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Stability and Change in Constitutional Law

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> [A] constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.[1]

This characterization of the role of the United States Constitution by the great Chief Justice one hundred and forty-four years ago accurately sets the scene for a consideration of stability and change in constitutional law. To have viewed the United States Constitution as a code would have been contrary to the entire common-law tradition out of which it grew. Instead, as this quotation reveals, it has never been seen as establishing a set, unchangeable meaning. The history of constitutional interpretation in the United States reveals that Pound's famous dictum, "law must be stable and yet it cannot stand still,"[2] is not limited to the development of statutory law or administrative edict.

An evaluation of stability and change in constitutional law must have as its theme the applicability of the doctrine of stare decisis in the interpretation and application of the Constitution. It could arguably be said that the sole means of change in constitutional law is provided in the amending process set up in article V of the great charter itself. But the difficulties in amending the Constitution are such that neither the Supreme Court nor the dominant political forces have ever taken the position that change in constitutional law can take place only through amendment and not through altered Court interpretation and application.

This proposition is so firmly grounded in our constitutional law that it would be unworthy of further discussion if it were not for the fact that there seems to be a widespread misunderstanding of this established and accepted role of the Supreme Court in molding and adapting the Constitution to the needs of each new day. Objection has been so frequently raised in recent years to the overruling of prior constitutional principles by the Supreme Court that some re-evaluation is necessary.

A clear distinction must be drawn between objection to current constitutional interpretation on the ground that it is wrong, and objection on the ground that current interpretation abandons prior

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1. Marshall, C. J., in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 203 (1819).
2. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

established principle. Objection to a constitutional interpretation on the ground that it is wrong is always legitimate and acceptable but must compete on its own merits with the quality of the new decision which has been made and the opinion which has been written. But objection on the ground that a current interpretation abandons prior established law must be evaluated in a wholly different way. This is not to say that objection solely on the ground that prior law has been abandoned is not proper in some cases. It is simply to stress the fact that considerations which lead to an effective evaluation of current constitutional interpretations differ widely, depending on whether the objection is to the merits of the interpretation or simply to the fact that it alters a prior rule.

The tendency to combine and confuse the two separate issues often leads to a serious misevaluation of the proper role of the Supreme Court in interpreting and applying the Constitution. The subject of this paper requires that it be limited to an evaluation of the proper role of the Court in instances where an interpretation of the Constitution has already been established by prior decision. The Court is not writing on a clean slate but is faced with a prior decision now being challenged as a statement of constitutional principle which should be abandoned.

There is no need here to go into a detailed consideration of the established application of stare decisis which allows the Supreme Court, in proper cases, to overrule prior decisions and strike out upon new paths. Analysis of the cases involving such instances has been accomplished many times elsewhere.[3] The reporting and consideration of such cases has been effectively made by the Court itself in two leading opinions. The first of these is the dissenting opinion by Justice Brandeis in *Burnet v. Coronado Oil and Gas Co.*,[4] and the second is Justice Reed's majority opinion in *Smith v. Allwright*.[5] Justice Brandeis, in footnotes to his opinion,[6] lists a total of approximately forty instances where the United States Supreme Court overruled prior decisions, up to the date of the case, 1932. Justice Reed, in the opinion for the Court in *Smith v. Allwright*, adds an additional fifteen cases[7] in the twelve years which had elapsed between his

3. *E.g.*, Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 21 WASH. L. REV. 158 (1946); Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190 (1946); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Reed, *Stare Decisis and Constitutional Law*, Pa. Bar Ass'n. Q., No. 35, April 1938, p. 131; *Precedent and the Constitution*, 3 RACE REL. L. REP. 395 (1958).

4. 285 U.S. 393, 405 (1932).

5. 321 U.S. 649 (1944).

6. 285 U.S. at 406-08 nn.1&2 (1932).

7. 321 U.S. 665 n.10 (1944).

opinion and that of Justice Brandeis. Without need to carry the count forward, we know that the process continues.

