

Taking Supreme Court Opinions Seriously

Henry P. Monaghan

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol39/iss1/4>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME 39

1979

NUMBER 1

©Copyright Maryland Law Review, Inc. 1980

TAKING SUPREME COURT OPINIONS SERIOUSLY*

HENRY P. MONAGHAN**

I.

Taking Supreme Court opinions seriously emerged as a topic of discussion at a lunch I attended last year with several Supreme Court law clerks. Somehow we came round to a particular three-judge district court case which I confidently opined was "certain" to be reversed on the basis of principles announced in prior opinions. The clerks were models of politeness and circumspection; never once did they even intimate that the judgment would (by divided vote) be affirmed.¹ But shortly after I had announced my views of that case, one of the clerks began to prod me, asking whether I simply took the Court's opinions "too seriously." I allowed that I had been around long enough to recognize that my notions of principled adjudication had all they could do to survive in the Supreme Court, given the force of the conflicting pressures on that body. Turning to a former student, I then engaged in what I thought to be an outstanding example of the Socratic dialogue:

Q: When you were on the law review, did you take seriously what was said in Supreme Court opinions?

A: Yes.

Q: When you spent the summer clerking for the X firm, did you take seriously what was said in Supreme Court opinions?

A: Yes.

* ©1980 Henry P. Monaghan. All rights reserved. A shorter version of this article was delivered on May 1, 1979 at the University of Maryland School of Law as part of the Morris Ames Soper Lecture series.

** Robert S. Stevens Professor of Law, Cornell University School of Law.

1. The case was *Foley v. Connelie*, 435 U.S. 291 (1978). In *Foley*, the Court ruled that a statute limiting New York's police force to United States citizens did not violate the equal protection clause of the fourteenth amendment. Justices Stewart, Marshall, and Stevens criticized the majority opinion as irreconcilable with the reasoning and authority of prior decisions.

Q: When you clerked on the Court of Appeals, did you take seriously what was said in Supreme Court opinions?

A: Yes.

Q: When you go into practice next year, will you take seriously what is said in Supreme Court opinions?

A: Yes.

Q: Do you think it is a little odd that the only institution that does not take seriously what is said in Supreme Court opinions is the Supreme Court itself?

A: (A smile).

As I later reflected upon this "perfect" demonstration, its excellence faded. Professor Jones is surely right in emphasizing that, in constitutional as well as in statutory adjudication, as the text "gets older and interpretative materials accumulate, the focus of professional and judicial attention shifts from the . . . text and history to the judicial precedents. Argument in a case now centers not on the text . . . but on the norm to be derived by analysis and synthesis of the judicial precedents."² Thus, inferior tribunals, lawyers, professors, and law students have little practical alternative but to take seriously not only what the Supreme Court does but also most of what it says in support of what it does.³ But the way in which the Supreme Court or its individual Justices should view the precedents presents questions of a different order. Although the matter is not problem-free, general agreement exists that openness and candor should accompany any effort by the Court to abandon or

2. Jones, *The Brooding Omnipresence of Constitutional Law*, 4 VT. L. REV. 1 (1979). I have criticized Professor Jones for what I believe to be his excessive assimilation of common law to constitutional adjudication. Monaghan, *Professor Jones and the Constitution*, 4 VT. L. REV. 87 (1979).

3. When the Supreme Court "does" but "sayeth not," as in cases of summary affirmance, different problems are involved. Although these dismissals are rulings on the merits so far as they reject specific challenges and leave the judgment appealed from undisturbed, they lack the precedential value — at least to the Supreme Court itself — of a formal opinion. They represent only that the judgment appealed from was correct as to those federal questions raised; they do not represent the Supreme Court's agreement with the lower court opinion. See *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, 476 n. 20 (1979); cf. *Mandel v. Bradley*, 432 U.S. 173 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975) (precedential effect of Supreme Court summary affirmances on lower courts). Similar problems exist when a majority opinion is lacking. The stare decisis effect of cases in which the majority agrees upon the result but not upon the supporting reasoning is discussed in Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956) [hereinafter cited as *Supreme Court No-Clear-Majority Decisions*].

cut down its earlier pronouncements.⁴ The Burger Court has received hard but justifiable criticism on this score in a wide variety of contexts, ranging from its narrowing of the *Miranda* doctrine⁵ to its holding that state-authored "defamation," standing alone, does not implicate any "liberty" interest protected by the fourteenth amendment.⁶

Beyond considerations of judicial candor the problem becomes more complicated. The question of the appropriate internal authority of the Court's opinions — their stare decisis effect — is not resolved by the observation that other tribunals are bound.⁷ Indeed, the received tradition among most Justices and commentators denies that members of the Court are or should be meaningfully constrained by stare decisis. The code phrase often attached to such a position is that stare decisis has "less weight" in constitutional cases,⁸ which usually means that stare decisis has no weight when the constitutional law on a particular subject seems, to a majority of the Court, to be in need of correction.

