than to disturb the general sense of security.’”\textsuperscript{139} In \textit{Moragne}, as in \textit{Reliable Transfer}, the Court found no clear congressional reliance on the outdated precedent. On the other hand, in at least one recent case, the Court decided not to overrule a common law precedent on the ground that Congress had relied on

\textsuperscript{131} \textit{Id.} at 407. The Court also rejected the argument that a clear division of damages facilitates out-of-court settlements. \textit{Id.} at 407-08.

\textsuperscript{132} \textit{Id.} at 404-07.

\textsuperscript{133} \textit{Id.} at 409-10.

\textsuperscript{134} \textit{Id.} at 409 n.15 (quoting \textit{Burnet}, 285 U.S. at 406 n.1 (Brandeis J., dissenting)).

\textsuperscript{135} 398 U.S. 375 (1970).

\textsuperscript{136} \textit{Id.} at 388-93.

\textsuperscript{137} \textit{Id.} at 379-88.

\textsuperscript{138} \textit{Id.} at 403.

\textsuperscript{139} \textit{Id.} at 404 (quoting H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 577 (tent. ed. 1958)).
it in subsequent legislative activity.\textsuperscript{140}

These common law decisions suggest the following three inquiries when the Supreme Court reconsiders a precedent: (1) Informed by criticism of the precedent and its reasoning by commentators, lower court judges, and the Court’s own opinions, can the Court now say with confidence that the precedent was wrongly decided? (2) Is the precedent not just wrong, but also pernicious, detracting from overall national policies? (3) Do the policy problems engendered by the rule outweigh the potential unfairness to private persons and the uncertainty for the other rules based upon the challenged rule, which will occur if the precedent is overturned? Only if all three questions are answered in the affirmative should the precedent be overruled. Consistent with traditional stare decisis (which I do not reconsider in this article), this is a hard test to pass.

These three inquiries are interrelated, of course, and one feature important to all three is the extent to which a precedent has become obsolescent. The extent to which private parties, Congress, and the Court itself rely upon the precedent over time depends, in part, on whether the precedent is consonant with other public policies and other developments in society. Each decision rests upon a complex array of assumptions about society and public policy. If those assumptions are undermined, the presumptive validity of the precedent is usually weakened; public lawmakers find it an unpersuasive policy paradigm, and private citizens are less likely to count on the precedent to make their plans. Hence, if society evolves “away” from the precedent, it is vulnerable to being overruled—unless it had become a cornerstone of legislative or judicial policy before its obsolescence became clear. In that event, more powerful arguments are required to overrule the precedent, whether it is a common law or a statutory precedent.

Though this evolutive approach is mainly characteristic of the Supreme Court’s treatment of common law precedents, several of the Court’s statutory decisions (especially in the period from 1961 to 1972) have rejected settled interpretations of federal statutes for similar reasons.\textsuperscript{141} Two cases from

this period illustrate the use of an evolutive approach to statutory precedents. The first case is *Swift & Co. v. Wickham*, which overruled a precedent interpreting the old Three-Judge Court Act to require the convening of three-judge courts to hear cases involving Supremacy Clause preemption of state law. The Court carefully demonstrated the historical errors made in the prior precedent, its criticism by commentators, and the confusion and waste it had occasioned in the lower courts. There was little if any private reliance on the precedent, and Congress and the Court had not used it as a building block for further developments.  

"Unless inexorably commended by statute, a procedural principle of this importance should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."  

The author of the Court’s opinion in *Wickham* was the second Justice John Harlan, also the author of the opinion in *Moragne*. Although Justice Harlan believed strongly in stare decisis, he was willing to overrule statutory as well as common law precedents when they were demonstrably obsolete, and his opinions in the 1960s are a rich source of evolutive methodology.

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144. Before Kesler v. Department of Public Safety, 369 U.S. 153 (1962), the Three-Judge Court Act was thought to apply only when a state statute allegedly violated a substantive portion of the Constitution. Kesler held that the Act applied when a state law was allegedly preempted by a federal provision and hence invalid under the Supremacy Clause.


146. Id. at 116.

147. In addition to *Moragne* and *Wickham*, other examples include Welsh v. United States, 398 U.S. 333, 344 (1970) (Harlan, J., concurring in the result); Lear, Inc. v. Adkins, 395 U.S. 653 (1969); Zchernig v. Miller, 389 U.S. 429, 443 (1968) (Harlan, J., concurring in the result); Walker v.
His opinions are particularly acute analyses of the various ways in which the Court's interpretations of statutes may have unanticipated consequences. One related theme that does not often appear in his opinions is the way in which statutory precedents can be superseded by the complex interactions of different, and changing, statutory policies.

An excellent example of the evolutive approach in this context is *Boys Markets, Inc. v. Retail Clerks Union, Local 770*. The Norris-LaGuardia Act of 1932 forbids federal courts from issuing injunctions in labor relations controversies. The Supreme Court in *Sinclair Refining Co. v. Atkinson* held that the Act bars injunctive relief against a strike called in violation of a no-strike clause in a labor-management collective bargaining agreement and in the face of employer requests for arbitration pursuant to the agreement's arbitration clause. *Boys Markets* overruled *Sinclair*, notwithstanding the super-strong presumption and the Court's recognition that Congress had been urged to reevaluate the Court's decisions in this area. The Court emphasized that *Sinclair* was a "significant departure" from prior decisions (Justice Frankfurter's proceduralist exception), but that alone was not critical, for *Sinclair* was a reasoned departure. Instead, what was critical for the Court was that "in light of developments subsequent to *Sinclair,*" it had become clear that the precedent "frustrate[d] realization of an important goal of our national labor policy."

When *Sinclair* was decided in the early 1960s, a new but important development in national labor policy was the encouragement of peaceful resolution of labor disputes through private arbitration. In a series of cases decided between 1957 and 1961, the Court applied section 301 of the Labor Management Relations Act of 1947 to enforce arbitration clauses of collective bargaining agreements. In the same year the Court decided *Sinclair*, it held

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151. Id. at 210-15.


153. Note that Justice Brennan, who would later write the decision overruling *Sinclair*, wrote a strong dissenting opinion in *Sinclair*, 370 U.S. at 215 (Brennan, J., with Douglas & Harlan, JJ., dissenting).


in *Charles Dowd Box Co. v. Courtney*\(^\text{156}\) that state courts could enforce collective bargaining agreements and enjoin strikes in violation of no-strike clauses.\(^\text{157}\) Obviously, there was some tension between the anti-injunction policy articulated in *Sinclair* and the arbitration policy set forth in *Charles Dowd*. The Court in *Sinclair* was fully aware of this tension but felt that its resolution was justified by the legislative history of section 301 and the anti-injunction policy of Norris-LaGuardia, at least for federal courts.

The incoherence of allowing state court injunctions to enforce no-strike promises as a condition of peaceful arbitration (*Charles Dowd*), but not allowing federal court injunctions (*Sinclair*), produced trouble. An ABA committee and scholarly commentators were sharply critical of *Sinclair*, because it rendered enforcement of labor arbitration more difficult, and were even more critical of the bifurcation between federal and state remedies.\(^\text{158}\) The debate came to a head in 1968, when the Court held that state court lawsuits to enforce no-strike clauses could be removed to federal court because they raised section 301 issues.\(^\text{159}\) This development “produced an anomalous situation which . . . [made] urgent [the Court’s] reconsideration of *Sinclair*.\(^\text{160}\) Unless *Sinclair* were overruled, state courts would have always been ousted from jurisdiction over no-strike suits, because unions would have an incentive to remove such cases to obtain *Sinclair’s* relief from injunctions.

The unanticipated developments after *Sinclair* necessitated that either it or *Charles Dowd* be overruled—so stare decisis would inevitably be sacrificed. The Court in *Boys Markets* chose to overrule *Sinclair*, primarily because commentary and experience in the 1960s persuaded it of “the devastating implications for the enforceability of arbitration agreements and their accompanying no-strike obligations if equitable remedies were not available.”\(^\text{161}\) The Court, further, rejected *Sinclair’s* reconciliation of section 301 and the Norris-LaGuardia Act, by emphasizing the shift in national labor policy from protection of the nascent labor movement (Norris-LaGuardia) to the encouragement of collective bargaining and peaceful resolution of industrial disputes (section 301, as interpreted).\(^\text{162}\)

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157. Id. at 506.
160. *Boys Markets*, 398 U.S. at 244.
161. Id. at 247; see id. at 247-49 (discussing effect on incentive to agree to arbitration clauses if injunctive enforcement unavailable).
162. Id. at 249-53.
B. AFFIRMATIVE ARGUMENTS FOR REPLACING THE SUPER-STRONG PRESUMPTION WITH AN EVOLUTIVE APPROACH FOR OVERRULING STATUTORY PRECEDENTS

Under the evolutive approach suggested by the Court's common law decisions, the Court would overrule a statutory precedent when the reasoning underlying the precedent has been discredited over time; the precedent's consequences are positively troublesome, unfair, or contrary to current statutory policies; and practical experience suggests that the statutory goals are better met by a new rule that does not unduly undermine the reliance interests of Congress and private persons who reasonably acted upon the basis of the old rule. The Court should simply abandon the rhetoric and grudging practice of the super-strong presumption against overruling statutory precedents and adopt this evolutive approach of normal stare decisis, as it has in some statutory cases, such as Boys Markets. Apart from the arbitrariness of the super-strong presumption, there are three affirmative reasons for replacing it with something like this evolutive approach.

First, the evolutive approach is a more logical way to protect the central goal of stare decisis: the orderly development of the law. Indeed, the exceptions to the super-strong presumption suggest the logic of an approach that focuses on the continuing fit between the statutory precedent and current policy. If a precedent can be overruled because the Court did not carefully consider all the arguments and evidence, why shouldn't a precedent be overruled when the assumptions of a careful consideration have been undone over time? If subsequent legislative developments may justify overruling a statutory precedent, why shouldn't other subsequent developments—in social mores, public policy, and social trends—also justify such overruling, if they expose the precedent as a wrong turn in the judiciary's development of a statutory scheme? Finally, aren't most statutes common law statutes, to the extent that they have gaps and ambiguities which Congress fully expects the judiciary to fill?

This analysis suggests that the Court's existing approach is not doing its job—to protect precedents against unnecessary questioning, even while sacrificing the clearly counterproductive ones. The super-strong presumption protects some horrible precedents, while the array of exceptions is used to question and undermine less egregious precedents. The super-strong presumption and its exceptions have become a game of judicial hide-and-go-seek. The very same Justices will invoke the super-strong presumption when they don't want to overrule a statutory precedent but will ignore it—or invoke a procrustean exception—when they are willing to overrule.163 In the

163. For example, Justice Brennan, the author of Boys Markets and Monell, has in other cases brushed aside arguments for overruling statutory precedents he likes by invocation of private reli-
last fifteen years, fewer statutory precedents have been openly overruled, and
then only after a lengthy battle over procedural and historical arcana, but
more of them are overruled implicitly or piecemeal. It is not apparent
whether the super-strong presumption is the cause or effect of this phenome-
non. What is apparent is that this doctrinaire approach costs statutory law
some of its open and orderly development. Silly decisions like Federal Base-
ball are reaffirmed, while potentially important shifts in substantive inter-
pretation are treated as innocent clarifications of "dicta."

Second, the evolutive approach focuses on substance and policy rather
than on procedure and form. The super-strong presumption too often trig-
gers wasteful discussion of marginally relevant historical and procedural
data, while the evolutive approach focuses on the relevant policy concerns.
Recall Monell, in which the Court overruled Monroe's holding that local
governments are immune from suit under section 1983. The Court went to
great length to avoid stare decisis concerns by pigeonholing the overruling
into the proceduralist and reliance exceptions. The Court argued that
Monroe overlooked important historical evidence, and pointed out that sub-
sequent decisions permitted local governments to be held liable under section
1983. The Court also noted the lack of private reliance on Monroe as well
as congressional discussion assuming local entities could be sued. Yet the
dissent persuasively countered each claim with a counterclaim: the historical
evidence provides not insubstantial support for Monroe's result; subsequent
decisions allowing section 1983 lawsuits against local governments did
not pose the Monroe issue for the Court, and indeed Monroe was reaffirmed
as least three times when it was addressed; municipal insurance policies

ance and legislative acquiescence. E.g., Welch v. State Dep't of Highways & Public Transp., 107 S.
Ct. 2941, 2968 (1987) (Brennan, J., dissenting); Johnson v. Transportation Agency, Santa Clara
County, 107 S. Ct. 1442, 1450 n.7 (1987); NLRB v. International Longshoremen's Ass'n, 473 U.S.
61 (1985); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180,

Chief Justice Rehnquist has invoked the super-strong presumption (sometimes in rather strong
language) to protect certain precedents. Monell v. Department of Social Servs., 436 U.S. 658, 715-
16 (1978) (Rehnquist, J., dissenting); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 502
(1973) (Rehnquist, J., dissenting). In other cases, however, he has been ready to overrule statutory
precedents. E.g., Johnson, 107 S. Ct. at 1474 (Scalia, J., with Rehnquist, C.J. dissenting); Busic v.