Two brief observations can serve to show the breadth of the doctrine of the acceptability of overruling prior constitutional cases. The first is that the prior decision being overruled may be recent or of long standing. Without regard to the current instances which have engendered so much controversy, overruling prior decisions can involve an earlier decision which was decided only a year before, as in the *Legal Tender Cases* in 1871,[8] or can involve the overruling of a precedent nearly 100 years old, as in *Erie R.R. v. Tompkins* in 1938.[9]

The second observation centers upon the fact that the acceptability of the reexamination of constitutional decisions was solidly established early in constitutional history. A feel for the Court's attitude is shown by Chief Justice Taney in *The Genesee Chief*, in 1851, overruling a prior constitutional principle established in 1827: "And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."[10] Indeed, the right and duty of the Court to reexamine precedent has always been so well accepted and well established that Thayer, writing in 1908, said: "[A]s one looks back over our history and the field of political discussions in the past . . . he seems to see the whole region strewn with the wrecks of the Constitution—of what people have been imagining and putting forward as the Constitution."[11]

Lest this brief statement of the doctrine that it has always been acceptable for the Supreme Court to overrule its prior decisions be taken as an indication that precedent should have no utility, let it be said that the Court has always accepted the proposition that the following of precedent should be the rule rather than the exception.[12] And here again the pattern of the common-law tradition is analogous. Yet, treating the principle of following prior decisions as the rule and the overruling of prior decisions as exceptional does no more than pose the critical issue. This issue, of course, is the evaluation in a given case as to whether a prior decision should be followed or should be shorn of its vitality either through the process of overruling it or distinguishing it away.

8. 79 U.S. (12 Wall.) 457 (1871).
9. 304 U.S. 64 (1938).
10. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 471, 478 (1851).
11. THAYER, LEGAL ESSAYS 158 (1908).
12. Justice Brandeis dissenting in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

The fact of the existence of the principle that prior decisions need not be followed in all instances is easy to establish. But when the search is begun for the guiding considerations which determine in a given case whether precedent should rule or not, the principles become difficult and obscure. Roscoe Pound, in his prescient wisdom, declared: "If we seek principles, we must seek principles of change no less than principles of stability."[13]

It is not surprising that "principles of change" are difficult to extract and have been stated only in the broadest of generalities, which actually have been statements of conclusions rather than guides. A brief mention of a few of these generalities, limited to those appearing in opinions of the Supreme Court, can reveal the nature of the problem. Thus, the Court has said that decisions should be followed "unless clearly erroneous."[14] Again, a decision should not be disturbed except for "the most cogent reasons."[15] Stare decisis may not prevail over a "system of justice based on a considered and a consistent application of the Constitution."[16] Does the prior precedent collide "with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"?[17] "Time and circumstances" may have "drained" a prior case "of vitality."[18]

Probably the most accurate view of the nature of the process of the Court in deciding whether a prior decision should be overruled or not is to recognize that there must be balancing of the disadvantages and dislocations resulting from the overruling as opposed to the disadvantages and dislocations of maintaining the prior decision, once it is determined by the judges that they feel the prior decision is wrong.[19] Max Radin characterized the problem most succinctly, perhaps, when he said, "[N]either following nor disregarding a precedent is as easy as it seems."[20]

The enforced following of precedent means that judges may create law which is virtually immune from change. It means that an earlier generation may create a rigid legal structure which cannot stand the stresses of growth and development in society. It could even mean that a court could subvert the Constitution by erroneous decisions,[21] since it cannot be assumed that a prior decision is any

13. POUND, *op. cit. supra* note 2, at 1.
14. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865).
15. National Bank v. Whitney, 103 U.S. 99, 102 (1881).
16. Graves v. Schmidlapp, 315 U.S. 657, 665 (1942).
17. Helvering v. Hallock, 309 U.S. 106, 119 (1940).
18. Tigner v. Texas, 310 U.S. 141, 144 (1940).
19. *Cf.* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 580 (1944) (dissenting opinion).
20. Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137, 139 (1946).
21. Covington, *supra* note 3, at 198.

more correct than the new decision.[22] On the other hand, failure to respect the wisdom of past considerations can destroy a continuity in law, and encourage disregard for the law, even the fundamental law, because it may be changed tomorrow.

I.

What are the principles of stability and change? There can be no attempt here to create an exhaustive analysis. Rather, an enumeration of a number of factors, together with brief comments upon them, is all that can be attempted. In making such an enumeration, it should be recognized that each principle stated contains both elements demanding stability and elements demanding change. Each factor contains its own built-in safeguard against the abuse of the power to abandon precedent. By the same token, each consideration contains within it elements which urge that prior decisions not be controlling in proper cases.

There are at least nine intrinsic considerations which can be isolated as they relate to the particular legal issue involved in the case which is to be decided. Then, there are at least three extrinsic considerations which relate in general to the issue concerning the abandonment of past precedent. The intrinsic considerations will be briefly enumerated and commented upon first.