4. This subject is far more complicated than the single sentence in the text suggests, but it is beyond the compass of this paper. The techniques employed by the Supreme Court to overrule precedent are discussed in Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211. Professor Israel explains that precedent is generally overruled on the basis of either changed conditions, the lessons of experience, or the existence of inconsistent precedent. *Id.* at 219-26. Precedent may also be overruled by reexamination and reinterpretation of the basis for the earlier decision. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for example, the Court reexamined the legislative history upon which it had relied in *Monroe v. Pape*, 365 U.S. 167 (1961), and found its earlier reading was faulty. For a collection of cases and materials discussing the occasions upon which the Supreme Court has overruled prior decisions, including a discussion of the judicial discretion that leads to overruling, see Blaustein & Field, "*Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 154-56 (citing other studies), 184-94 (table of overrulings) (1958).

5. The Burger Court's approach to a strict construction of the *Miranda* doctrine is critically analyzed in Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, in which Professor Stone observes that "In its unyielding determination to reach the desired result, the Court has too often resorted to distortion of the record, disregard of the precedents, and an unwillingness honestly to explain or to justify its conclusions." *Id.* at 169.

6. *Paul v. Davis*, 424 U.S. 693 (1976), criticized in Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 424 (1977) [hereinafter cited as *Of "Liberty" and "Property"*]. For additional criticism, see sources cited *id.* at 424 n.131.

7. I recognize that stare decisis also embraces questions relating to the attitude of hierarchically inferior courts to precedent, but that aspect of the problem is beyond the scope of this article.

8. This phrase is often accompanied by an excerpt from Justice Brandeis' dissenting opinion in *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932): [I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of

This willingness to abandon stare decisis is not adequately accounted for by the explanations usually advanced: the half-believed platitude that the only "correct" rule of decision is "the constitution itself, and not what we [the Court] have said about it,"⁹ the indiscriminating assertion of a social and political need to discover the "correct" constitutional rule in *every* case,¹⁰ or the legislature's inability to overrule the "erroneous" decision through the ordinary political processes.¹¹ At least among commentators, the level of indifference towards (or indeed distaste for) stare decisis has its real roots elsewhere. In part it is a function of the substantive constitutional philosophy endorsed by each commentator. Those who, like Professor Tribe, avow that the key constitutional clauses are "open-textured" and "unfolding" recognize the self-defeating nature of any insistence upon stare decisis.¹² This is, a fortiori, true for those who view the Supreme Court as "physician" responsible for the ongoing care of a "living," one hopes "robust," patient (the Constitution); they can hardly be expected to welcome the bony fingers of the past's dead hand around the patient's throat. Moreover, stare decisis is simply an unwelcome nuisance for the commentators whose concerns center upon the outer boundaries and

better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

See, e.g., *United States v. Scott*, 437 U.S. 82, 101 (1978). For a collection of cases and authorities discussing stare decisis and constitutional decisionmaking, see Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 20 TEMP. L.Q. 503, 506-12 (1947), and authorities cited in Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 984 n.68 (1935). In a Cardozo Lecture, condensed for publication in the *American Bar Association Journal*, Mr. Justice Douglas observed that "Justices who in their private practice . . . advise[d] clients with large property interests have been the strongest adherents to *stare decisis* and former legislators and schoolmen . . . [have been] least influenced by it." *Armstrong, Mr. Justice Douglas on Stare Decisis: A Condensation of the Eighth Cardozo Lecture*, 35 A.B.A.J. 541, 543 (1949).

9. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

10. Surely some aspects of some constitutional provisions are not of substantial social importance. In my opinion, decisions construing the seventh amendment's right to trial by jury, as well as many of the decisions interpreting the double jeopardy clause lack the social importance necessary to justify a departure from stare decisis on this ground.

11. *See, e.g.,* *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

12. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1-2 (Supp. 1979). *See also* E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 59-60 (1949); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-37 (1949). But see the efforts by former Justice Goldberg, a Justice who viewed the key clauses as "open-textured," to protect the expansive holdings of the Warren Court with a strong theory of stare decisis. A. GOLDBERG, *EQUAL JUSTICE: THE WARREN COURT ERA OF THE SUPREME COURT* (1971).

expanding territories of constitutional law. Because these scholars do not believe that any of their favorite constitutional edifices will be torn down, they are intent upon rationalizing the remainder of the subject according to their individual beliefs. That process necessarily involves some overruling, and these commentators are willing to abandon stare decisis for the opportunity to lodge their own constructions within the Court.