The oddest history is that of Justice Byron White. He wrote one of the leading defenses of the
super-strong presumption in Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). See also Conti-
nental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 60 (1977) (White, J., concurring in the judg-
ment). Yet he often votes to overrule statutory precedents, and in at least two recent cases he has
voted to overrule or narrow precedents he had joined. Johnson, 107 S. Ct. at 1465 (White, J., dis-
senting); Guardians Ass'n, 463 U.S. at 384.

164. Monell, 436 U.S. at 664-90, 695-97, 700-01.
165. Id. at 696-700.
166. Id. at 719-24 (Rehnquist, J., dissenting).
167. Id. at 714-16.
and indemnity ordinances surely constituted significant local reliance on the immunity guaranteed by *Monroe;* and no statute passed after *Monroe* explicitly or implicitly negated it. All of this debate takes up over forty pages of the *United States Reports.* To what effect? Surely little of this material was persuasive one way or the other to members of the Court.

The best justification for overruling *Monroe* is evolutive. Just as in *Boys Markets,* the Court in *Monell* was confronted with a statutory precedent that had unanticipated consequences which became increasingly anomalous over time. The primary anomaly was a technical one. *Monroe* held that municipalities were immune from section 1983 lawsuits, and the Court in *Moor v. County of Alameda* extended the immunity to counties. In both cases, the Court relied on the fact that cities and counties were subdivisions of the state and were instrumentalities for administering state law. During this same period, section 1983 was the primary basis for desegregation lawsuits against school boards—also subdivisions of the state administering state law—yet the Court routinely decided those cases. In the 1970s, school boards objected that they, too, should have *Monroe* immunity. Not only was it hard to think of good reasons to exclude local school boards from an immunity given cities and counties, but in many cases (including *Monell*) the defendant school board had excellent arguments that it was actually an agency or department of a city. The *Monell* Court was caught in a wholly unanticipated logical bind: Either extend *Monroe* to cover at least some school boards, or overrule it.

The former option was unattractive, in part because of the desegregation cases, but also in part because of substantive problems with the *Monroe* immunity rule in the 1960s and 1970s. The main holding of *Monroe* was not its immunity for municipalities, but instead its holding that section 1983's state action requirement is satisfied without a showing that state law allows the challenged conduct. This holding, as well as the expansion of constitu-

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168. *Id.* at 717.
169. *Id.* at 716-17.
170. Much of the following discussion is suggested by the petitioner's brief in *Monell* (which did not ask the Court to overrule *Monroe*) and by Justice Powell's thoughtful concurrence in the case. Justice Powell stated that the stability value of stare decisis must be weighed against "the necessity of change, lest rules 'simply persist from blind imitation of the past.'" *Id.* at 709 n.6 (quoting Holmes, *The Path of the Law,* 10 *Harv. L. Rev.* 457, 469 (1897)).
173. Between 1954 and 1976, the Court itself decided at least 19 desegregation cases brought against school boards under § 1983, and in eight of those cases the only basis for federal jurisdiction was 28 U.S.C. § 1343, the jurisdictional predicate for § 1983. Petitioner's Brief at 14-15, *Monell* (No. 75-1914).
tional and statutory civil rights in the 1960s, transformed section 1983 in ways that cut against the Court's holding that municipalities could not be sued. Section 1983 became an important mechanism through which local as well as state officials could be held accountable for their unconstitutional actions, even when they were merely acting pursuant to local government policy. Obviously, in such cases, plaintiffs had no real quarrel with the local officials, but were attacking local policies. Naturally, when local officials were sued under these circumstances, their defense was sometimes provided by the municipality or county, which might also pay any money judgment.

Moreover, with the liberalization of class action rules, section 1983 became a mechanism for effecting structural reform in state and local governments and for removing institutional impediments to constitutional protections. That the objects of the restructuring—local governments—were not parties in these cases became a striking anomaly. Whatever the Supreme Court may have said, local governments were often the real defendants. Commentators cogently criticized this anomaly, and lower courts began to get around it by implying a cause of action under the fourteenth amendment. In the absence of compelling historical evidence or public and private reliance, there was little reason in 1978 to support blanket immunity for local governments.

While I agree with the Monell result, there are important substantive counterarguments supporting Monroe. Like the Court, I assume that municipalities indemnified and represented their officials when they were sued, but this point is not supported by empirical surveys (to my knowledge). Section 1983 lawsuits have perhaps become too numerous, and there is some evidence that an unusually large number of them are frivolous. If this is true, shouldn't local governments enjoy some kind of limited immunity? The Court has in fact accorded a limited immunity to local governments, but will this really insulate them from frivolous lawsuits? These are hard questions, about which there is virtually no discussion in Monell. Rather than arguing about arcane legislative history, the Court's subsequent citations of Monroe, and arguable congressional acquiescence in the precedent, the dissenting opinion in Monell might have closely examined the policy consequences of overruling Monroe. The Court, in turn, might usefully have focused its attention on the policy consequences of its decision, and perhaps

176. Monell, 438 U.S. at 713 n.9 (Powell, J., concurring).
178. See, e.g., Brault v. Town of Milton, 527 F.2d 730, 735 (7th Cir. 1975) (en banc).
179. See Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1297-98 (1986) (municipality only liable for acts in pursuance of municipal custom or policy); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (same).
invited further briefing on these topics.\textsuperscript{180}

In short, the reasons for overruling \textit{Monroe} have little to do with the legislative history of the 1871 statute, and a lot to do with the practical and theoretical evolution of the statute. One can tell a similar story about \textit{Guardians Association}, whose partial overruling of \textit{Lau} is justified, not by the uneven treatment of legislative history in the statutory precedent, but by the evolution of our ideas about "discrimination" in the two decades since the enactment of the Civil Rights Act in 1964.\textsuperscript{181} In my view, virtually all of the leading Supreme Court decisions overruling statutory precedents can be better justified by the evolution of statutory policy and debate away from the precedent, than by the scholastic discussion of whether the overruled precedent was the result of a deliberative process, with full briefing, and the like.\textsuperscript{182} And other decisions might have properly overruled or at least limited statutory precedents if the Court had focused on substantive points.\textsuperscript{183}

\textsuperscript{180} None of the parties in \textit{Monell} even asked the Court to overrule \textit{Monroe}.

\textsuperscript{181} Our society's commitment to equality has undergone a significant evolution in the last 35 years. The original focus of concern was open bigotry—refusal to serve black travelers in restaurants, determined segregation in education, and public policies obviously targeted at racial minorities. Few practice that sort of open bigotry anymore; we have learned, however, that substantially eliminating open bigotry has not yielded a society of equality for blacks, both because the effects of previous discrimination are long lasting and because covert discrimination still exists. Moreover, the anti-discrimination principle is now vigorously applied to protect women, the elderly, and the handicapped, groups more subtly discriminated against. Thus, in the 1970s an important focus of concern was discriminatory effects, a focus reflected in \textit{Lau}.

On the other hand, \textit{Lau}'s holding that title VI itself flatly prohibits discriminatory effects seems in retrospect unnecessarily broad. A danger recognized in the debates growing out of affirmative action is that making decisions preferring historically disadvantaged groups may ultimately reinforce invidious discrimination and race consciousness. United Steelworkers \textit{v.} Weber, 443 U.S. 193, 254-55 (1979) (Rehnquist, J., dissenting); Regents of the Univ. of Cal. \textit{v. Bakke}, 438 U.S. 265 (1978) (opinion of Powell, J.). Critics of the expansion of the anti-discrimination principle argue that it should not apply to other groups in the same way it does to racial groups. Discrimination against the elderly, who are subsidized by society in many ways, is quite different from discrimination against blacks, who bear the burden of historical oppression. In light of the intense policy debate—most of which was not anticipated either by Congress in 1964 or by \textit{Lau} in 1974—it is a good idea to leave room for administrative flexibility interpreting title VI, as the Court did in \textit{Guardians Association}.


\textsuperscript{183} Apart from \textit{Flood v. Kuhn}, my favorite candidate for overruling is Caminetti \textit{v. United
Third, an evolutive approach is more consistent with our society's concepts of law, and with the comparative institutional competence of courts and legislatures, than is the super-strong presumption against overruling statutory precedents. The remainder of this part is devoted to these arguments, for they return us to the original justifications for the Court's professed reluctance to overrule statutory precedents.

C. UNTENABLE ARGUMENTS FOR THE SUPER-STRONG PRESUMPTION

The traditional argument for the super-strong presumption is that once the Court interprets a statute, Congress is the institution competent to change that interpretation. This basic argument, appealing to separation of powers concepts, has been formulated in several different ways. The three main variations of this argument are explored here. I maintain that the traditional argument rests upon unrealistic views about statutory interpretation and the legislative process. Neither logic nor experience suggests any good reason to treat statutory precedents differently from common law precedents.

1. The Judicial Legislation Argument

A formalist conception of separation of powers might view an evolutive model for overruling statutory precedents as judicial usurpation of legislative power. Forty years ago, Professor Horace set forth this argument for the super-strong presumption. When the Court interprets a statute, "[t]he statute to that extent becomes more determinate, or, if you will, amended to the extent of the Court's decision. . . . After the decision, whether the Court correctly or incorrectly interpreted the statute, the law consists of the statute plus the decision of the Court."184 If the Court were to overrule the first interpretation, it would be engaging in "legislative" activity, without any of the safeguards of normal legislative action—public debate, bicameral approval, presentment to the President. "Unless Congress has acted, neither the Court nor anyone else can determine whether or not its interpretation was inconsistent with the intent of Congress."185

Horace's argument has been reiterated by individual Justices a number of times over the years, most recently at the end of the 1986 Term.186 Its most
celebrated, and forceful, articulation was in Justice Hugo Black's dissenting opinion in Boys Markets. Justice Black argued that the Court's willingness to overrule Sinclair arguably violated article I of the Constitution, which assigns all "legislative" responsibilities to Congress. 187 "When the law has been settled by an earlier case, then any subsequent 'reinterpretation' of the statute is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute." 188

This formalist "judicial legislation" argument has never been accepted by a majority of the Court as a justification for the super-strong presumption, and it is inconsistent with the Court's actual practice of overruling statutory precedents quite frequently. It would require a very powerful formalist argument to work such a radical transformation in the Court's stare decisis practice. The argument developed by Professor Horack and Justice Black does not constitute such a powerful formalist argument.

The appeal of a formalist argument is strongest when based upon the plain meaning of a constitutional text. The Constitution, however, does not set forth any standards for stare decisis. Article I simply vests the "legislative Power" in the Congress, and article III just as simply vests the "judicial Power" in the Supreme Court and whatever inferior courts Congress might create. While many of the framers assumed that federal courts would adhere to precedents, 189 there is no evidence that anyone considered stare decisis principles important to, or a part of, the constitutional scheme. Moreover, nothing in the Constitution vests Congress with all "lawmaking" powers, as

188. Id. at 257-58. In the 1940s, however, Justice Black frequently joined opinions overruling statutory precedents even when constitutional concerns were not present. Examples include Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), and Helvering v. Hallock, 309 U.S. 106 (1940). Moreover, Justice Black wrote one of the most controversial decisions overruling a statutory precedent. Commissioner v. Estate of Church, 335 U.S. 632 (1948). In several important cases, Justice Black dissented when the majority invoked stare decisis for a statutory precedent. See, e.g., Francis v. Southern Pac. Co., 333 U.S. 445, 452 (1948) (Northern Pac. R.R. v. Adams, 192 U.S. 440 (1904), ought to be reexamined because of new legal circumstances); Cleveland v. United States, 329 U.S. 14, 20 (1946) (Caminetti v. United States, 242 U.S. 470 (1917), ought to be overruled because of new societal attitudes). By the 1960s, however, Justice Black was more reluctant to overrule statutory precedents and often dissented from decisions to that effect. James v. United States, 366 U.S. 213, 222 (1961) (Black, J., concurring in part and dissenting from the overruling of Commissioner v. Wilcox, 327 U.S. 404 (1958)). Note also that Justice Black was the author of Sinclair, the precedent overruled in Boys Markets.
189. See, e.g., The Federalist No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.").
the formalist argument seems to assume. Indeed, even if it did, the specific argument made by Professor Horack and Justice Black would be vulnerable to attack. If every judicial interpretation of a statute were tantamount to a legislative amendment, as they argue, does that not utterly conflate article I and article III? The argument’s distinction between acceptable judicial lawmaking (the original interpretation) and unacceptable judicial lawmaking (the overruling) is essentially a semantic one, with no persuasive formal justification. Why should an errant initial interpretation of legislative expectations be considered acceptable judicial lawmaking, and a later, corrective interpretation be considered usurpation?