(1) The ease or difficulty of the correction of past error by other branches of the government is of particular concern. The Supreme Court urges that a constitutional precedent is less subject to the doctrine of stare decisis than precedent which may be altered by legislation.[23] At first glance, this doctrine is a startling one since it means that the fundamental law is more subject to being overruled by the Court than is statutory law. It is the very fact that constitutional law is not subject to easy change which has led the Court to establish this firm principle.

This is not to say, however, that courts should never overrule prior decisions when the possibility of legislative correction is present. In his dissenting opinion in the *Burnet* case, Justice Brandeis cites at least fifteen instances where the Supreme Court overruled cases even though error could have been corrected by legislation.[24] Insight into the justification for the Court's overruling of precedent even in cases

22. Wood v. Brady, 150 U.S. 18, 23 (1893): "[C]ourts are bound in their very nature to declare what the law is and has been, and not what it shall be in the future, and . . . if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors."

23. Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962); Smith v. Allwright, 321 U.S. 649, 665 (1944).

24. 285 U.S. 393, 406 (1932).

where the legislature could accomplish change was given most effectively by Paul Freund when he said: "The legislature's inaction may reflect satisfaction with the fluidity of the judicial process rather than with the particular precedent."[25]

(2) The distinction between the "interpretation of the Constitution to extract the principle itself" and the "application of a constitutional principle" has been stressed by both Justices Brandeis[26] and Reed.[27] The consideration is that constitutional principles themselves remain virtually unyielding but that the application of these principles in given cases is more freely subject to change. The Court has never sufficiently articulated this distinction in an opinion by explanation or example, although Justice Brandeis did give us the example of the due process clause and the process of determining whether a particular statute is unreasonable, arbitrary, or capricious.[28] But Justice Reed, in an address, became more precise when he gave as examples of the constitutional principles themselves such matters as the power of the Court to declare acts of Congress unconstitutional, the commerce clause as a limitation upon the power of the states, the power of the Supreme Court to review state decisions upon federal questions, the doctrine of dual sovereignty, the separation of powers, and the principle of federal supremacy.[29] He refers to only one instance in recent years where the Court extracted a principle anew from the Constitution. This was in the case of *United States v. Butler*,[30] which adopted the broader interpretation of the general welfare clause to the effect that it is an additional grant of power to the federal government to spend money for the general welfare over and beyond the other powers to regulate. Justice Reed then went on to say that the application of these principles to particular cases is "properly and continuously subject to critical reexamination.[31]

(3) The extent to which circumstances have changed since the earlier decision has been one of the most commonly stated reasons why an earlier decision may lose its force as precedent. Chief Justice Taft in *Stafford v. Wallace* referred to the extension of the federal commerce power to stockyards and meatpackers in 1922 as "the natural development of interstate commerce under modern conditions."[32] And Chief Justice Taney in *The Genesee Chief*, in overruling

25. FREUND, ON UNDERSTANDING THE SUPREME COURT 38 (1949).
26. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410 (1932).
27. Smith v. Allwright, 321 U.S. 649, 665 (1944).
28. Burnet v. Coronado Oil and Gas Co., *supra* note 26, at 410.
29. Reed, *supra* note 3, at 139.
30. 297 U.S. 1 (1936).
31. Reed, *supra* note 3, at 140.
32. 258 U.S. 495, 518 (1922); *cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937) ("the economic conditions which have supervened" are one justification

an earlier decision which had restricted the federal power so as not to apply to internal navigable waters, stressed that the earlier decision had been made "when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day."[33] The extent to which changes in our society demand the "adapting" of the Constitution (using Marshall's word)[34] clearly are of significant value in evaluating the binding effect of past precedents.

(4) The quality and persuasiveness of the opinion in a case overruling a prior decision is obviously of importance in evaluating the determination by the Court to overrule. The Justice, feeling a particular precedent should be abandoned, might well test his decision to overrule by exploring his ability to write a persuasive opinion.

Too often, the value of this particular consideration has been neglected, especially in recent years. We have been treated time and time again to the spectacle of commentators and the press generally attacking decisions without reference to the scope of those decisions as set forth in the opinions, or without regard to the quality and persuasiveness of the opinions in establishing the need for changes in the law.

Three examples should suffice to make the point. In reference to the school integration decision, *Brown v. Board of Education*,[35] little mention has been made of the emphasis by the Court on the fact that at the time of the adoption of the equal protection of the laws clause, public school education had only a fragmentary existence compared to the extent it permeates our social structure today. The Court's decision in *Jencks v. United States*[36] was popularly characterized as forcing the "throwing open of the files of the FBI" so that Communists and their attorneys could go rummaging around in them. But the decision, as anyone who read the opinion carefully could not escape seeing, was much narrower. It simply required that prior statements made by witnesses used by the government in trials be made available to the defendants in those same trials so that proper cross-examination as to the trustworthiness of the witnesses could be carried out. A third example can be found in the overly broad conclusions concerning the scope of the Supreme Court's decisions relating to prayer and bible reading in the public schools.[37] The decisions obvi-

for giving the constitutional issue "fresh consideration").