More fundamentally, the minimal role of stare decisis in constitutional cases reflects the corresponding weakness of the doctrine in common law adjudication. Dean Levi posits that the American doctrine of stare decisis permits a court to realign prior cases in terms of the material facts as it sees them; the precedent-setting court's view of the material facts, the controlling rules, or the operative theories are not binding upon the non-precedent court.¹³ Dean Levi surely captures the essence of the professorial attitude toward cases. Professors have, for many years, astonished students with their perceptive rerationalizations of the cases. What student has not thrilled to "Don't these cases *really* reflect . . ." or some similar incantation?¹⁴ Even if Dean Levi did not accurately describe the attitude of judges thirty years ago, he would surely find many companions among the new breed of social engineers who are assuming judicial office in increasing numbers. Moreover, these judges are quite comfortable simply overruling precedents which they are unable to rerationalize.¹⁵ It is only slight exaggeration,

13. E. LEVI, *supra* note 12, at 1-4. This "flexibility" in the application of precedent had been previously recognized by Max Radin in a 1933 article. Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933). Radin, however, apparently believed that the rule, not the facts, constituted the precedent. *Id.* at 210.

14. At least one practitioner has blamed the methods of teaching in our law schools, coupled with the presence of academics on the bench, as factors in the decline of the status of precedent. See Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied*, 21 WASH. L. REV. 158, 169-70 (1946).

15. For those judges who can so easily overrule precedent, any significant claims stare decisis may impart can be accommodated through the device of prospective overruling, a position advanced by Kocourek & Koven, *supra* note 8. By limiting an overruling decision to prospective effect only, "the courts can, without any reluctance, overrule those precedents which do not meet the standards and requirements of contemporary society," *id.* at 973, while they preserve the virtues of traditional stare decisis: certainty, stability, and order in society, *id.* at 972-73. The Supreme Court has made extensive use of the technique of overruling prospectively except for the case before it in cases concerning criminal procedure. *E.g.*, *United States v. Peltier*, 422 U.S. 531 (1975). See also *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973) (state court not constitutionally compelled to make new construction of statute retroactive).

therefore, to say that, in the common law area, stare decisis is no longer a justificatory doctrine. Rather, it is simply an expository style or technique which impels a court, so far as practicable, to "place the situations they are judging within the generalized class of some existing decision."¹⁶

The weakness of stare decisis in the common law area is not simply a reflection of rapidly accelerating social and economic change. It is also a function of pervasive and deeply felt intellectual currents. Since the seventeenth century the western world has witnessed an apparently inexorable decline in beliefs of permanence with respect to any form of social or intellectual ordering, a decline which has accelerated sharply in this century.¹⁷ In the United States, this decline has been sharply reinforced by the emergence and dominance of pragmatism in philosophy and its jurisprudential handmaiden, "pragmatic instrumentalism."¹⁸ These developments generate an attitude that in each case the "law must be argued for,"¹⁹ with the inevitable result that any appeal to authority possesses little innate attractiveness.²⁰ And if stare decisis cannot

16. Radin, *supra* note 13, at 212. See R. WASSERSTROM, *THE JUDICIAL DECISION* 50-53 (1961) (discussing and criticizing this liberal view). The most provoking illustration for the proposition that stare decisis, at least in the common law area, is merely a matter of expository style or technique, is Karl Llewellyn's iconoclastic list of sixty-four different ways to handle precedent. K. LLEWELLYN, *THE COMMON LAW TRADITION* 75-91 (1960). Llewellyn's list has been summarized as comprising "eight ways to follow but constrict a precedent, eight to stand by it, thirty-two to expand it, twelve ways to avoid it and four to kill it." Wise, *The Doctrine of Stare Decisis*, 21 WAYNE ST. L. REV. 1043, 1051 (1975). Professor Wise's article presents a more reverential attitude towards the role of stare decisis in our society.

17. *E.g.*, F. BAUMER, *MODERN EUROPEAN THOUGHT, CONTINUITY AND CHANGE IN IDEAS 1600-1950* (1977); Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831, 851-60 (1978).

18. "Pragmatic instrumentalism" has been described as America's dominant philosophy of law. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978). Professor Summers characterizes the instrumentalists as theorists who "reacted against formalism, conceptualism, and narrowness in analytical jurisprudence and in substantive law. They conceived of law not as a formal system or an inert matter but as a goal-directed activity designed to resolve or alleviate problems of group life." *Id.* at 433. Law, as viewed by the instrumentalist becomes "far more than a mere source of structured or conceptual issues in which jurists . . . may deploy their tools. Goals for law, how law is made, the way it works, its effects, how it changes and its potentialities and limits" become the objects of jurisprudential study. *Id.*

19. *Id.* at 441.

20. Presumably, this modern philosophy of law prevents the preservation of precedent by a generalized appeal to authority. Rather, precedent will only prevail where there is a concrete, focused analysis on the "disadvantages of making [the particular] change." Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12 (1966).

maintain its grip on the common law system which spawned it, can there be any wonder that it has fared still worse in the high-pressure atmosphere of constitutional law?