The only formalist principle that even seems relevant is that of legislative supremacy, and that principle provides no better support for the judicial legislation argument. The lawmaking supremacy of Congress is not necessarily undermined, as a formal matter, when the Court overrules its own prior interpretation of a statute. Just as Congress could have overruled the Court’s original interpretation, so it can always reinstate it.

Moreover, in three different situations, the strict formalist position taken by Professor Horack and Justice Black would actually undermine, rather than subserve, legislative supremacy. First, if the earlier interpretation of the statute is clearly incorrect in identifying the expectations of the enacting Congress, the Court elevates reliance on its own error above legislative expectations if it does not overrule the precedent. Second, if the earlier interpretation of the statute is inconsistent with later statutory policies (including other judicial interpretations), adherence to the earlier interpretation undermines ongoing legislative expectations. Third, if the earlier interpretation proves unworkable, adherence to it cuts against the implicit legislative assumption that courts will fill in statutory gaps in ways that facilitate the overall working of the statutory scheme. In general, the implication of the formalist position, that statutory precedents can only be overruled if they are

190. Justice Black wrote of Congress’ monopoly over “lawmaking” in his opinion for the Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952), but it is Justice Jackson’s more flexible concurring opinion in that case that has been influential. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 690 (1981) (President’s actions concerning claims against Iran after release of hostages survives separation of powers challenge).

191. Professor Horack concedes that the initial interpretation is also a form of “legislative” activity, but justifies it as “an inescapable product of the judicial process.” Horack, supra note 12, at 250-51.

192. As a practical matter, Congress does not overrule Supreme Court interpretations of statutes very often, just as it does not update statutes to reflect new developments with sufficient regularity. But this argument is not easily invoked by formalists.

193. See R. DICKERSON, supra note 12, at 253 (highlighting illogic of the Black/Horack formalist argument: “The original interpretation, which by hypothesis thwarted legislative intent, did not invade the legislature’s prerogative, whereas later corrections, which by hypothesis support the result originally intended by the legislature, would invade it.”).
unconstitutional, seems contrary to legislative supremacy. Surely the Court shows more deference to Congress by announcing that the Court has itself erred in divining statutory meaning than by saying that Congress has passed an unconstitutional statute. Additionally, the formalist argument risks generating more constitutional lawmaking. Recall Justice Brandeis’ opinion in *Erie*, which overruled *Swift* only after finding its interpretation in some nebulous way unconstitutional.  

2. The Building Block Argument

Dean Levi suggested a realist variation of the judicial legislation argument. Statutory language is often ambiguous, especially when applied to situations not contemplated by the drafters. The “meaning” of the statute in those cases must be supplied by courts, which often have a great deal of discretion in setting the interpretation. But “once a decisive interpretation of legislative intent has been made, and in that sense a direction has been fixed within the gap of ambiguity, the [C]ourt should take that direction as given.” That is, once the “direction” of the statute is set, the Court, private parties, and perhaps even Congress will build upon that direction as they apply and develop the statute further. Any change in the statute’s direction—overruling the initial interpretation—should be left to Congress, because it is better situated in a democracy to make controversial policy decisions.

Unlike the Horack-Black argument, Dean Levi’s argument rests upon practical, rather than semantic, concerns. Yet Dean Levi’s argument seems slender support for the super-strong presumption, which he pretty much endorses. If a statutory precedent does not decisively set a direction for the

194. In *Erie*, the Court could easily have overruled *Swift* on evolutive grounds: the statutory basis for *Swift*'s interpretation was debatable; its rule had not worked out as expected and had produced unfairness and anomalies. This point was made by Justice Stanley Reed’s concurring opinion in *Erie*: “In this Court, stare decisis, in statutory construction, is a useful rule, not an inexorable command. It seems preferable to overturn an established construction of an act of Congress, rather than, in the circumstances of this case, to interpret the Constitution.” 304 U.S. at 92 (citations omitted).


196. *Id.* at 523.

197. Dean Levi examines in detail the Supreme Court’s refusal in *Cleveland v. United States*, 329 U.S. 14 (1946), to overrule *Caminetti v. United States*, 242 U.S. 470 (1917), which held the Mann Act, 18 U.S.C. § 2421, applicable to criminalize the transportation of a woman across state borders for purposes of being a mistress (an “immoral purpose” under the statute according to *Caminetti*). Dean Levi apparently approves the result in *Cleveland*, but that seems anomalous in light of his concerns about judicial avoidance of “controversial” choices and indecision. The *Caminetti* issue has not disappeared, and lively controversy remains whether sexual activity should be a criminal “immoral purpose.” By reaffirming *Caminetti*, *Cleveland* appears foolish as well as indecisive in retrospect.

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statute, can it then be overruled? If overruling it would not be controversial? Shouldn't those same rules apply to overruling common law precedents?

To the extent that it supports stricter stare decisis in statutory cases, Dean Levi's argument seems to rest upon a stark dichotomy between the development of statutory law, on the one hand, and constitutional and common law, on the other. The latter develop evolutil, through a series of decisions that slowly build up and become an interconnected foundation of principles and policies. No one decision stands alone. Each is connected with a spiral of other decisions, and a decision that is incoherent with the evolving spiral can often be overruled without undermining the overall stability of the spiral. On the other hand, statutory law develops in a more linear fashion: the early cases "fix" the direction of the statute—the legislative intent—and later cases build upon the first ones. Obviously, if the Court overrules an early decision, then much of the law is unhinged, and the stability sought by stare decisis is deeply compromised.

Dean Levi's argument is a valid stare decisis argument, but one applicable not just to statutory precedents. To the extent that our polity desires orderly, stable development of law, it does not want courts to overrule foundational cases, whether in common law or statutory law. And indeed, Dean Levi's central point is entirely consistent with an evolutive approach: A precedent is more vulnerable to being overruled if the surrounding "legal terrain" has become increasingly inconsistent with the precedent, and it has become increasingly anomalous. I differ with Dean Levi in that I view both statutory law and common law as evolutive.

The Sherman Act and section 1983, to take two prominent examples, have developed very much in Dean Levi's "spiral" common law way, rather than in his linear statutory way. Federal Baseball did not become a cornerstone of the Sherman Act, in large part because its reasoning and assumptions became increasingly anomalous over time. They became legal vestiges, politely ignored whenever possible. Parker v. Brown, on the other hand, may be debatable as a matter of policy, but it has been a more foundational case, one on which other cases have built and which is an important keystone to Sherman Act policy. Parker should be harder to overrule than Federal Baseball and Toolson, though, curiously, the latter two cases have been reaffirmed, and only Parker has been called into question by the Court.

More complicated statutory schemes often grow through a spiral rather than a linear process. They differ from the Sherman Act primarily in the extent to which the statutory language and legislative history direct and

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199. Eskridge, Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987); see R. DWORKIN, LAW'S EMPIRE 313-54 (1986) (fully developed jurisprudence in which constitutional, statutory, and common law interpretation are structurally similar processes).
channel that evolution. For example, the National Labor Relations Act (NLRA) has grown through a spiral process in which new rules are developed by the agency and the Court over time in a common law process. The National Labor Relations Board has frequently felt free to reevaluate its interpretation of the statute, and the Court has approved some substantial shifts. "The nature of the problem, as revealed by unfolding variant situations, invariably involves an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience."200 Similarly, the Court has felt free to follow an evolutive approach in areas where it (rather than the agency) makes NLRA policy. For instance, the Court has shifted direction twice in the last thirty years in determining standards for the NLRA's preemption of state law.201

In short, contrary to Dean Levi's argument for the super-strong presumption, the development of statutory law is in many ways similar to the development of common law. Both are bounded, and both proceed within those bounds in a trial-and-error fashion. Each case builds upon previous ones, but also learns from experience with previous cases.

3. The Legislative Acquiescence Argument

Among Supreme Court Justices (but not the commentators) the most popular argument for the super-strong presumption is the legal process argument that changes in statutory policy can be made by the legislature.202 Although Burnet is typically cited for this argument, the argument does not support treating common law and statutory precedents differently, for each can be corrected by the legislature.203 Indeed, recently when the Court has overruled common law precedents, it has done so notwithstanding legislative activity. For example, Moragne's overruling of an admiralty precedent bar-


203. Indeed, Justice Brandeis' Burnet dissent cited both common law and statutory overrulings as examples of cases where "correction might have been secured by legislation." 285 U.S. at 406 n.1.
ring wrongful death recovery was achieved under normal stare decisis principles even though Congress had addressed wrongful death questions in the Death on the High Seas Act, which contained an explicit policy decision not to extend statutory wrongful death recovery to the Moragne situation (deaths within three miles of shore).\textsuperscript{204} In fact, Moragne unanimously ruled that Congress' statutory action supported its result because it reflected the widespread acceptance of wrongful death recovery among modern policymakers\textsuperscript{205} While the Court will hesitate to overrule its common law decisions if Congress has actually relied on them to pass or amend statutes, it does not so hesitate simply because Congress has legislated in the area but did not overrule the common law itself.\textsuperscript{206} There is no more reason to leave matters to the legislature in most statutory cases than there is in common law cases, like Moragne, that operate at the margins of statutes.

Thus, the leave-it-to-the-legislature argument is an incoherent basis for differentiating common law and statutory precedents. It is also a fairly lame argument. If the Court errs, why should the legislature have to make the correction? The Court has never systematically grappled with this inquiry. Instead, it has developed a related argument based on legislative acquiescence: If Congress is aware of the Court's prior statutory interpretation and does not change it, the Court should presume that Congress has "acquiesced" in the interpretation.\textsuperscript{207} The presumption of acquiescence is considered especially strong if Congress has reenacted the statute or amended the provision which served as the basis for the Court's earlier interpretation.\textsuperscript{208}

My initial reaction to the acquiescence argument is that it is little better than

\textsuperscript{204} Judge Posner criticizes Moragne's failure to consider the legislative policy, which extended wrongful death recovery only to death on the high seas (three miles beyond the coastline), and not to death in coastal waters (the case in Moragne). Posner, \textit{Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution}, 37 \textit{Case W. Res. L. Rev.} 179, 202 (1987).

\textsuperscript{205} Moragne, 398 U.S. at 393-94, 397-98.

\textsuperscript{206} For another recent case, see Trammel v. United States, 445 U.S. 40, 53 (1980) (vesting option to exercise spousal privilege against adverse testimony in spouse who is called to testify; overruling Hawkins v. United States, 358 U.S. 74 (1958)).

\textsuperscript{207} "The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940). More recent cases accepting a legislative acquiescence argument include United States v. Johnson, 107 S. Ct. 2063, 2066 & n.6 (1987); Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1450 n.7 (1987); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 55 n.18 (1985); Runyon v. McCrary, 427 U.S. 160, 174-75 (1976); Laird v. Nelms, 406 U.S. 797, 802 (1972).

\textsuperscript{208} "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978) (dictum). Other cases citing legislative reenactments of interpreted statutes include Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2333, 2343 (1987); Albermarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); Snyder v. Harris, 394 U.S. 332, 339-40 (1969).
the leave-it-to-the-legislature argument. In most instances, Congress is either not aware of the Court's statutory interpretations or faces no formal opportunity to examine those interpretations. Even when those interpretations are brought to the attention of a congressional committee, the rest of Congress usually remains unaware of them.209

In a few cases, though, the acquiescence argument has a more plausible appeal, because a case can be made that the legislature's acquiescence speaks deliberation about and approval of the interpretation. For example, Flood v. Kuhn acknowledged the "illogic" of continuing to exempt professional baseball from the antitrust laws but justified adherence to stare decisis in large part on grounds of implicit legislative approval. The Court noted that after Toolson (the 1953 decision upholding the baseball exemption) more than fifty bills were introduced in Congress in connection with the Court's decisions.210 While some of the bills sought to strip baseball of its exemption, most sought to expand the exemption to other professional sports. Indeed, the only bills to be reported by committee, and the two bills passed by either chamber of the legislature, would have expanded the immunity.211 From this evidence, the Court was "loath" to overrule Toolson and Federal Baseball "when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."212

Although Flood v. Kuhn is an unusually strong case for the acquiescence argument, its analysis is problematic from at least three different perspectives, each of which suggests that little meaning can usually be derived from Congress' inaction. The first perspective is proceduralist. Legal process theory poses the question: "If a legislature has discretion whether to legislate or not to legislate, how can significance rationally be attached to its decision not to do so?"213 Congress' failure to modify the illogical exclusion of baseball, and only baseball, from the antitrust laws might be the result of any combi-


211. As detailed in Respondents' Brief at 34-36, Flood (No. 71-32), bills were introduced and hearings on the topic held in 1957, 1958, 1959, 1960, 1964, and 1965. In 1958, the House voted for a bill (H.R. 10378) expanding the exemption to other professional sports, but the Senate took no action. In 1960 and 1964, a Senate committee recommended similar legislation; and in 1965, the Senate passed such a bill (S. 950), but the House took no action. "Baseball has consistently supported such legislation" to expand the exemption to other sports, respondents piously announced. Id. at 33 n. **.