33. 53 U.S. (12 How.) 471, 485 (1851).

34. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 203 (1819), set out at p. 221 *supra*.

35. 347 U.S. 483 (1954).

36. 353 U.S. 657 (1957).

37. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

ously do not bar invocations at public meetings, voluntary baccalaureate services, Christmas trees in public schools, and the like.[38]

(5) The opposite of the preceding factor is the extent to which the earlier case being reexamined was well or poorly presented and developed by counsel and the persuasiveness of the Court's opinion.[39] Failure to heed the relevance of this consideration constitutes a denial of the role of the adversary system and the proper respect for the qualities of the advocate. The constitutional principle could have been established in a certain way simply because the lawyer who argued for that application was far more effective to the Court than the lawyer who argued the opposite point of view. In many instances, also, important constitutional law has been made in cases between two private parties who were themselves concerned only with the winning of the particular dispute in which they were involved and not with the ultimate principles which might be established.[40] Such considerations make most relevant the evaluation of the precedent for its quality. On the other side, it need hardly be said that a precedent established by a noted Justice or through the advocacy of a great lawyer may discourage reexamination.[41]

(6) The need for having a rule of law settled is sometimes far more important than that it be settled the way the judge who is considering the rule feels is the best way. This is particularly so in commercial law and property law, where having the rule established so that people can rely upon it is a prime consideration.[42] The Supreme Court

38. These conclusions are reached in an extraordinarily balanced and effective opinion of the Attorney General of Massachusetts dated August 20, 1963. This opinion is summarized in a Joint Memorandum of the American Jewish Committee Institute of Human Relations and the Anti-Defamation League of B'nai B'rith dated September 4, 1963.

39. In The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 471 (1851), the Court, in overruling a prior decision, said: "[W]e are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be forseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided." *Id.* at 484. See also Covington, *supra* note 3, at 198. The Court has also referred to the close vote in an earlier case as making the overruling of it perhaps somewhat more justified. United States v. Darby, 312 U.S. 100, 115 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937).

40. In the Judiciary Act of 1937, 28 U.S.C. § 2403 (1958), provision was made for governmental intervention in suits between private parties which involve the constitutionality of federal legislation. Passage of this law reflected dissatisfaction with the device of leaving constitutional litigation wholly in the hands of private litigants. Legislation, 38 COLUM. L. REV. 153 (1938).

41. The extreme reluctance of the Court to overrule a questionable decision by Chief Justice Marshall is quite evident in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), which upheld a statute extending diversity jurisdiction of the federal courts to citizens of the District of Columbia.

42. Rock Spring Distilling Co. v. W. A. Gaines & Co., 246 U.S. 312, 320 (1918); Wallace v. McConnell, 38 U.S. (13 Pet.) 124, 136-37 (1839).

recognizes the importance of this truism. As Justice Brandeis said in his opinion in the *Burnet* case, "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."[43]

(7) A step beyond the preceding consideration is the recognition that established principles sometimes involve vested rights of property or contract which would be undermined by a new decision. Chief Justice Taney referred to the absence of any vested rights in the *Genesee Chief* case which has previously been quoted.[44] In cases where property has been acquired or contracts made in reliance on a rule, overruling is much more difficult to justify.[45]

(8) Justice Brandeis, in his opinion in the *Burnet* case, referred to the use of the process of "trial and error" as appropriate to the judicial function.[46] His suggestion should not be taken as advocacy of a license to the Court to experiment without limitation or responsibility. But it does point up a significant factor which is often overlooked. Since the principle of stare decisis as applied by the Supreme Court in constitutional law allows room for the overruling of precedent, this in turn means that a decision overturning prior law can itself be overturned if it fails. In another way, this is simply to say that the new decision overruling a prior case does not itself now become binding forever; it also is subject to reexamination and reconsideration under all of the factors here enumerated.

This abandoning of precedent with a later return to it is seen in the early recognition by the Court of the right of intensive government control, including regulation of prices, over businesses outside the area of the traditional public utility.[47] Then, there came the period in the earlier years of this century when only those businesses which did fit the common-law pattern of a public utility were subject to stringent price and other governmental controls.[48] Finally, there was the return to the earlier doctrine in 1934 in *Nebbia v. New York*, which authorized detailed governmental price control in the milk industry in New York.[49]

(9) Finally, perhaps as a summary of the other factors, the history

43. 285 U.S. 393, 406 (1932).