But what of those of us who have a relatively narrow view of judicial authority under the Constitution, particularly those of us who would assign determinative weight to original intent, modestly conceived, in interpreting constitutional provisions? Can we too ignore the claims of *stare decisis*? I would very much doubt that any amount of reflection will convince me to embrace such a view, for its consequences are, for me, potentially far too destabilizing.²¹ For example, regardless of the propriety of the original determination that voting in state elections is an interest protected by section one of the fourteenth amendment²² or that the provision imposes the substance of the first amendment upon the states,²³ each of these determinations is far too deeply embedded in the constitutional order to admit of reassessment.²⁴ I do not think that an individual appointed to the Court could responsibly base his vote, in relevant cases, on the theory that only the national government is bound to respect free expression or the theory that the fourteenth amendment was never intended to reach suffrage qualifications.²⁵ Nor — although this is a different issue — could *five* Justices responsibly so decide, although a solid case on the merits could be made if these matters were considered *de novo*. History has its claims, at least where settled expectations of the body politic have clustered around constitutional doctrine.

21. For the — to my mind doubtful — suggestion that the lack of effective *stare decisis* in constitutional cases blurs any distinction between a written and unwritten constitution, see Brown, *Construing the Constitution: A Trial Lawyer's Plea for Stare Decisis*, 44 A.B.A.J. 742, 743 (1958).

22. *Baker v. Carr*, 369 U.S. 186 (1962).

23. *Gitlow v. New York*, 268 U.S. 652 (1925).

24. Like Dean Griswold, "I fear that I am so unreconstructed, that I shall never understand" how the fourteenth amendment can be extended and applied to these areas. Griswold, *The Judicial Process*, 31 FED B.J. 309, 315 (1972). Dean Griswold's comments were made with respect to the first amendment.

25. For this reason, Justice Harlan's opinion in *Oregon v. Mitchell*, 400 U.S. 112, (1970) has always struck me as among the most interesting in constitutional law. Justice Harlan cast a fifth vote against a congressional act lowering the voting age in state elections to eighteen. Most of his elaborate opinion was designed to show that voting was not an interest protected by section one of the fourteenth amendment, a position which I think is historically correct as a matter of the Framers' original understanding, but which seemed foreclosed by a long and unbroken line of Supreme Court authority. Justice Harlan admitted this and conceded that if he followed authority he would have felt constrained to uphold the act. *Id.* at 152 (Harlan, J., concurring in part and dissenting in part). Nonetheless, he devoted but a few

Hard problems of stare decisis also exist for me at a more modest level. The shopping center picketing case illustrates my difficulties.²⁶ Whatever the soundness of the initial holding that picketing at privately-owned shopping centers is constitutionally protected activity, the propriety of subsequent decisions strangling and then interring that holding quite plainly pose questions of a different order.²⁷ *Roe v. Wade*²⁸ presents a similar issue. While I think the case incorrectly decided,²⁹ I would be reluctant now to disturb its authority (passing here the question of the scope of that "authority").

The Court's decision last term in *Lalli v. Lalli*³⁰ presents a paradigmatic illustration of some of my concerns. *Lalli* typifies the frequent judicial failure to consider or disclose how precedent should be handled in a particular case. By a five-to-four vote, the *Lalli* court rejected the claim that an intestacy statute requiring illegitimate children to present specific proof of paternity in order to inherit from their fathers violated the equal protection clause of the fourteenth amendment.³¹ The dissenting Justices found this decision directly in conflict with the "reasoning" of *Trimble v. Gordon*,³² a case decided only two terms earlier. Finding no reason to retreat from the *Trimble* decision, the dissenters asserted that the requirements of the statute at issue in *Lalli* also violated the equal protection clause.³³ Justices Blackmun and Rehnquist cast two of five votes for upholding the statute, apparently on the simple and unexplained basis of their

paragraphs to the claims of stare decisis, ultimately rejecting it on this "fundamental" matter. *Id.* at 218-19. I think he was mistaken on this point. I have grave doubt that a judge should cast a deciding vote on the basis of a theory, however historically correct, that is not only unacceptable to his own colleagues but which is unlikely to be acceptable to any future justice. See Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 129 n.61 (1978) [hereinafter cited as *The Constitution Goes to Harvard*].

26. *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

27. *Hudgins v. NLRB*, 424 U.S. 507 (1976), recounts the story. See generally Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387, 398-400 (1979).

28. 410 U.S. 113 (1973).

29. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

30. 439 U.S. 259 (1978).

31. *Id.* at 275-76.