212. Flood, 407 U.S. at 283-84.

nation of reasons:

1. positive legislator approval of the Court’s decisions;
2. legislator apathy concerning the application of antitrust rules to professional sports;
3. legislator disapproval of the Court’s decisions, but disagreement among legislators as to what should be done (e.g., overrule the baseball exemption or expand it to other sports);
4. legislator disapproval of the Court’s decisions, but procedural roadblocks to proposed legislation (e.g., committee or subcommittee opposition, House Rules Committee opposition, Senate filibuster, threatened presidential veto);
5. legislator disapproval of the Court’s decisions, but other issues more important for the legislative agenda and no time to deal with the baseball exemption;
6. legislator disapproval of the Court’s decisions and no opposition to legislation, but legislation still forestalled due to compromises and logrolling.

As a matter of the legal process, “[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines,” argued Justice Frankfurter. Because of the many possible reasons for legislative inaction, “we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”

The vagaries of the political process make it hard to determine what Congress’ “positive inaction” meant. The logical inferences that can be drawn undermine the Court’s own inaction as much as support it. Doesn’t the historical evidence suggest that the political process was troubled by the Court’s arbitrary line-drawing? Why else would so many bills have been introduced? Why else would some of the bills have been reported out of committee and passed by one of the chambers? Don’t twenty years of legislative stalemate on the immunity issue suggest that a political solution was not workable?

214. The list in text is adapted from id. at 1395-96. Some of the speculation may seem fanciful, but it was a very real consideration in the 1970s, when many members of Congress actively worked to attract a baseball team to the District of Columbia. Right after Flood v. Kuhn it appeared to at least one informed observer that “there is more bicameral interest in where baseball will be played than in the legalities of the sport.” Martin, The Aftermath of Flood v. Kuhn: Professional Baseball’s Exemption from Antitrust Regulation, 3 West St. U.L. Rev. 262, 280 (1976).

215. Helvering v. Hallock, 309 U.S. 106, 119-21 (1940); see Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442, 1473 (1987) (Scalia, J., dissenting) (“I think we should admit that vindication by Congressional inaction is a canard.”); Flood v. Kuhn, 407 U.S. 258, 287 n.3 (1972) (Douglas, J., dissenting) (citing Hallock); Girouard v. United States, 328 U.S. 61, 69 (1946) (“It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.”). The rhetoric in this Hallock line of cases is, of course, inconsistent with the rhetoric in the cases cited supra notes 207 and 208. I examine this tension in Eskridge, Interpreting Legislative Inaction (draft May 1988).
That only the Court itself could untangle the incoherence created by its own decisions?216

This legal process argument, of course, suggests a response. Since most of the legislative activity sought to expand the exemption to other sports, it would be anomalous for the Court to move in the opposite direction by overruling Federal Baseball and Toolson. This is a good argument, and probably persuaded a majority of the Court, but it is subject to a powerful counter-argument. That is, “public choice theory,” the application of economic insights to political behavior, suggests that the pattern of legislative proposals following Toolson is a predictable response of the political process but illustrates the chief systemic problem of the political process—its tendency to pander to small, well-organized groups. In a nutshell,217 public choice theory predicts that groups will tend to organize politically more often when they are small and well-defined, and when they are seeking concentrated benefits (such as subsidies) or opposing concentrated costs (such as special taxes or user fees). Groups will not organize as often to seek or oppose legislation that distributes benefits to the general population or is paid for generally. Much of the legislative agenda is dictated by the formation and activity of interest groups.

Baseball club owners are a small, well-organized group intensely interested in preserving their exemption from antitrust law and can be expected to lobby hard against any proposal to overturn Flood v. Kuhn. Those primarily hurt by the sport’s exemption are the millions of spectators who buy tickets (and, arguably, pay higher prices because of the owners’ cooperative behavior). We are largely ignorant of any injury we have suffered and are, in any event, unlikely to organize politically because whatever harm we have suffered individually is quite small. Baseball players were harmed by the reserve clause through the 1960s, but like consumers they were not politically well organized until 1966.218 On the other hand, the owners in other profes-

216. Professional baseball took the position in Flood that the forum for remedying problems with the reserve clause was labor arbitration, rather than Congress or the courts.

217. The model described here is taken from my synthesis in earlier articles. Eskridge, supra note 199, at 1518-19; Eskridge, Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275 (1988). I agree, however, with Farber & Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873 (1987), that we should be cautious about applying public choice models and should accept them as hypotheses and not proven data.

218. The Major League Players Association was formed in 1954, but it did not become a major force until after 1966. It sponsored the Flood litigation, for example. Players were not better organized, in part because there were so many of them and (I suspect) in part because they had substantially more allegiance to their teams (and hence to the owners of their teams) than to the interest group before the 1960s. In the 1970s the players became better organized and were able to eliminate the reserve clause and other anticompetitive restrictions through arbitration and collective bargaining. W. Eskridge & P. Frickey, Statutes and the Creation of Public Policy 303-04 note h (1987).
sional sports, such as football, are also likely to be politically well-organized and might be expected to press for legislation expanding the antitrust exemption to other professional sports, as indeed they did. That Congress, even under continuous special interest pressure, refused to expand baseball's exemption to other sports is persuasive evidence that the deliberative procedures of Congress were "working," and rebuffed the demands of the special interest groups. In my view, this history on the whole supports cancellation of the exemption by the Court that blunderingly created it.

The final line of defense for the acquiescence argument in Flood v. Kuhn is, that a controversial political decision like removing baseball's antitrust exemption ought to be made by Congress.\textsuperscript{219} This is, of course, a return to the leave-it-to-the-legislature argument and illustrates the somewhat fanciful nature of that argument in cases like Flood. The Court's decision in Toolson was itself controversial; to justify the preservation of Toolson in order to avoid further controversy, all of which is attributable to the Court's original mistake, is insanity.

The legitimacy of our government is not enhanced by leaving these sorts of controversial decisions to Congress, for it is very hard for Congress to change the status quo, especially when the status quo is defined by an authoritative judicial decision that arguably creates reliance interests. Our political organs are much more reluctant to take away entitlements than to grant new ones, a tendency greatly exacerbated by the "dilemma of the ungrateful electorate."\textsuperscript{220} According to this theory, the things an elected representative does for interest groups will be remembered and felt much less strongly than the things she does to penalize those groups. Yet most legislators are regularly reelected. Legislators accomplish this trick by refusing to make political choices harming important interest groups. Legislators will do almost anything to avoid making hard political choices, and Congress' decade of grappling with the immunity issue illustrates the operation of this avoidance. When hard political choices must be made, legislators prefer to draft general statutes and leave the specific decisions to someone else, mainly judges and administrators. Most legislators would have been perfectly happy for the Court to have overruled Federal Baseball (preferably prospectively). Baseball owners would have objected, but legislators could have deferred to the Court (a perfect avoidance strategy) and perhaps even legislated some relief concerning the reserve clause. Hence, the Court in Toolson and Flood v.

\textsuperscript{219} See H. Hart & A. Sacks, supra note 213, at 1348-80 (reviewing Dean Levi's notion that controversial decisions properly belong with legislature); Levi, supra note 12, at 521-25, 538-40 (legislature should make controversial decisions because it is responsible to people and because courts are normally timid).

\textsuperscript{220} See Eskridge, supra note 217, at 288-89.
Kuhn was doing Congress no favor when it dumped the baseball exemption back into the legislative lap.

A third perspective, political decisionmaking theory, supports my skepticism about the meaning of legislative inaction and suggests that the Court’s adherence to ridiculously incoherent statutory precedents may in fact disrupt the legislative process. Political scientist John Kingdon posits that Congress is an “organized anarchy” whose deliberations are best characterized by the theory of “garbage can decisionmaking.”\(^{221}\) Congress is an organized anarchy because it enjoys fluid participation in decisionmaking, works haphazardly by trial and error, and does not operate according to fixed and rigid substantive preferences. In such an anarchy, there will not be linear and rational decisionmaking, but the legislative agenda will be quite limited because the deliberative energy of its participants is limited. Salient concerns of national policy, proposals to deal with those concerns, and political opportunities to do something will coexist as separate streams in the “garbage can.” Public policy will typically be made when the streams fortuitously come together: A concern is recognized as salient, a well-considered solution is available that fits in with current thinking about other arenas of policy, and the political climate is ripe for change (the change fits in with the agendas of important participants in the process, and constraints do not inhibit action).

Garbage can decisionmaking gives us little confidence that the Supreme Court’s shuttling a problem of statutory interpretation back to Congress will result in any serious consideration of the issue. In many cases, the Court’s decision will not make the issue salient enough to find a place on the legislative agenda, and even when the issue is salient (as the baseball immunity issue has been) nothing will be done unless there is a well-considered proposal that fits in with the drift of public thinking and the personal agendas of important participants. Moreover, the garbage can model suggests that the legislative agenda is not infinitely elastic. The insertion of one issue into the agenda crowds out other issues. Is it desirable for the Court to add to the clutter? The issue of baseball’s exemption from the antitrust laws is a worst case for such an addition: The issue is at bottom trivial, yet it is so controversial that it is bound to command legislative attention, especially in light of the patent “illogic” of the exemption.\(^{222}\)


\(^{222}\) Thus, I think that if the Court had simply overruled Federal Baseball when it had a chance to do so in Toolson, the matter would have effectively been removed from the legislative agenda. A few bills probably would have been introduced, and perhaps some relief legislated in connection with the reserve clause, but given a strong statement by the Court and the obvious correctness of the overruling (especially if it were made prospective only) I doubt that the matter would have lasted long on the legislative agenda.
In conclusion, none of the traditional arguments for the super-strong presumption against overruling statutory precedents is persuasive in Flood, which is a strong case for the legislative acquiescence argument. Normal stare decisis concerns, chiefly baseball's reliance on the antitrust immunity, still made Flood a difficult case. The Court could have—and can still—overrule Federal Baseball prospectively, with a transition period if necessary.

III. APPLYING THE EVOLUTIVE APPROACH TO OVERRULING STATUTORY PRECEDENTS

The super-strong presumption against overruling statutory precedents is rhetoric that the Supreme Court ought to discard. It has become riddled with exceptions and is only selectively followed, and it rests upon either a confused formalism or a naive view of the political process. In my view, statutory precedents are entitled only to normal stare decisis effect. Thus, the Supreme Court can overrule them if they are clearly wrong, produce bad policy consequences, and have not generated an undue amount of public and private reliance.

Although this evolutive approach is not dictated by existing Supreme Court doctrine, it is directly inspired by some of the Court's statutory decisions, especially Boys Markets and other decisions between 1961 and 1972, when the super-strong presumption was in temporary eclipse. Thus, the evolutive approach would merely be a return to the Court's traditional stare decisis analysis. Indeed, I agree with most of the results reached by the Court, for normal stare decisis principles are most deferential to precedents. For example, I agree with the Court's refusal to overrule Weber, for utterly standard stare decisis reasons. These reasons are explored in the first section of this part. On the other hand, for the reasons explored in part II, I think Toolson and Flood v. Kuhn were wrongly decided. The second section of this part analyzes another recent Sherman Act case and argues that the Court should have overruled this equally antique precedent, at least prospectively. The third section of this part examines the Supreme Court's recent overruling of the so-called Enelow-Ettelson doctrine, which permitted immediate appeal of stays pending arbitration, and points to this case as a good example of the evolutive approach proposed in this article.

A. THE AFFIRMATIVE ACTION CASES

Return to the case with which this article started. Justice Scalia's dissenting opinion in Johnson argued that Weber should be overruled, thereby rendering voluntary affirmative action plans violative of title VII of the Civil Rights Act of 1964. The Court's main defense of Weber was its assertion in a footnote that "Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore
may assume that our interpretation was correct.”

This is a fallacious argument, for the legal process reasons suggested in part II, and in Justice Scalia’s dissent. Any argument from legislative inaction is subject to the objection that it is hard to “assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.”