44. 53 U.S. (12 How.) 471, 487 (1851). See also Washington v. W. C. Dawson & Co., 264 U.S. 219, 238 (1924) (dissenting opinion).

45. But vested rights of property do not constitute a legal obstacle to overruling a prior decision if the Court is convinced overruling is indicated. Dunbar v. City of New York, 251 U.S. 516, 518 (1920).

46. 285 U.S. 393, 408 (1932).

47. Munn v. Illinois, 94 U.S. 113 (1877).

48. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Williams v. Standard Oil Co., 278 U.S. 235 (1929); Tyson & Brother v. Banton, 273 U.S. 418 (1927).

49. 291 U.S. 502 (1934).

of constitutional law shows a development in the direction of what can be called a striving toward the American ideals of liberty and justice for all. The clearest example of this is the historical evaluation of cases in the area of fair procedures as part of due process of law. A pattern of development over many years in the direction of greater protection of individual rights surely can be seen. This development is, of course, precisely the same kind as takes place in the common law itself. This is as it should be since due process of law is a common-law concept, and there never has been any indication that the framers of the Constitution felt they were freezing the concept into an unchangeable mold. A much more accurate interpretation of what is involved in a constitutional provision such as due process of law is that the framers intended to insure that the principle continue as part of the developing common law of this country and continue to be subject to the growth and vitality which characterized its development in Britain.

The extrinsic factors which are applicable to cases generally, rather than a particular case, are not as subject to separation. But perhaps three of them can be given sufficiently different emphasis to justify enumeration.

(1) Of obvious relevance, as is revealed by the entire theme of the evaluation of stability and change, is the history and tradition of the common law. The doctrine of stare decisis was not a doctrine which required the slavish following of precedent until long after the American common law had broken off from the British common law and was subject to its own development.[50] It was not until the end of the nineteenth century that the House of Lords in the *London Street Tramways* case took the firm position that it had to follow prior decisions.[51] Also relevant is the fact that this British principle is not subject to the possibility of stultification of the law that a similar rule applied in the United States Supreme Court would create. Any legal principle in Britain is subject to change by legislation by the House of Commons; even British constitutional principles are subject to this statutory alteration.

Yet on the other side, while the doctrine of stare decisis does not require that precedents always be followed, it is inescapable that the history and tradition of the common law requires that earlier decisions normally will be followed. Good reason must be found to overrule them.[52] This part of the history and tradition of the common law is every bit as important as the part which does allow the overruling

50. Radin, *supra* note 20, at 155.
51. London Street Tramways, Ltd. v. London County Council, [1898] A.C. 375.
52. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

of precedents when the Court is convinced that they must be overruled.

(2) Of the utmost importance in extrinsic considerations controlling the extent to which prior decisions shall be followed is the quality of the judges who are making the decisions. The point is obvious. A judge who is well trained in the American and common-law traditions, and who is objective and balanced in his approach to issues, obviously garners greater trust in making his decisions, which in the end must be so subjective.

The accepted power of courts to overrule decisions argues for continuing wisdom in selecting judges. Yet, the power to overrule can save us from the errors of the inadequate judge whom we are bound to get sometimes no matter how careful the selection.

(3) The pressures of public opinion and from the political branch of the government are inescapably and properly present. It has been said often enough that judges are human, and it would be tragic if they did not have the human qualities which make them susceptible to some extent to pressures from various sources. To a degree, but not completely, the judges should "follow the election returns," or they lose touch with the current mores of society. The balance which must be achieved by the judge in objectivity and yet in human compassion is one of those indefinable matters which can so often separate the better judge from the equally trained, talented, and able lawyer who is not able to function effectively in judicial robes.

As this enumeration is now completed, it becomes obvious that the considerations cannot in themselves yield "correct" answers. It can only be hoped that there has been here some isolation of various guideposts which can be more explicit than such general statements as "cases should be overruled when they are plainly in error," or that they should be overruled only for "cogent reasons."

II.

The issue of stability and change in constitutional law has been the subject of never-ending concern throughout our constitutional history, as is made clear from the materials briefly surveyed above. That this issue is at this time in one of its periods of most active ferment cannot be doubted. The current agitation over Supreme Court decisions has now extended for almost a decade, dating from the school integration case, *Brown v. Board of Education*.[53] Proposed legislation designed to curb the power of the Supreme Court has been taken seriously by the Congress.[54] Proposals for constitutional amend-

53. 347 U.S. 483 (1954).