32. 430 U.S. 762 (1977). See 439 U.S. at 277 (Brennan, J., dissenting). In *Trimble*, the Court had invalidated an intestacy statute requiring paternal acknowledgment and marriage of the parents as preconditions to paternal inheritance by illegitimates.

33. 439 U.S. at 279.

rejection of *Trimble*.³⁴ Justice Powell, writing for himself, Chief Justice Burger, and Justice Stewart, provided what, to my mind, was an acceptable basis for distinguishing *Trimble*.³⁵ In so doing, he completely rerationalized *Trimble's* decisive elements, thereby providing a textbook illustration of Dean Levi's common law judge.³⁶ What is deeply unsettling about the attitude of the Justices of the *Lalli* majority toward the Court's earlier precedent is their apparently unconscious and certainly unarticulated assumptions about the appropriate role of precedent in constitutional adjudication.

I recognize that the problem is a complicated one, and that in any adequate theory of stare decisis questions relating to the criteria for overruling a precedent will shade into consideration of what constitutes a "precedent" for purposes of the theory.³⁷ Still, the

34. Justice Blackmun found very little value in the *Trimble* decision. He regarded it "as a derelict, explainable only because of the overtones of its appealing facts and offering little precedent for constitutional analysis of state intestate succession laws." *Id.* at 277 (Blackmun, J., concurring).

35. Justice Powell noted that the statute at issue in *Trimble* required paternal acknowledgment and legitimation of the child through the parents' marriage, while the statute with which the Court in *Lalli* was concerned required only that the paternity of the father be declared in a judicial proceeding sometime before his death. *Id.* at 266-68. Justice Powell had also written the majority opinion in *Trimble*.

36. See notes 13 to 16 and accompanying text *supra*. Dean Levi, it should be emphasized, insists that stare decisis has no role to play in constitutional adjudication. See E. LEVI, *supra* note 12, at 41. For another example of judicial "rerationalization," see the discussion of *Paul v. Davis*, 424 U.S. 693 (1976), in *Of "Liberty" & "Property"*, *supra* note 6, at 423. There, this author observed that the Court's rerationalization of earlier cases recognizing the standing of a plaintiff to complain about governmental defamation was "startling to anyone familiar with those precedents," *id.* at 424, and urged that "[f]air treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy," *id.*

37. In contexts other than constitutional law, widely divergent concepts of what constitutes a precedent have been advanced: a principle based on the material facts as they are viewed by the precedent court, see Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930), or by the nonprecedent court, Levi, *supra* note 12, at 2; the "rules" formulated by the precedent court, see Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117, 121 (1959) (commenting on this misnamed "classical" theory of binding precedent); and the reasons given for the rules formulated, cf. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification*, 63 CORNELL L. REV. 707, 730-32 (1978) (the precedent consists of "nothing less than facts, issues, ruling, and substantive reasons for those rulings.").

The contrasting implications among these diverse concepts of precedent are significant. For example, to view stare decisis as requiring identical decision only upon identical material facts as they are seen by the nonprecedent court, the position taken by Dean Levi with respect to common law cases, is to impose little constraint by the doctrine. Stare decisis, so loosely understood, leaves the nonprecedent court free to avoid the bonds of preceding cases by recasting their material facts or assigning reasons to the prior decisions quite distinct from those originally assigned. With this leeway, courts will seldom be faced with the necessity for explicit overruling.

crucial point is that any conception of stare decisis should, at the minimum, be consciously and articulately held. Beyond that, we need considerable discussion of the appropriate role for precedent in constitutional cases.³⁸ I hope that the present academic concern with fundamental issues in constitutional theory will include serious consideration on this subject.³⁹

Although contrary to the conventional wisdom, perhaps a version of the doctrine of stare decisis much stronger than that which now exists in the common law may be maintained in at least some areas of constitutional law. Professor Tribe's challenges *in limine* to any effort at formulating an adequately principled doctrine do not seem to me insurmountable. Professor Tribe argues that any use of stare decisis is necessarily contentless and subjective — it is a "discretionary" doctrine inevitably employed "as a means of selectively leaving in place just those decisions the commentators think wrong but whose overruling even they find unthinkable."⁴⁰ Although this observation has force, no reason exists to assume it a priori. Professor Tribe also asks, "[i]f the decisional cornerstones of the past are to be preserved, does not principled adjudication force also a preservation of the open-ended modes of interpretation that

38. The need for a recognized, articulated conception of stare decisis also exists in the area of statutory construction. In *California v. United States*, 438 U.S. 645 (1978), for example, a divided Court rejected its prior, concededly decisive, constructions of the Reclamation Act of 1902, and adopted a view of the statute which, by disavowing dictum in the earlier cases, preserved the "factual" holdings of those cases. Commenting on what was in reality a plain disregard of precedent, Justice White noted that:

Our cases that the Court now discards are relatively recent decisions dealing with an issue of statutory construction and with a subject matter that is under constant audit by Congress Only the revisionary zeal of the present majority can explain its misreading of our cases and its evident willingness to disregard them.