The Johnson majority responded that legislative inattention was not a plausible explanation for the congressional inaction, since Weber was a widely publicized, controversial decision. Indeed, the majority argued, Congress responded to the Court’s equally controversial decision in General Electric v. Gilbert, which held that title VII did not apply to an employer’s failure to provide pregnancy benefits, by enacting the Pregnancy Discrimination Act of 1978, which provides that refusal to provide pregnancy benefits can be unlawful discrimination under title VII. “Surely,” the majority concluded, “it is appropriate to find some probative value in such radically different Congressional reactions to this court’s interpretations of the same statute.”

Not surely. Not even necessarily. Recall the legislative response to Toolson. The Court’s decision stimulated congressional interest, not to overrule the outdated baseball exemption, but to expand it, because owners of professional athletic teams in baseball and other sports were better organized than players and consumers. Gilbert and Weber reveal a similar phenomenon. Gilbert’s holding was swiftly overturned, in large part because organized women’s groups made it an important item on the legislative agenda. Weber’s holding was not the object of serious legislative efforts at overruling, in large

224. Id. at 1473 (Scalia, J., dissenting). Justice Scalia also argued that the Court relied upon “the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.” Id. at 1472-73. This is an oversimplification of what statutory interpretation involves, as shown in my discussion in Eskridge, supra note 199. Finally, Justice Scalia argued that Johnson, in which the Court relied on congressional inaction as a basis for not overruling a precedent, is inconsistent with Monell, where the Court was willing to overrule a statutory precedent which had existed through 17 years of congressional inaction. Johnson, 107 S. Ct. at 1473. This argument makes the commendable point that the Court’s practice has been inconsistent, but Johnson and Monell are arguably different. In the former case, not a single bill had been introduced to overrule Weber, and congressional discussion had not been unfriendly. In the latter case, there had been substantial congressional criticism of Monroe, and some legislative action seemed to assume that Monroe was wrong. See supra notes 108-22 and accompanying text.
228. Johnson, 107 S. Ct. at 1451 n.7.
part because the Brian Webers constitute a diffuse, unaffluent group that is unlikely to be organized, and because well-organized groups such as unions and employers are on the whole not opposed to the Weber result, and well-organized minority groups (especially blacks and women) are intensely opposed to any modification of Weber. A Congress attentive to the dilemma of the ungrateful electorate is not likely to take up this issue, and in fact it has not. Not only is Congress' inaction easily comprehensible, but it is deeply troubling, because the people hurt by affirmative action receive no meaningful hearing in the legislative process. As Justice Scalia argued in dissent, affirmative action may be an example of cost-shifting by well-organized groups (unions and employers) to unorganized groups (Brian Weber and Paul Johnson).\textsuperscript{229}

In short, Johnson's legislative inaction argument is only the most recent example of how the super-strong presumption against overruling statutory precedents can obscure analysis. The question remains: should Weber be overruled under the evolutive approach urged here? Justice Scalia made three different arguments for overruling the precedent. I find each of the arguments incompletely persuasive and agree, for traditional stare decisis reasons, with the Court's refusal to overrule Weber.

To begin with, Justice Scalia argued that it is "'beyond doubt . . . that [Weber] misapprehended the meaning of the controlling provision.'"\textsuperscript{230} The controlling provision is section 703(a) of the Civil Rights Act of 1964, which prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."\textsuperscript{231} Justice Scalia found the language of the statute "unambiguous" in its prohibition of an employer's discrimination against white male employees in order to redress racial or sexual imbalances in the employer's workforce or selected parts of it. This is the same argument originally made in the Weber dissent, and it is made no more persuasively by Justice Scalia.

What, indeed, does it mean to "discriminate" under title VII? It can mean to make any "distinction" based upon race or sex, and that is the meaning Justice Scalia contends is the only meaning the word can have. Yet "discriminate" can also mean to make distinctions based upon prejudice, stereotypes, or other invidious reasons. To deny Paul Johnson a job because the employer hates whites or males or believes invalid stereotypes about white males is to discriminate under this second definition. To deny Johnson the

\textsuperscript{229} Johnson, 107 S. Ct. at 1475-76.
\textsuperscript{230} Id. at 1474 (Scalia, J., dissenting) (quoting Monroe v. Pape, 365 U.S. 167, 192 (1961) (Harlan, J., concurring)).
\textsuperscript{231} 42 U.S.C. § 2000e-2(a) (1982). Weber also involved § 703(d), which relates to training programs.
job because the employer is seeking over time to achieve greater balance in the workforce and to undo some of the ill effects of racial or sexual stereotypes is not the same thing. Nothing in section 703(a) suggests that Justice Scalia's definition is the most likely definition, let alone the only possible one.232

Justice Scalia mentioned but declined to rely on the legislative history of title VII. Rather, his second argument is that \textit{Weber} was a sharp departure from previous Supreme Court interpretations of title VII and has introduced "instability and unpredictable expansion" into the law of employment discrimination.233 This charge is, on the whole, not supported by the evolution of title VII.

The validation of affirmative action in \textit{Weber} can be viewed in part as a practical judicial response to our nation's experience with title VII in its first fifteen years.234 The original legislative expectation (in 1964) was that once invidious discrimination was eliminated, blacks and women and other excluded groups would assume their proportionate places throughout the workforce. This did not occur, in part because discrimination became more covert and in part because of underlying stereotypes. These residual forms of discrimination were harder to root out than open bigotry had been. The Supreme Court's response, in such cases as \textit{Griggs v. Duke Power Co.},235 was to emphasize the idea that results matter. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."236

After \textit{Griggs}, employers and unions faced potential title VII liability if the percentage of women and minorities in their workforces remained unusually low. Potential defendants could prove their good faith and rectify some of the past discrimination through voluntary affirmative action. Indeed, the Supreme Court several times in the 1970s encouraged voluntary remedies to ameliorate the effects of past discrimination.237 While the \textit{Weber} situation was not specifically addressed by the Court, the drift of its opinions was apparent. And in \textit{University of California Board of Regents v. Bakke},238 a ma-
Majority of the Court dealt with the affirmative action issue in the context of title VI of the Act, holding that a public agency could under certain circumstances follow a policy of racial preferences.

*Weber* went further than the Court’s prior cases interpreting title VII, and as interpreted in *Johnson* it goes further to validate affirmative action programs under title VII than would be permissible under title VI.239 Yet the history does not justify Justice Scalia’s assertion that *Weber* was a “dramatic departure from the Court’s prior Title VII precedents,” nor do the post-*Weber* developments support his suggestion that the decision “has provided little guidance to persons seeking to conform their conduct to the law.”240 Indeed, as Justice Stevens’ concurring opinion in *Johnson* emphasized,241 *Weber* has become the basis for a series of Supreme Court decisions permitting affirmative action plans in a variety of settings.242 These cases have not given clean-cut guidelines (as Justice Scalia correctly observed), but they have provided guidance. To overrule *Weber* would cast that guidance into doubt and require the Court to reconsider these other cases as well.

Justice Scalia’s third argument is that *Weber*, *Bakke*, and *Johnson* constitute a “line of decisions rooted so firmly in naivete” that they all “must be wrong.”243 In each case, the Court held that certain voluntary affirmative action plans are permissible as long as they do not establish hard-and-fast quotas over time. Yet in practice, Justice Scalia argued, such voluntary plans become assurances that white males (typically in blue collar positions) will not be seriously considered if there is any “minimally qualified” minority applicant. Effectively, this reintroduces invidious discrimination based upon race and sex. Moreover, given the incentive to produce good numbers because of potential *Griggs* lawsuits and pressure from government contracting agencies, employers will feel required to practice such discrimination. “A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely permitting intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.”244

This is Justice Scalia’s best argument, but while he confidently lampooned

239. *Johnson*, 107 S. Ct. at 1447-48 n.6. *Johnson* probably did not have to interpret the *Weber* precedent so broadly to reach this result. *Id.* at 1460-65 (O’Connor, J., concurring in the judgment).

240. *Id.* at 1473-74 (Scalia, J., dissenting).

241. *Id.* at 1457-60 (Stevens, J., concurring).

242. See *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 106 S. Ct. 3019, 3053 (1986) (upholding affirmative action program for union and apprenticeship programs); *Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3073 (1986) (upholding consent decree permitting voluntary, race-conscious affirmative action such as was permissible in *Weber*).


244. *Id.* at 1475 (emphasis in original).
the majority for naivete, he provided no empirical support for his vision of employer conduct. And under the facts of Weber and Johnson, Justice Scalia’s concern for white male employees must be met by concern for blacks who could not become craft employees because they did not have the employment history prerequisites (Weber), and for female employees who had traditionally been discouraged from applying for a position described in sexist terms (Johnson). Yet employers will probably often follow the path of least resistance and create criteria that are de facto racist and sexist.

Still, this concern is an insufficient reason to overrule Weber. Instead, Justice Scalia’s appeal to justice best supports the position taken by Justice O’Connor’s opinion concurring in the Johnson judgment. Justice O’Connor interpreted Weber as a balance between the desire for color blind employment decisions and the need for elimination of the lasting effects of discrimination against minorities. The balance permitted affirmative action “only as a remedial device to eliminate actual or apparent discrimination.” She agreed with the Court that Weber should not be overruled, but she urged that the precedent not be expanded to permit virtually any voluntary affirmative action plan, as the concurring opinion of Justice Stevens suggested. Justice O’Connor’s limiting principle, drawn from recent constitutional precedents for public employers, is that societal discrimination, standing alone, does not justify an open-ended system of racial or sexual quotas, but that a statistical imbalance sufficient to establish a prima facie case of title VII discrimination will suffice.

Whatever one’s position on Justice O’Connor’s exact test for evaluating affirmative action plans by public employers, her approach to precedents is the one most consistent with the evolutive approach outlined in the article. Unlike the Johnson dissenters, Justice O’Connor was sensitive to the direction staked out by the Court’s precedents and would not lightly disturb the values and expectations expressed in them. Unlike the majority Justices, she did not dismiss the problems of justice presented by Weber and declined to expand the precedent beyond the needs of the particular case. In short, Weber should not have been overruled. Nor should it have been unnecessarily expanded.

B. ANTITRUST DAMAGES CASES

The plaintiff shipper of excelsior and flax in Keogh v. Chicago & Northwestern Railway sued the railroad carrier defendant under the Sherman Act for participating in a conspiracy to fix rates. The challenged rates had been

245. Id. at 1461 (O’Connor, J., concurring in the judgment).
246. Id. at 1461-63 (relying on Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1856 (1986) (O’Connor, J., concurring in part and concurring in the judgment).
247. 260 U.S. 156 (1922).
filed with the Interstate Commerce Commission (ICC) and challenged by Keogh and other shippers, but the ICC had upheld them as "reasonable" pursuant to the Interstate Commerce Act. A unanimous Supreme Court held that even though the Interstate Commerce Act does not immunize regulated carriers from government antitrust prosecutions, it does immunize carriers from private treble damages liability. The Court gave three reasons for its holding: (1) The rates filed with and accepted by the ICC are the "legal" rates. It would be anomalous to impute to Congress an intent that carriers could be sued for price-fixing when they were only charging the rates required by law.248 (2) If Keogh were to prevail, he would receive a lower rate denied other shippers, akin to an unlawful discriminatory "rebate."249 (3) To establish his injury, Keogh would have to prove a "hypothetical" lower rate (in the absence of the price-fixing) and its acceptability to the ICC. Additionally, Keogh would have to prove that it, and not other shippers or the ultimate consumer, would have received the benefit of the hypothetical lower rate. These problems rendered the damage calculation too speculative.250

More than half a century later, Judge Henry Friendly suggested, in Square D Co. v. Niagara Frontier Tariff Bureau,251 that Keogh should be reconsidered, because "many of [its] arguments do not seem so compelling today as they did in 1922."252 The United States urged the Supreme Court to follow Judge Friendly's suggestion, and the Court accepted the case on certiorari. Upon reconsideration of Keogh, the Court declined to overrule the statutory precedent, citing the super-strong presumption against overruling statutory precedents and Congress' reliance on the precedent as it revised the Interstate Commerce Act in this century.253

Under an evolutive approach to statutory precedents, Keogh should have been overruled in part. Judge Friendly's scholarly opinion following Keogh but suggesting that it be overruled is a model of the evolutive approach. Judge Friendly carefully demonstrated that each of the reasons given for the Keogh holding has become obsolete because of changes in law and society, and I concur with his analysis. The analysis here has a broader focus, because Judge Friendly analyzed the technical issues so carefully. Three developments in antitrust and railroad policy over the last fifty years not only

248. Id. at 162-63.
249. Id. at 163.
250. Id. at 164.
251. 760 F.2d 1347 (2d Cir. 1985) (following Keogh but suggesting it should be overruled), aff'd, 106 S. Ct. 1922 (1986).
252. Id. at 1352. Square D was a case involving motor carriers rather than rail carriers, but Keogh was fully applicable, because the legal principles regulating rail and motor carriers are parallel. In this section, my arguments refer only to rail carriers, but similar points can be made for motor carriers.
render *Keogh* analytically obsolete, but indicate that its injustice is substantial enough to overcome the normal stare decisis presumption of correctness.