54. The Jenner Bill, S. 2646, 85th Cong., 2d Sess. (1958), would have taken from

ments are now pending, having been passed by a few states, which would completely alter the system of judicial review of legislation and change our constitutional system in some of its most fundamental aspects.[55]

There can be no complete analysis and evaluation of the current constitutional issues here. But the constitutional decisions which have brought about the current drive to remake our present constitutional structure can speak to us on the issue of the proper role of stability and change in constitutional law.

Decisions in four areas particularly have been subject to popular attack. In each of these four areas there has been at least some abandonment of precedent by the Court. In some instances, overruling has been precise and has been stated by the Court. In other instances, the alteration in constitutional law has been through the acceptable common-law device of distinguishing away precedents which are at least fairly close to controlling.

These four areas are: (1) the elimination of racial discrimination under equal protection of the laws, particularly the abandonment of the doctrine of "separate but equal" in the school integration and later decisions; (2) developments in procedural due process of law which have increased the protection of accused persons in criminal cases (it is only an incidental fact that some of the criminal cases have involved the prosecution of alleged subversives); (3) the application of the principle of separation of church and state in the banning of organized prayer and worship in public schools; and (4) the assumption by the Court of the power to insist that voting rights not be diluted by artificial and unrealistic legislative districting.

The first three of these categories of recent constitutional developments have a common core. In each instance, a minority individual or group is finding protection against the majority in the judicial enforcement of constitutional principles. The attack upon these decisions could be summarized overall by recognizing that they contain the implicit assertion that the Court has been too friendly to liberty. Yet, stating the nature of the attack in these words reveals in stark

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the Supreme Court the jurisdiction to hear cases involving charges of subversion and involving the validity and application of the government's various personnel security programs.

55. The three proposed amendments emanate from the Council of State Governments. One would establish a Court of the Union to review judgments of the United States Supreme Court and to be made up of the chief justices of all the states. The second would abolish all federal power over legislative apportionment. The third alters the amending process of the Constitution to permit amendments to be enacted wholly by the states, without any national power of approval. See Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963). All three proposals have been officially disapproved by the American Bar Association. Editorial, *Amending the Constitution*, 49 A.B.A.J. 970 (1963).

fashion the doubtful underpinning of the criticism. The phrase commonly heard today, that "majorities have rights too," is inescapably correct. But the use of the phrase in context reveals that those who characterize the current issues in these terms may not be according proper strength to the traditional structures of American freedom. A pure and unlimited rule by the majority would be a dictatorship of the majority and could easily be as totalitarian and as authoritarian as any dictatorship. And every time a minority right is protected, the power of the majority to have its way is lessened. This is the inescapable nature of freedom.

Our Constitution is designed to insure that the rights of individuals and minorities shall not be subject to the dictatorship of the majority. This most fundamental of American principles was effectively stated by the Court in *West Virginia State Board of Education v. Barnette*, speaking through Justice Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights, may not be submitted to vote; they depend on the outcome of no elections.[56]

While some recent decisions of the Court in these three areas may be subject to valid criticism, the overall mood of the times would appear to raise the question whether there is a dangerous press for conformity that does not show a sufficient tolerance of the rights of minorities, be they racial, religious, political, or even those individuals who have been accused of crimes.

In evaluating each of the three areas of decisions under discussion with respect to the stability-versus-change dilemma, pertinent considerations are revealed which justify the abandonment of prior constitutional doctrine.

It might be argued persuasively that the nation was not yet quite ready for the sweeping impact of the school integration decision and the others that have followed.[57] The reluctance to implement the decisions in many quarters and the turmoil which they have caused might give backing to this belief. Yet, on the other hand, was it not far too late in our national history to have had a Supreme Court

56. 319 U.S. 624, 638 (1943).

57. Watson v. City of Memphis, 373 U.S. 526 (1963); Goss v. Board of Educ., 373 U.S. 683 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Boynton v. Virginia, 364 U.S. 454 (1960); Gayle v. Browder, 352 U.S. 903 (1956); Brown v. Board of Educ., 347 U.S. 483 (1954), *supplemental opinion*, 349 U.S. 294 (1955).

decision reaffirming a doctrine of doubtful validity when it was created,[58] and one which does not comport with the aspirations of the American people as a whole, and of this nation as a leader of the nations of the world? The matter of timing is of the utmost importance in the development of the law. Yet the Court cannot exercise full control over its timing. The cases were before the Court and had to be decided. The fact that the dominant forces of the nation have accepted the decisions reveals that it was far too late in our national history and development to have reaffirmed the separate but equal principle, which was rapidly becoming outmoded.[59]