Id. at 692 (White, J., dissenting). Justice White went on to advise that until Congress disturbs the previous cases, the Court should respect them. *Id.* Compare the Court's actions in this case with *LEVI*, *supra* note 12, at 27-47.

39. Professor Howard Ball has made a shallow effort to consider the appropriate role of precedent in constitutional cases. See H. BALL, *JUDICIAL CRAFTSMANSHIP OR FIAT?* (1978). It contains such insights as "an opinion that overturns an earlier precedent must be well written [sic], thoroughly thought out, and based on an understanding of the fundamentals of the American legal system." *Id.* at 225. For thoughtful analyses of various aspects of stare decisis, see Brillmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV L. REV. 297, 302-10 (1979); Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 1294 (1966); Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 49 U. CHI. L. REV. 636, 679-88 (1979); Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972).

40. L. TRIBE, *supra* note 12, at 2, criticizing *The Constitution Goes to Harvard*, *supra* note 25.

such decisions inescapably embodied?"⁴¹ Surely this statement is open to challenge. Apart from the now discredited *Lochner* line of cases,⁴² how many decisions openly avow "open-ended modes of interpretation"? In virtually every case, the Court makes an effort — often strained — to disclaim any such authority by finding an acceptable textual home for its results. In the face of the current explicit challenges to its authority to proceed in an "open-ended" fashion, the Court surely cannot invoke *stare decisis* as having established the propriety of the very authority the Court has so persistently denied.⁴³

41. *Id.*

42. *Lochner v. New York*, 198 U.S. 45 (1905). These cases "are now universally acknowledged to have been constitutionally improper." Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 415 (1978) [hereinafter cited as *Constitutional Interpretivism*].

43. General agreement exists that, whatever the intention of its framers and ratifiers, the fourteenth amendment fastens most of the values contained in the Bill of Rights upon the states. The controversial issue, however, is the extent to which the amendment authorizes judicial resort to values not referable to the constitutional text or the structure it creates. Strongly held positions bearing on that question have emerged. They range from Raoul Berger's view that section one was initially designed for the very limited, narrow purpose of guaranteeing racial equality with respect to certain specified civil (not political or social) rights, such as the rights to contract and to hold property, see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 18-19* (1977), to that of Professor Tribe, who reads the amendment as validating a broad range of nontextually based rights, including affirmative claims against the government for minimally adequate levels of housing, welfare, and medical assistance, see L. TRIBE, *supra* note 12, at 1116-36 (1978). Both of these views, including the role of original intent in constitutional interpretation, are discussed in *The Constitution Goes to Harvard*, *supra* note 25.

In a series of articles, Professor John Hart Ely advances a middle position. Professor Ely argues that the fourteenth amendment sanctions careful judicial scrutiny of legislation which bears heavily and unequally upon those underrepresented in the political process. But Professor Ely emphasizes the intertwined defects in judicial efforts at the formulation of fundamental rights, values, or principles that lack a solid grounding in the constitutional text. All such efforts inevitably reduce themselves to nothing more than the imposition of judicial value preferences on the political organs of government. See Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); *Constitutional Interpretivism*, *supra* note 42; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, *supra* note 29. Moreover, any such judicial conduct conflicts with the core institutional settlement embodied in the Constitution and reinforced by its amendments, namely, the scheme of representative government, which assigns policy-making functions to the political organs of government. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, *supra*. These objections to judicial value imposition seem to me insurmountable, given my belief that no satisfactory evidence exists to show that judicial development of a *lex non scripta* reflects the purpose of either the drafters or ratifiers of the eighteenth century Constitution or of the Civil War amendments. For further elaboration, see J. ELY, *DEMOCRACY AND DISTRUST* (1980).

My purpose here is not to advance a comprehensive theory of the appropriate role of stare decisis in constitutional cases. I need far more time for study and reflection to make that effort, even in tentative form. Suffice it to say that if the doctrine of stare decisis is to have any viability in constitutional cases — an open question — I think it will have to be entirely detached from any dependence upon common law analogies,⁴⁴ both in terms of the meaning of a “precedent”⁴⁵ and in terms of the justifications for modification or overruling.⁴⁶ I suggest here, however, that *before* one can theorize about the possible content of the doctrine, one must first consider what, if any, underlying conditions are supposed for the development of *any* theory of stare decisis. Stated in general terms, one must consider the extent to which stare decisis possibilities are affected by factual and normative premises concerning the nature of the appellate judicial process. For I think it plain that the non-precedent court will evaluate the precedents, current or distant, against some conceptions of how a court works or the precedent-setting court worked. Although these conceptions will often be well below the level of the consciousness, they will be present.

II.