The most important legal change since *Keogh* has been the development of the Sherman Act through common law trial and error, working out practical problems and creating workable legal rules. For example, early reluctance, manifested in *Keogh*, to award damages that are in some way speculative has given way to the Court's recognition that "[d]ifficulty of ascertainment is not long confused with right of recovery." Thus, some of the problems implicated in *Keogh* have been resolved over time. The central problem in *Keogh*—how to integrate the Sherman Act's policy with the policies of various regulatory regimes—has been a central feature of the Sherman Act's statutory evolution.

The Sherman Act's first interaction with another statutory scheme was its interaction with the Interstate Commerce Act. Not surprisingly, the Court proceeded unevenly. In *United States v. Trans-Missouri Freight Association*, the Court upheld a government Sherman Act prosecution against carrier price-fixing; the Court rejected arguments that such prices should be left to the ICC's regulation. *Keogh* was, of course, a retreat from the approach of *Trans-Missouri* and reflected the expanded ratemaking authority given to the ICC by subsequent amendments to the Interstate Commerce Act.

The *Trans-Missouri/Keogh* line of cases represents the Supreme Court's first, clumsy, attempt to integrate the Sherman Act and a regulatory statute. In the next fifty years, the Court developed a more sophisticated approach, giving more emphasis to antitrust policy. Since the early 1960s, the Court has warned that implied immunity from antitrust treble actions should be allowed only where there is a "plain repugnancy" between such damages action and the regulatory scheme. In industries in which rates are filed with an agency other than the ICC, courts have not created an implied immunity from antitrust damage actions, though they have sought to protect

254. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931) (quoting Straus v. Victor Talking Mach. Co., 297 F. 791, 802 (2d Cir. 1924)). Modern Sherman Act case law utterly rejects the *Keogh* arguments that treble damages should be refused because plaintiff will not be able to prove market price with precision, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-25 (1969), or because plaintiff may have "passed on" the higher rates to its own customers. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487-94 (1968); see *Square D*, 760 F.2d at 1353 (Supreme Court has allowed plaintiffs to recover damages passed on to consumers).

255. 166 U.S. 290 (1897).

256. Id. at 312-26; see *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) (similarity between agreement at issue and agreement in *Trans-Missouri* requires that similar result be reached).

257. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); see Gordon v. New York Stock Exch., 422 U.S. 659, 683 (1973) (implied immunity created only if necessary to make statutory scheme work, and then only to minimum extent necessary).
the regulatory scheme through deferential procedures. A leading case is *Carnation Co. v. Pacific Westbound Conference*. Carnation, a shipper, alleged that an association of carriers by water had conspired to fix shipping rates. The conference (relying on *Keogh*) responded that the Shipping Act immunized them from such actions, and that only the Federal Maritime Commission (FMC) had authority to consider complaints about the filed rates. The Supreme Court held that the best way to protect the statutory scheme was not to create a broad immunity from antitrust lawsuits, but instead to require the antitrust action to be stayed pending referral to the FMC to determine whether the challenged conduct was unlawful under the Shipping Act.

Under the *Carnation* principle, the best way to accommodate a regulatory scheme such as the Interstate Commerce Act is through deference to the primary jurisdiction of the agency, not through an implied antitrust immunity. Thus, *Keogh* was, in retrospect, quite wrong in assuming that Sherman Act damages liability would clash directly with the ICC’s jurisdiction over rates, and that courts could not easily obtain an ICC advisory opinion on whether an antitrust plaintiff’s hypothetical market rate would pass muster under the Interstate Commerce Act. Indeed, courts since *Keogh* have frequently referred rate issues to the ICC for such advisory opinions. More important, the *Carnation* principle suggests that antitrust immunity might be adopted only if treble damages actions would invade the ICC’s own authority to regulate similar conduct.

This introduces a second major change after *Keogh*: disappointment in the ability of the ICC to regulate price-fixing and related anticompetitive conduct. *Keogh* involved rates filed with the ICC and subject to hearings to determine their validity; an assumption of the decision was that those rates were the “best” possible rates, given the regulatory objectives. This view of ICC ratemaking has eroded over time. For one thing, the number of rate filings with the ICC has increased 1200% since *Keogh*, without a corresponding increase in ICC resources. Of the 1,200,000 filings in 1983, the ICC examined only 188, resulting in suspension of only 11 filed rates. In addition, the agency now recognizes that there is no single “legal” rate; instead, there is a “range of reasonableness.” This obviously leaves considera-

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259. Id. at 222-24.
260. See MCI Communications Corp. v. American Tel. & Tel., 708 F.2d 1081, 1101-05 (7th Cir.) (Communications Act does not entitle AT&T to implied antitrust exemption), cert denied, 464 U.S. 891 (1983); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) (supervision by regulatory body does not provide immunity against all antitrust claims).
261. See *Square D*, 760 F.2d at 1352-53 (citing cases).
262. These figures were cited by the Brief for the United States as Amicus Curiae in Support of Petitioners at 13 & n.14, *Square D* (No. 85-21), and were not disputed by any of the parties or amici in the *Square D* case.
ble room for carriers to fix rates so that they consistently fall at the top of the range. The ICC is not equipped to regulate this sort of conduct, as the agency candidly admitted in the *Square D* case.

The agency is, however, charged with regulating carrier "rate bureaus." Pursuant to the Reed-Bulwinkle Act of 1948, carriers can, with the approval of the ICC, form joint associations to discuss rates. Congress and the ICC believed that some collective price-fixing is necessary in the railroad and trucking industry because of the complexity and interconnectedness of their rate structures. For example, one carrier may offer service from point A to point C but must pay a second carrier for the transfer of the goods from point B to point C; in order for the first carrier to set its rates, it needs to know the second carrier's rates. Thus Congress contemplated that carriers could agree to discuss rates collectively, but only to the extent allowed by the rate agreement submitted to and approved by the ICC and only if such discussions did not discourage "independent action" by carriers to depart from agreed-upon rates. So long as the carriers act within their rate agreement, they are immune from antitrust liability, under the Reed-Bulwinkle Act.

The shippers in *Square D* relied on the Reed-Bulwinkle Act to argue that Congress had overruled *Keogh* by replacing the decision with a more precisely drawn statutory immunity. That argument is untenable, because the legislative history indicates no desire to change then-existing antitrust principles applicable to the railroad and motor carrier industries. The significance of the Reed-Bulwinkle Act is the extent to which collective ratemaking itself seems to have been the occasion for secret anticompetitive conduct in blatant violation of both the antitrust laws and the rate agreements. The *Square D* case itself may be typical of what has been going on in some of these rate bureaus for more than three decades. The plaintiff shippers alleged that the carrier rate bureau ignored the notice, publication, public hearing, and record-keeping requirements of its rate agreement and set rates secretly through a "Principals Committee" from 1966 to 1981. Secret price-fixing and collective boycotting of carriers exercising their independent action

266. *Square D*, 106 S. Ct. at 1927.
267. *See Square D*, 760 F.2d at 1356-60 (excellent examination of legislative history of Reed-Bulwinkle Act).
268. The allegations in *Square D* were the same as those in a complaint filed by the United States, which resulted in a consent decree. United States v. Niagara Frontier Tariff Bureau, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984); *see also* United States v. Bessemer & Lake Erie R.R., 717 F.2d 593 (D.C. Cir. 1983); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 600 F. Supp. 859 (N.D. Ohio 1983).
OVERRULING STATUTORY PRECEDENTS

rights allegedly was not unusual in the 1960s and 1970s, yet the ICC was apparently unaware of such activity, until government and private antitrust lawsuits alerted the nation to the problem.

Dissatisfaction with the ICC's overall performance led to the enactment of legislation substantially deregulating rail and motor transportation in 1980. The legislation endorsed greater competition as the best way for the transportation industry to develop. This has been accomplished, first, by circumscribing the immunity for and activity of rate bureaus and, second, by substantially removing the ICC from rate-setting. The old provisions for tariff filing and reasonableness determination are removed for railroads when there is a shipper contract on file with the ICC or when the ICC has exempted the carrier by administrative regulation. The ICC still retains a fair amount of potential power to review rates, as in areas where it finds "market dominance." The 1980 statutes did not overrule Keogh, but they decisively undermine its central rationale. Most shippers in Keogh's position today have no real remedy before the ICC.

The growing dissatisfaction with the ICC's enforcement of its statutory duties is an illustration of a third major change in public policy after Keogh: acceptance of private enforcement of public rights. The idea implicitly accepted in Keogh is that public rights are only enforced by the government, either through the ICC in rate proceedings or the Department of Justice in antitrust proceedings. Unless Congress says otherwise, such a scheme of public enforcement precludes private lawsuits, for they would presumptively disrupt the statutory scheme. This central idea has been discredited from two different directions.

First, the legal culture today is more skeptical of the ability of agencies to serve the public interest. Keogh's position, vesting faith in the ICC, was in the 1920s the progressive position; after some hostility to the idea of administrative adjudication of rights earlier in the history of the ICC, the Supreme Court in the 1920s was finally giving the agency breathing room to grow and


271. Section 10706 of the recodified Interstate Commerce Act is a much more detailed specification for ICC regulation of rate bureaus. It gives the ICC express power to require reports from the bureaus, 49 U.S.C. § 10706(e) (1982), and to review its approval of rate agreements. Id. § 10706(f)-(g). Indeed, the ICC is now required to review each agreement no less than once every three years, to determine whether it is operating successfully and in the public interest. Id. § 10706(h). Moreover, the 1980 amendments explicitly limit the activities of rate bureaus. Id. § 10706 (a)(3), (b)(3).

272. Id. § 10713.
develop. The ICC was perceived in the 1920s as a vigorous, public-minded agency, but the evidence recounted above suggests that this has not been the case for some time. Indeed, Professor Bernstein's celebrated model of the "life cycle of an independent commission" found the ICC to be well into the process of "devitalization" in the 1950s. He would probably have found it all but moribund in the 1970s. Bernstein attributed the process of devitalization to the agency's loss of its original political support, the adoption of routines to the detriment of creativity, and the formation of ossifying ties with the regulated entities. Later literature detailing the process of "agency capture" draws upon the basic life cycle model, and economists and legal scholars have persuasively argued that the systemic problems with agency regulation justify greater reliance on private enforcement through lawsuits resolved in courts.

Second, the legal culture is better aware of the ability of private lawsuits to protect the public interest. Class actions, for instance, permit adjudication of the rights of the entire group and often vindicate rights that would otherwise not be litigated because each individual's stake is too small, or most victims are unaware of their rights. This undermines Keogh's assumption that recovery by shippers would act as a discriminatory rebate; if the shipper brings a class action, as in Square D, all victims will share fairly in the recovery. The progressive literature defending the expansion of class actions has a broader message as well. The monetary incentives accruing from large scale recoveries may be the most effective way to enforce public policies.

This sketchy history of legal and societal developments since 1922 suggests that Keogh no longer fits our legal culture; it has produced the abuses perpetrated under the guise of rate bureaus in the last several decades. Judge Friendly's opinion carefully demonstrated that the analytical underpinnings of Keogh have dissipated. My analysis suggests that Keogh helped perpetrate indefensible trade activities and has become seriously obsolescent.

Why, then, did Square D refuse Judge Friendly's suggestion to overrule Keogh? Apart from the inertial force of the super-strong presumption against overruling statutory precedents, the main reason was probably a desire to protect reliance interests. The conduct challenged in Square D oc-

277. See M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95 (1955).
278. Id. at 90-91.
curred before 1981, at a time when railroad and motor carrier rate bureaus had enjoyed decades of largely unquestioned Keogh and Reed-Bulwinkle immunity from antitrust treble damage actions. Had Square D overruled Keogh, dozens of lawsuits against past railroad and/or truck conspiracies might have followed, a result arguably unfair and contrary to public policy given the substantial changes in rate bureau activity required by the 1980 reforms. The Court could have dealt with this problem by overruling its statutory precedent prospectively. The Court also could have overruled Keogh retroactively back to 1981, when the 1980 amendments became fully operative. While the amendments themselves did not overrule Keogh, they rendered its policy obsolete, and alerted the industry that Keogh could no longer be relied on as in the past. At the very least, Keogh should be overruled for any rate-setting that is not nominally monitored by the ICC.