In the developments of procedural due process of law, the traditions of the common law would appear to demand changes designed to increase the protection of those accused of crimes. This has been the whole sweep of historical development in due process. Should an indigent, unpopular defendant, who cannot obtain a lawyer, be forced to go to trial in a serious criminal case and to attempt to defend himself without the aid of legal counsel?[60] The question would answer itself except for the realization that the right to counsel has been a developing one, and that at an earlier period we did force such persons to trial without the aid of counsel. But the fact that we used to do things another way would also justify trial by battle or by ordeal, or would justify all manner of failures to recognize other basic human rights which modern enlightenment can reveal.

The same observations may be made, for example, on the issue concerning the furnishing of a transcript to an indigent accused so that he may appeal his conviction.[61] Should the American people accept as fundamental a principle that an accused should be able to appeal his conviction only if he has the sizeable amount of money needed to buy

58. The doctrine of "separate but equal," created in a case involving public transportation, Plessy v. Ferguson, 163 U.S. 537 (1896), was never applied by the Court to the ownership of property or place of residence. Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917). Justice Harlan's dissenting opinion in Plessy v. Ferguson, *supra* at 552, takes its place alongside his famous dissent in the Civil Rights Cases, 109 U.S. 3, 26 (1883), as a classic capturing of the spirit of the fourteenth amendment.

59. The short answer to the assertion that racially separate educational facilities could be acceptable was given by the Court in the Brown case when it said: "Separate educational facilities are inherently unequal." 347 U.S. at 495. Warning of such a holding had clearly been given in Sweatt v. Painter, 339 U.S. 629 (1950), which held that a newly-created Negro law school in Texas was not the equal of the University of Texas Law School. One of the grounds given by the Court for its holding was the advantage of going to a law school which had a distinguished group of alumni. How can a new school create an equal group of alumni? An analysis of the factors the Court relied upon in the *Sweatt* case reveals that they are largely inherent and are virtually impossible to duplicate.

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

61. Griffin v. Illinois, 351 U.S. 12 (1956).

a transcript and pay other costs? The mere statement of the question again seems to answer that the Constitution need not be found to step aside to allow justice so to be based upon financial ability. The only justification for the prior rule is the fact that we had not yet become sensitive to the need for the change. Of course, perfect equality can never be achieved in procedural due process of law. But when obvious inequality can be corrected with a burden which seems no higher than proper for the price of freedom, the tradition of the common law has always been to correct the disparities.

And the principle would seem to be equally applicable if the person accused is an alleged Communist or other subversive. The problems of due process were most prominent in the minds of the framers of the Bill of Rights. In a country dedicated to freedom, they can be no less prominent in the minds of those who administer criminal justice today. A danger equally serious to that of subversion is the adoption of totalitarian methods to combat totalitarianism.

In the matter of the elimination of organized worship and prayer in the public schools, we have less of a departure from prior decision, although the claim is made that the American tradition as a religious nation is being thwarted.[62] Actually, the use of the public schools for regular religious ceremony has been a recent development in the United States. Here we have nothing more than the Court reacting to this recent development in making an initial application of the constitutional principle against granting to religion an authoritative role in secular affairs. Here is more clearly an instance where the Court is attempting to play its established role of protecting the minorities from a forming and strengthening majority, where the issue is one of liberty.

The summary of the brief descriptions of these three areas of recent controversial constitutional decision reveals that the claim that the Court is abandoning prior constitutional law, that the Court is changing the meaning of the Constitution, actually is a form of objecting to the decisions on their merits. In each instance, the claim that the Court should not have changed prior law because the prior law had been settled would seem not to stand up to the established right of the Court to reconsider prior constitutional law, under the considerations briefly set forth above. In all of these areas, it would appear proper to say that there were factors which justified the Court in reexamining prior doctrine. The issue as to whether the law should

62. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). It can be argued that Zorach v. Clauson, 343 U.S. 306 (1952), upholding a school released-time program for religious instruction, was prior contrary authority. While the recent cases may indicate a shift in the Court's approach, *Zorach* was readily distinguishable.

have been changed when the doctrine was reexamined becomes, then, one of evaluation of the strength and acceptability of the particular decision. The point is that these decisions should be evaluated on their own merit rather than be made subject to the assertion that they are wrong because prior contrary authority existed in varying degrees.