We are concerned here with some generally unnoticed suppositions made in connection with the decisionmaking behavior of multimember judicial tribunals. The most important of these is the assumption that “opinions of the Court” have a collective character, that is, that they represent the shared view, in all points of significance, of those who join in the opinion. That assumption, in turn, rests upon the further, process-oriented premise that the

44. The English doctrine seems particularly inapposite at this point. The concerns it reflects were developed with an eye on the fact that until midway through this century, the House of Lords disclaimed any authority to overrule its precedents. This strict adherence did not result in any serious consequences because Parliament could swiftly correct judicial errors. Ellenbogen, *supra* note 8, at 504.

45. In constitutional cases, the Court seems to view the “precedent” as involving at least the “rules of law” adopted by the majority. *E.g.*, *Hertz v. Woodman*, 218 U.S. 205, 213 (1912). See *Supreme Court No-Clear Majority Decisions*, *supra* note 3.

46. To the extent that stare decisis has been thought to have a role in constitutional cases, writers have suggested adherence to the doctrine by invoking interests similar to those protected by stare decisis in common law adjudication. Interests such as the protection of property expectations, the general desire for certainty, and the need for uniformity have been advanced in support of observing stare decisis in both areas of the law. See Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 HARV. L. REV. 125, 130-31 (1889); Ellenbogen, *supra* note 8, at 504-06.

internal operations of appellate tribunals are so structured that a collective interchange among the court's members can occur; we believe, that is, that the appellate process is one which affords room for a "maturing of collective thought."⁴⁷ In easy cases, the maturation process is relatively instantaneous, for the correct answer is quickly apparent; in hard cases, the maturation process occurs more slowly as the need for an interchange of views increases. The paradigm is the three-judge court, in which the court is assumed to issue opinions only after the requisite interchange of views among its judges. And the existence of concurring and dissenting opinions in these tribunals further reinforces the common view that the court operates within a framework which encourages and stimulates interchange among its members.

Our "classical" process assumptions will at any particular moment only partially reflect reality. The clearest indication of this fact is the extent to which any current batch of appellate court law clerks is struck by the disparity between their assumptions of how appellate courts decide cases and how the cases are in fact often decided. Their awakening is expressed not only through specific discussion, but in the law clerks' scarcely concealed amusement that their (once) esteemed professors write articles intended to influence the development of the law by the courts. Of course, we prepare students badly with regard to the premises of the classical model, for they bring to their courts the assumption that reasons must *precede* the court's initial "judgment" rather than follow it, thereby ignoring the distinction between the process of justifying a decision and its accompanying psychological states.⁴⁸ Nonetheless, a portion of what the clerks see — for example, vote trading and judicial indifference — is not reconcilable with the classical mode of how appellate courts should work. Still, I am struck by the tenacity of the classical model. Its behavioral assumptions are widely shared. For me the clearest illustration is, once again, the apparent attitude of law clerks after

47. Curiously, as Professor White observed with reference to the work of legal scholars in the 1950's, Henry Hart seems to be the first modern commentator to emphasize the concept of an opinion as reflecting a "maturing of collective thought." White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-87 (1973). However, Justice Jackson made a similar point on the importance of the collective character of judicial opinions in a 1944 article. See Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334, 335 (1944).

48. R. WASSERSTROM, *supra* note 16, at 25-27, admirably deals with this distinction. See also Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 991 (1978).

they enter into practice or become law teachers. Most of their cynicism is gone. How frequently they say — “What did the *court* mean here? How could the court have said that? How could Justice X have joined that opinion in view of what he said in . . .?”

I accept Justice Jackson's view that “the first essential of a lasting precedent is that the court or majority that promulgates it be fully committed to its principles.”⁴⁹ My concern is with the institutional patterns of Supreme Court opinion-making. Do these patterns, realistically viewed, in fact deter judicial commitment to promulgated principles? We frequently emphasize the Supreme Court's relative institutional superiority over the other organs of the national government in developing a stable, coherent body of constitutional law. The life tenure of its members, their insulation from the political process, and the judicial procedure for examining and deciding questions and recording the results all contribute to this superiority.⁵⁰ The written opinion is both the embodiment and symbol of these advantages. However, we tend to ignore the question whether the Supreme Court labors under unique structural disadvantages that impair the classical premise that its members share the significant points announced in the “opinion of the Court.” Put differently, the question is this: Even assuming the Supreme Court opinions are adequately principled, given the manner in which opinions are in fact formulated, to what extent should they be viewed as containing anything more than the principles of their writers?