C. CASES ALLOWING IMMEDIATE APPEAL OF EQUITABLE STAYS

Enelow v. New York Life Insurance Co. was a diversity suit at law, seeking damages under a life insurance policy. The insurance company pleaded an equitable affirmative defense and moved for trial on this defense by the judge, before the jury trial on the contract claims. The judge granted the motion, and the claimant filed an immediate appeal. Normally, federal courts will only hear an appeal of a “final” order. However, the Supreme Court in 1935 held applicable section 129 of the Judicial Code, which permitted immediate appeal of interlocutory orders constituting an exercise of equitable jurisdiction granting or refusing injunctions. Although section 129 did not permit appeals of orders granting or denying ordinary stays, Enelow held that the order was the functional equivalent of an injunction. Even though the judge issuing the equitable order was the same judge who would be conducting the law trial, the Court analogized the procedure to that followed by equity courts enjoining proceedings at law. In a companion case, the Court held that the Enelow rule also supported an immediate appeal of a

281. Square D, 760 F.2d at 1360 n.7.
282. See United States v. Estate of Donneley, 397 U.S. 286, 295 (1970) (“In rare cases, decisions construing federal cases might be denied full retroactive effect, as for instance when this Court overrules its own construction of a statute.”); Simpson v. Union Oil Co. 377 U.S. 13, 25 (1964) (reserving possibility of prospective overruling); R. Dickerson, supra note 12, at 257-58 (favoring prospective application in many cases in which statutory precedents are overruled). The option of a prospective overruling was presented to the Court in Square D. Brief for the Association of American Railroads as Amicus Curiae in Support of Respondents at 29-30, Square D (No. 85-21).
283. Commentary in the leading ICC practice journal made this very point. See Kahn, supra note 275, at 483-85.
284. 293 U.S. 379 (1935).
287. Enelow, 293 U.S. at 382-83.
stay of an action at law in order to enforce an agreement to arbitrate a contractual dispute.\textsuperscript{288}

The artificial, arguably strained, reasoning of \textit{Enelow} might well have been abandoned once the Court merged law and equity three years later through its adoption of the Federal Rules of Civil Procedure. No longer did the same federal judge have to pretend to be a law judge for part of a case like \textit{Enelow}, and a chancellor in equity for the other. Under rule 2, the judge performed both functions wearing the same hat. Surprisingly, the Supreme Court in \textit{Ettelson v. Metropolitan Life Insurance Co.}\textsuperscript{289} held that the \textit{Enelow} doctrine survived the Federal Rules' merger of law and equity and that plaintiffs were in no different position than if a state equity court had restrained them from proceeding in a law action.\textsuperscript{290} In \textit{City of Morgantown v. Royal Insurance Co.}\textsuperscript{291} the Court refused to extend \textit{Enelow} to render stays of equitable lawsuits immediately appealable, noting here the merger of law and equity in the Federal Rules and the general policy of avoiding piecemeal appeals.\textsuperscript{292}

The Supreme Court in 1955 expressed some concern about the arbitrary nature of the \textit{Enelow-Ettelson} doctrine, but declined at that time to overrule it.\textsuperscript{293} Lower court judges and commentators have subjected the doctrine to increasingly outraged criticism, especially in this decade.\textsuperscript{294} It has been termed "an historical anomaly,"\textsuperscript{295} a "Serbonian bog,"\textsuperscript{296} and a "medieval" rule\textsuperscript{297} by circuit courts applying the doctrine. In 1987, Judge Richard Posner analyzed the \textit{Enelow-Ettelson} doctrine in a most scholarly opinion that is a classic example of the evolutive approach I urge for the Court to apply in

\textsuperscript{288} Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449 (1935).
\textsuperscript{289} 317 U.S. 188 (1942).
\textsuperscript{290} Id. at 191-92.
\textsuperscript{291} 337 U.S. 254 (1949).
\textsuperscript{292} The Court stated that it "would ill serve the stated purposes of the Rules of Civil Procedure were we to perpetuate by analogy distinctions which the rules expressly disavow." Id. at 258. Justice Black in dissent predicted (wrongly, in retrospect) that \textit{Morgantown} could not logically be cabined to equitable proceedings and that its reasoning overruled \textit{Enelow} and \textit{Ettelson sub silentio}. Id. at 261-63.
\textsuperscript{293} Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 184-85 (1955), criticized \textit{Enelow-Ettelson} as arbitrary and archaic but declined to overrule it because "the distinction has been applied for years," and Congress ought to solve the problem. See Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480-81 & 481 n.8 (1978) (holding \textit{Enelow-Ettelson} doctrine inapplicable to order denying class certification).
\textsuperscript{294} Every circuit (excepting the new Federal Circuit) has criticized the \textit{Enelow-Ettelson} doctrine, Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 740 (7th Cir. 1986), and the academic commentators have long criticized the doctrine as worthless and counterproductive. E.g., 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[3], at 245 (2d ed. 1985); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3923 (1977); Mathy, \textit{The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration}, 63 MARQ. L. REV. 31 (1979).
\textsuperscript{295} Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1022 (6th Cir. 1979).
\textsuperscript{296} Hartford Fin. Sys. v. Florida Software Servs., Inc., 712 F.2d 724, 727 (1st Cir. 1983).
\textsuperscript{297} Mar-Len of La., Inc. v. Parsons-Gilbane, 732 F.2d 444, 445 n.1 (5th Cir. 1984).
reconsidering statutory precedents.\textsuperscript{298} In \textit{Gulfstream Aerospace Corp. v. Mayacamas Corp.},\textsuperscript{299} decided this year, the Supreme Court overruled the Enelow-Ettelson doctrine. I believe the Court was unquestionably right, and that its opinion is similar to the evolutive approach urged in this article.

The Court’s opinion in \textit{Gulfstream Aerospace} avoids the formalisms and anomalies of the opinions in \textit{Johnson} and \textit{Square D}. The Court’s opinion is remarkable in that it refuses to mention the super-strong presumption against overruling statutory precedents, or even the legislative acquiescence argument. Nor does the Court invoke any of the exceptions to the super-strong presumption. Its reason for overruling the doctrine is distinctly evolutive: “A half century’s experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals.”\textsuperscript{300}

The Court started with the “artificial” reasoning underlying the \textit{Enelow-Ettelson} doctrine.\textsuperscript{301} Even when federal judges followed different rules for law cases and equity cases, the judge’s stay of the legal issues required only issuance of an order by the judge in charge of all issues in the case; to call such an order an “injunction” simply because it \textit{would} have been an injunction in a system with different judges handling law and equity is a fiction established by \textit{Enelow}. To perpetuate that fiction after the merger of law and equity in 1938, as \textit{Ettelson} did, is to wander into “Alice’s Wonderland.”\textsuperscript{302} Thus, the doctrine itself is not well grounded in logic.

The Court’s analysis continued. “The artificiality of the \textit{Enelow-Ettelson} doctrine is not merely an intellectual infelicity; the gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule helplessly unworkable in operation” and leads to “arbitrary and anomalous results.”\textsuperscript{303} For example, many complaints contain a congeries of allegations—some legal, some equitable, some hard to categorize. Was the complaint predominantly legal, in which case the doctrine applied? Or predominantly equitable, in which case it did not? In these and other cases, courts of appeals became mired in semantic distinctions, and the complex process of categorization yielded an ever-deepening scholasticism.

Finally, the Supreme Court agreed with the chorus of judges and commen-

\footnotesize
\begin{itemize}
\item \textsuperscript{298} Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986); see Matterhorn, Inc. v. NCR Corp., 763 F.2d 866, 870-71 (7th Cir. 1985) (trial balloon criticizing the doctrine by Judge Posner).
\item \textsuperscript{299} 108 S. Ct. 1133, 1138-43 (1988).
\item \textsuperscript{300} \textit{Id.} at 1140.
\item \textsuperscript{301} \textit{Id.}
\item \textsuperscript{302} Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563, 565 (2d Cir. 1942) (Clark, J.), \textit{quoted in Gulfstream Aerospace}, 108 S. Ct. at 1140.
\item \textsuperscript{303} \textit{Gulfstream Aerospace}, 108 S. Ct. at 1140-41.
\end{itemize}
ators who complained that the *Enelow-Ettelson* doctrine was not only fictive, hard to apply, and arbitrary, but also "divorced from any rational or coherent appeals policy."304 The doctrine was a glaring exception to the general final order rule, which the Court has tended to police carefully in recent years.305 Most important, whatever "escape hatch" purpose the doctrine served can be served by other, well-based exceptions to the finality rule. One such exception, added by Congress in 1958, permits review of interlocutory orders when there is "substantial ground for difference of opinion" and when "an immediate appeal from the order may materially advance the ultimate termination of the litigation."306

What is notably absent from the Supreme Court's opinion is any discussion of the various legislative inaction arguments, which are just as applicable to this case as to any number of others.307 In contrast, when the Supreme Court had criticized the *Enelow-Ettelson* doctrine in 1955 as complicated and arbitrary, the Court did not overrule the doctrine, since "the distinction has been applied for years . . . and we conclude that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper."308 After 1955, Congress has indeed focused on appealability issues. The 1958 statute, for example, amended another subsection of the current version of the statute that *Enelow* and *Ettelson* interpreted. And, in 1986, H.R. 4975 was introduced in the Ninety-Ninth Congress to overrule the *Enelow-Ettelson* doctrine.309 Hence, Congress was in some way aware of the problem, and the Court could have argued some degree of mild congressional acquiescence, pursuant to earlier decisions.

Obviously, based upon the discussion in part II, I am skeptical of legislative acquiescence arguments and would urge the Court to deemphasize those arguments in general. Note that such arguments may have less force in connection with appellate procedure statutes. These are common law statutes—generally worded, implicit delegations to the Court to fill in the details—and Congress rarely bestirs itself to amend them. Indeed, the Court has been ac-


305. Judge Posner pointed out in *Olson* that the appellate caseload has increased tenfold since 1942, while the number of appellate federal judges has only increased threefold. *Olson*, 806 F.2d at 740.

306. 28 U.S.C. § 1292(b) (1982). Judge Posner cogently argued in *Olson* that Congress' action in adding § 1292(b) was evidence of legislative non-acquiescence in the *Enelow-Ettelson* doctrine. *Olson*, 806 F.2d at 738.

307. I believe the Court ignored the issue, in part because it was so determined to overrule *Enelow* and *Ettelson*, but also in part because none of the parties had requested the Court to overrule these cases and, hence, had not briefed the issue.


309. The bill was not reported out of committee.
tive in developing the details of appellate jurisdictional rules, and the experience of Enelow and Ettelson is that waiting for Congress to overrule jurisdictional cases is like waiting for Godot. The legislative agenda is very crowded, and matters of appellate procedure do not occupy a high place on that agenda, because Congress expects the Court to take care of that. It stands separation of powers on its head to argue that Congress should correct the Court's own mistake—especially when the mistake is so clear and the matter so much more within the arena of expertise practically left to the Supreme Court.

CONCLUSION

I hope that Gulfstream Aerospace will signal a shift away from the Court's frequent invocation of a special stare decisis rule for statutory precedents (Square D) and of the legislative acquiescence rule (Johnson). It is likely that the Court will continue to grapple with these issues, however. Indeed, shortly after Gulfstream Aerospace, the Court requested briefs on the question of whether its statutory civil rights precedent, Runyon v. McCrary, should be overruled. Justices Blackmun, Stevens, Marshall, and Brennan dissented from the reargument as inconsistent with "the accepted doctrine of stare decisis." Specifically, the dissenting Justices argued that Runyon's interpretation of section 1981 to prohibit private acts of racial discrimination in contract matters was entitled to particularly strong stare decisis effect. Runyon itself had relied heavily upon an earlier statutory precedent, based in part on legislative refusal to overrule that precedent. The dissenters broadly relied on the precept that "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." Five Justices rejected this argument, observing that "we have explicitly overruled statutory precedents in a host of cases."

Similar arguments could have been made in Gulfstream Aerospace, which overruled Enelow and Ettelson notwithstanding legislative acquiescence and

312. Id. (Blackmun, J., dissenting). A separate dissent, written by Justice Stevens, relied on other arguments. All four Justices joined both dissents.
314. Runyon, 470 U.S. at 174-75 & n.11; see id. at 186-87 (Powell, J. concurring); id. at 189-92 (Stevens, J., concurring).
316. Id.
failure to enact a bill overruling those cases. These sorts of arguments should not be the focus of the Court’s deliberation. For the reasons rehearsed in this article, the Court should be chary of invoking “special” stare decisis treatment of statutory precedents. The super-strong presumption against overruling statutory precedents has never been thoroughly examined by the Court, and its rhetoric ought to be abandoned. In its place, the Court ought to focus on traditional stare decisis concerns—errors in the precedent’s premises or reasoning, the practical operation of the precedent, the fit between the precedent and current statutory and constitutional policy, private and public reliance. In reconsidering Runyon, the Court ought to focus on these concerns. For many of the same reasons that I believe the Court was correct in not overruling Weber, including “our society’s commitment to ending racial discrimination,”317 I believe there is much to be said for not overruling Runyon based upon traditional stare decisis principles. After all, the best lesson of Justice Brandeis’ dissent in Burnet is that the Court will depart from the traditional rule of stare decisis only when necessary “to bring its opinions into agreement with experience and with facts newly ascertained.”318

317. Id. (Blackmun, J., dissenting).
# Appendix A
## Supreme Court Decisions Explicitly OVERRULING Statutory Precedents: 1961-1987

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Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 499-500 (1973) (5-3-1).