This conclusion is not a surprising one. It is the nature of lawyers and judges, indeed of all critics, to insist upon the doctrine of stare decisis when the new decision is disapproved, but to ignore the principle of stare decisis when the new decision is favorable to one's point of view.[63] Perhaps the most obvious example of this human trait is to be found in the sweeping decision by the Supreme Court in 1938 in *Erie R.R. v. Tompkins*.[64] Here was a case that wiped out a ninety-six-year-old principle that federal courts apply a federal common law. This was unquestionably a constitutional rule of the utmost importance. Yet, when the ninety-six-year-old decision was reexamined by the Court and determined to be wrong (perhaps with less justification on change of circumstances than in some of the cases discussed above) the new decision became the guiding constitutional principle with little criticism. The issue rarely is whether the Court can properly change a constitutional principle. The issue almost always is whether the constitutional principle now adopted is as acceptable, in the eyes of the beholder, as the earlier principle now abandoned.

As to the fourth area of present controversial constitutional decision, that involving legislative redistricting, the nature of the cases differ, but similar principles apply. *Baker v. Carr*[65] and the cases on redistricting following it involve in the aggregate the protection of the rights of the majority from subversion by entrenched minorities. This fact seems to make rather surprising the attacks upon these decisions by the same groups that attack the other decisions of the Court. It would appear that the Court cannot satisfy anyone. It cannot protect minorities, but it also cannot protect the majority.

The recognition that rights of voting and political participation may be so weighted that individuals may be effectively eliminated as voters would seem simply in the stating to justify the Court's re-

63. In dissenting in Smith v. Allwright, 321 U.S. 649, 666 (1944), Justice Roberts wrote a rather vituperative opinion scolding the Court for freely disregarding and overruling prior decisions. He said that constitutional adjudication was becoming like "a restricted railroad ticket, good for this day and train only." *Id.* at 669. Yet, twelve years earlier Justice Roberts had joined in Justice Brandeis' famous opinion in the *Burnet* case, 285 U.S. at 405, which constitutes the strongest justification in the Court's history for a power to overrule prior decisions!

64. 304 U.S. 64 (1938).

65. 369 U.S. 186 (1962). *Cf.* Gray v. Sanders, 372 U.S. 368 (1963), holding invalid the Georgia county unit voting system.

examination of its prior reluctance to intrude. Nothing in the Constitution indicates in any way that the right to vote and have one's vote counted equally is not a right subject to protection through the judicial process. The Court's previous self-restraint in this area has been no more than a Court-created rule,[66] and again, one which did not imply that the Court had no concern. The Court's traditional protection of the right of racial minorities to vote reveals that it never wholly abdicated responsibility in the election arena.[67] Objection to the Court's intrusion in this area can be seen, again, as objection to the Court's undertaking to police this constitutional right rather than that the Court has changed a prior rule.

On the issue of the merits in all of these cases of recent controversy in constitutional litigation, reasonable men may differ. It is true that the rights of minorities can be overprotected. No complete equality can ever be achieved. But it can properly be observed that the issue is one of balancing the interests of the individual or the group against the interests of all. The balance is an intricate, delicate matter. In making this balance, it should be accepted that the American tradition is one of protecting the individual and the minority as far as can be done without precipitating serious dangers to the well-being of the nation and the people as a whole. Only by following this general principle can this nation avoid falling into the trap that has characterized totalitarian nations throughout all history. The protection of the rights of individuals and minorities against the will of the majority is the manifestation of liberty. It is the characteristic of American freedom.

So it is that the issue of stability and change in constitutional law usually resolves itself into the policy question whether the law can be improved by change rather than into the question whether there is or should be a right in the courts to make a change by overruling prior authority. There are many safeguards built into the structure which protect us from the abuse of the right to alter constitutional law by court decision. The successful working of these safeguards over approximately a century and three-quarters of American constitutional history reveals their efficacy. In nearly all instances the issue should be joined not on the right of the Court to overrule but on the merits of the decision made.

It is not the constitution-amending power that plays the major role in the American system in resolving the dilemma of stability and change in constitutional law. It is the Supreme Court. And this is not

66. South v. Peters, 339 U.S. 276 (1950); Colegrove v. Green, 328 U.S. 549 (1946).
67. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndou, 273 U.S. 536 (1927).

an innovation. It has been the guiding principle since the establishment of the doctrine of judicial review. The role of the Supreme Court in constitutional law has never been more succinctly, yet effectively, stated than by Justice Reed in his address to the Pennsylvania State Bar Association in 1938. Justice Reed said: "[C]onstitutional law is more a matter of government than of rule-making."[68]

68. Reed, *supra* note 3, at 142.