Ahrens v. Clark, 335 U.S. 188, 193 (1948).


Precedent was unexplained departure from prior precedents. Substantive experience with precedent unsatisfactory. [Common law statute (Sherman Act).]

Procedural reasons (insufficient discussion of issue in precedents). Subsequent statutory development.

Subsequent judicial and statutory developments.

Subsequent statutory and judicial developments. [Common law statute, with constitutional underpinnings (habeas).]

Precedent misinterpreted legislative history. Repudiation of precedent's reasoning in subsequent decisions.

Subsequent constitutional and judicial developments. New legislative history. [Common law statute, with constitutional underpinnings (section 1985).]

Erosion of original rationale. Subsequent judicial and statutory developments.

Sinclair was an aberration. Subsequent judicial developments. Policy reasons. [Common law statute (section 301).]

Hazeltine was an aberration. Bad policy consequences.
OVERRULING STATUTORY PRECEDENTS

Peyton v. Rowe, 391 U.S. 54, 67 (1968) (9-0).


Procedural reasons (erroneous view of legal history, contrary to other precedents). Extensively criticized. [Common law statute (habeas).]


Subsequent statutory developments. Substantive unfairness. [Common law statute (habeas).]


Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

Subsequent statutory and constitutional developments. Anomalous consequences of following precedent. [Common law statute (appellate jurisdiction)].

Swift & Co. v. Wickham, 382 U.S. 111, 124 (1965) (6-3).


Procedural infirmity (departure from prior cases). Critical commentary and practical experience. [Common law statute (three-judge court law)].

Harris v. United States, 382 U.S. 162, 167 (1965) (5-4).


Substantial problems with precedent. [Common law statute (rules of criminal procedure)].


Critical commentary. Practical problems and apparent evasion. [Common law statute (habeas)].


Subsequent judicial developments (Garmon test for labor preemption).


Subsequent judicial developments (Lincoln Mills). [Common law statute (section 301)].


Practical problems and apparent evasion. Inconsistency with other judicial and statutory rules.
## Appendix B

### Supreme Court Decisions Implicitly Overruling Statutory Precedents: 1961-1987

This appendix lists decisions which have the effect of overruling the holding (or part of the holding) of a statutory precedent, but in which the Court does not actually state that it is overruling the precedent. Cases are chosen for this appendix only when there is evidence within the Court’s opinion, and/or concurring or dissenting opinions, for the proposition that the precedent is overruled, and when subsequent citations of the “overruled” precedent support the categorization. (This appendix also cites evidence that a precedent has effectively been overruled and the Court’s vote—those in favor of curtailing the precedent, those opposed, and, in some instances, those taking no position on that issue.)

<table>
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<tr>
<th>Decision (Vote on Overruling)</th>
<th>Precedent(s) Implicitly Overruled</th>
<th>Evidence of Implicit Overruling</th>
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United States v. Perryman, 100 U.S. 235, 236 (1880).


Buckeye Powder Co. v. E.I. Du Pont de Nemours Powder Co., 248 U.S. 55, 63 (1918); Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912), and other cases.


Lefkowitz v. Newsome, 420 U.S. 283, 291-92 & nn.8-9 (1975), and several earlier cases.


Tot v. United States, 319 U.S. 463, 466 (1943).

Court distinguishes Choctaw, 450 U.S. at 555-56 n.5; id. at 569 (Stevens, J., concurring), but dissent demonstrates there is no principled way to distinguish it. Id. at 573-77 (Blackmun, J.). Subsequently, Court has limited Choctaw to its "very peculiar circumstances." 107 S. Ct. at 2321.

Court distinguishes precedent, 442 U.S. at 666 n.16, but earlier decision cannot logically survive and is probably an unconstitutional statutory interpretation. Id. at 680-81 (Blackmun, J., concurring).


Court only admits to "disavowing" dicta/reasoning of precedents, 438 U.S. at 670-75, but dissent shows Court is eviscerating precedents. Id. at 690-95 (White, J.).

Dissent discusses precedents that do not survive Court's interpretation of habeas statute. 428 U.S. at 518-19 & n.14 (Brennan, J.).

Court declines to follow Tot "statement," 423 U.S. at 221-22, notwithstanding dissent's argument that this was "essential to [Tot's] holding" and was accepted by Congress. Id. at 229-31 (Stewart, J.).
Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (7-2); see Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (5-1).


Court narrows Jewell to facts, 422 U.S. at 160-61, effectively overruling it. Id. at 166-67 (Blackmun, J., concurring in the result); see id. at 168-70 (Burger, C.J., dissenting); 392 U.S. at 407-08 (Fortas, J., dissenting in Fortnightly).

Court more or less ignores Manual, 418 U.S. at 104, but dissent argues implicit overruling. Id. at 142 (Brennan, J.).

Court recognizes that its decision is "at odds" with prior decisions. 415 U.S. at 543-45; see id. at 533-35 n.3 (rejecting jurisdictional approaches taken in other precedents).

Court seek to distinguish Brown Shoe, 412 U.S. at 411-13, but not persuasively. Id. at 417 (Douglas, J., dissenting). At any rate, Brown Shoe has been legislatively overruled for cases after 1954. Id. at 426 & n.10 (Stewart, J., dissenting).

Court treats parens patriae issue as "open," 405 U.S. at 260, contrary to precedent; see id. at 268-70 (Douglas, J., dissenting); id. at 271-73 (Brennan, J., dissenting).

Court questions reasoning of Gonzalez in light of prevailing Garmon test but distinguishes Gonzalez on facts. 403 U.S. at 293-97. Dissents argue this is implicit overruling. Id. at 302-03, 308 (Douglas, J.); id. at 309 & 319 n.3 (White, J.).

Court argues that Corrigan was not a "considered" opinion, and Hurd was just repeating Corrigan as dictum. 392 U.S. at 419 & 420 n.25. Dissent demonstrates relevance of both precedents. Id. at 451-52 & n.8 (Harlan, J.).


Court adopts a per se rule apparently inconsistent with White Motor, but without explicitly overruling the precedent. 388 U.S. at 379. Dissent claims opinion "completely repudiates" White Motor and effectively "overrule[s]" it. Id. at 388-89 (Stewart, J., concurring in part and dissenting in part).


Court notes that the reasoning of Achilli has been undercut by statutory changes, 380 U.S. at 348-49, and then ignores Achilli's holding.

Simpson v. Union Oil Co., 377 U.S. 13 (1964) (5-3).


Court narrows G.E. to its facts, 377 U.S. at 22-24, but dissent shows G.E. to be "virtually indistinguishable" from this case, id. at 26-27 & n.1 (Stewart, J.), and considers it "overrule[d]." Id. at 29; see id. at 31-32 (Brennan & Goldberg, JJ., memorandum).


Court distinguishes Aro I, 377 U.S. at 479-81 & n.1, but dissenting Justices argue that new result came from shift in Court personnel, see id. at 517-22 (Black, J.).


Dissent argues Hahn and many other cases are being effectively overruled. 370 U.S. at 136-38 (Stewart, J.). No subsequent Supreme Court citation or reliance on Hahn.


Dissent argues Farley is being overruled "sub silentio." 369 U.S. at 459 (Clark, J.). No subsequent Supreme Court reliance on Farley.


Court generally ignores Douds' statutory holding, but dissents criticize Court for abandoning statutory holding necessary to Douds' constitutional holding. 368 U.S. at 260 (Black, J.); id. at 262-63 (Douglas, J.); id. at 267-72 (Brennan, J.).


Court limits Rock "to its precise facts," 368 U.S. at 44, "gratuitously and erroneously" according to the dissent. Id. at 48 (Whittaker, J.).
This appendix lists decisions in which the Court has explicitly or in a few cases implicitly disavowed “significant reasoning” in a statutory precedent. Cases are chosen for this appendix only when the disapproved reasoning is important or prominent in the decision, even if it is technically dictum. (This appendix also cites evidence that significant reasoning in a precedent has been rejected and the Court’s vote—those in favor of rejecting the earlier statement, those opposed, and, in some instances, those taking no position on that issue.)

<table>
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<th>Precedent(s) with Disavowed Reasoning</th>
<th>Evidence that Significant Reasoning is Disavowed</th>
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Court seeks to reinterpret Bachowski reasoning that administrative inaction is subject to presumption of reviewability. 470 U.S. at 833-35.


Court disapproves of "questionable dictum," 471 U.S. at 57 n.21, but also seems hostile to Cantor reasoning. Id. at 56-58; see id. at 71-74 (Stevens, J., dissenting).


Acknowledgement by Court that earlier statements are disapproved, 467 U.S. at 549-50 & n.22, and criticism by dissent. Id. at 559 n.8 (Stevens, J.).


Acknowledgement by Court that it is narrowing Bob Jones, 465 U.S. at 377 n.14, and criticism by concurrence. Id. at 385-87 (O'Connor, J.).


Court narrows Czosek and Foust. 459 U.S. at 228-30. Concurrence relies on Foust dictum. Id. at 235-36 (White, J., concurring in the judgment and dissenting in part).


Court admits that previous cases had contrary dicta, 455 U.S. at 392-93 n.6 (citing cases), but argues that trend of dicta is in accord with holding in Zipes. Id. at 395-97.


Court explicitly rejects earlier "dictum," 454 U.S. at 186-88, though dissent argues that Bell Aerospace "principle" is correct. Id. at 192-97 (Powell, J., concurring in part and dissenting in part).


Court disavows prior dictum, 452 U.S. at 141 & n.19, though dissent argues that the dictum "represented the deliberate and considered view of the Court." Id. at 154 (Stewart, J.).
Overruling Statutory Precedents


Court rejects suggestions in Moe and previous cases, 450 U.S. at 525, and dissent relies on statements in prior precedents. Id. at 530-31 (Stevens, J.).

Confederated Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 470 (1976), and previous cases.


Court distinguishes Sheffield, 446 U.S. at 168-69, but concurrence emphasizes that part of its reasoning must fail. Id. at 191-92 & n.4 (Stevens, J.); see id. at 194, 196-200 (Powell, J., dissenting).


Court implicitly rejects prior dicta. See 443 U.S. at 220-21 & n.1 (Rehnquist, J., dissenting).


Court admits to narrowing Parker to exclude municipalities from its protection in some instances, 435 U.S. at 408-13 (plurality opinion), and dissent argues that holding cuts against reasoning of Parker. Id. at 215-17 (Brennan, J.).


Court restricts language/reasoning in Hawaii. 442 U.S. at 336, 341-42.


Court refuses to follow Garmon preemption test and creates a new one. 436 U.S. at 187-89 & n.13; see id. at 208 (Blackmun, J., concurring). Dissent claims violation of stare decisis. Id. at 215-17 (Brennan, J.).


Court declines to overrule Fay but “reject[s]” Fay’s “sweeping language” and its waiver standard “set forth in dicta.” 433 U.S. at 87-88; see id. at 94-96 (Stevens, J., concurring). Dissent argues Fay’s applicability. Id. at 102-09 (Brennan, J.); see also id. at 98-99 (White, J., concurring in the judgment).


Reid v. INS, 420 U.S. 619 (1975) (6-2).


Hill v. Martin, 296 U.S. 393, 403 (1935).

Dissent argues Hill rule, 405 U.S. at 558-59 (White, J.), but Court distinguishes this case. Id. at 555-56.


Court disavows "passing reference" to statute in Missouri-Kan.-Tex. R.R., 402 U.S. at 577-78.


Court disapproves of broad statements in Dombrowski. 401 U.S. at 50-53.

In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (7-1).


Court disagrees with "imprecise" dictum in Bowles, 390 U.S. at 775, but distinguishes Hope. Id. Dissent sees Court's decision as irreconcilable with Hope. Id. at 829-31 (Douglas, J.).


Court rejects Cohn dictum. 390 U.S. at 231 & n.4.


Court reformulates test for pendent federal jurisdiction, rejecting test formulated in Hurn. 383 U.S. at 722-25.


Court says it is only cutting back "dicta" in Whitehouse, 385 U.S. at 164, but dissent argues this essentially repudiates the Whitehouse reasoning. Id. at 179-80 (Fortas, J.).