The problem may be framed in a different, and perhaps clearer, historical context. Professor Fairman in his study of the Reconstruction Court provides the following description of the Court's internal operations:

After docketing, a case would wait some two or three years before in turn it was called for oral argument

While this waiting was too long, the process of consideration was too cursory. Ordinarily the interval between argument and announcement of the decision was about a month; sometimes it was even less. When a session lasted about seventeen weeks, more or less, opinions must be turned out with dispatch. Ordinarily the Court would discuss and vote on a case on the Saturday next after argument. The Justice to whom it was assigned would write his opinion, over say two or three weeks.

49. Jackson, *supra* note 47, at 335.

50. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 82 (2d ed. 1973); Monaghan, *First Amendment Due Process*, 83 *HARV. L. REV.* 518, 523-24 (1970).

Then he would bring his manuscript to conference and his brethren would listen to his reading of it This practice gives pause: the other Justices would generally have no opportunity to read the opinion and to reflect upon the drafting. On a Saturday there would be a discussion and then a vote on cases theretofore undecided, plus the listening to prepared opinions. That statement “shows to a demonstration” (one of Justice Clifford’s phrases) that the Court as a body could not have scrutinized opinions to weigh the import of expressions and omissions. So long as the Justices were satisfied on the major points, the author was pretty free, one gathers, to choose his language. It follows that, as compared with what might be supposed, one is less warranted in attributing to the Court the very language used, and better entitled to treat the composition (for praise or blame) as showing the quality of the author. Evidently there was not a very high sense of corporate responsibility.

There might be dissent from the Court’s decision, or from a holding on some particular point; but individual notations of disagreement or doubt merely about implications or dicta were exceedingly rare.⁵¹

Given the process Fairman describes, the Reconstruction Court opinions cannot be meaningfully characterized as the end products of a process designed to achieve a “maturing of collective thought.” Quite obviously, members of the Court frequently would join an “opinion of the Court” the day it was read in conference simply because they “generally” agreed with its content. It is just as clear that this act could not commit the Justices to all that was said in the opinion and presumably the Justices so understood. A Justice could fairly insist upon not being bound by the opinion’s “dicta,” generously conceived, even if the lower courts and the Bar had far less running room in this regard. Indeed, a member of that Court — to say nothing of future Justices — might insist upon a distinction between the “holding” of the precedent case and its supporting rules, principles, or reasons — between *stare decisis* and *stare dictis* — and believe himself constrained only by the former.⁵²

51. C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88: PART ONE 69-70 (6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (P. Freund ed. 1971)) (footnotes omitted).

52. The distinction between *stare decisis* and *stare dictis* was used by Professor Oliphant to describe what he viewed as an unfortunate, yet fundamental, change in Anglo-American law — “a shift from following decisions [*stare decisis*] to following so-called principles [*stare dictis*].” Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 72 (1928) (*stare decisis* involves a narrow rule covering the instant fact situation and at least one other).

Similar inquiries are in order with respect to the current behavioral characteristics of the Supreme Court. How does the Court operate in the formulation of opinions? This question, in the realm of behavioral science, is one to which tentative answers can be offered. The harder question is one of theory. Do we care? Our tradition is to view the "opinion of the Court" as reflecting some measure of collective agreement. To what extent is this premise (and its supporting classical model) a factual or a normative construct? To the extent that the Supreme Court's actual behavior in the formulation of opinions departs from the classical model, may its members discount heavily much of what is contained in the "opinion of the Court" even if no similar discount is appropriate elsewhere in the profession? I am ready to suggest some tentative answers, factual and normative.

III.

The inquiry might usefully start by noting the obscuring character of the considerable recent controversy, erupting within the Supreme Court itself, which has focused on what the Court is *not* able to do. Repeated suggestions have been made that the sheer volume of decisions demanding authoritative resolution necessitates the creation of a new intermediate court.⁵³ "It is not a healthy situation," Chief Justice Burger recently said, "when cases deserving authoritative resolution must remain unresolved because we are currently accepting more cases for plenary review than we can cope with in the manner they deserve."⁵⁴ The obscuring character of the current concern over what the Court is not doing lies in the fact that it has deflected attention from an older and, to my mind, more central concern. Is the Court doing too much (as well as too little) in its efforts to dispose of "cases deserving of authoritative resolution?"

Long ago Henry Hart argued that the Court was "trying to decide more cases than it [could] decide well," with the result that many opinions not only failed to "genuinely illumine," but indeed, failed "even by much more elementary standards" of craftsmanship.⁵⁵ Professor Hart thought that the Court's excessive output

53. See, e.g., *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1028-30 (1978) (Chief Justice Burger, dissenting from a denial of certiorari proposes that Congress create a "National Court of Appeals" to ease the workload of the Supreme Court).

54. *Id.* at 1025.

55. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1958).

impaired the reasoned quality of its opinions; there was, he said, insufficient time for the opinions to reflect the "time consuming process" needed for a "maturing of collective thought."⁵⁶ Judge Thurmond Arnold immediately responded with a heated defense of the quality of the Court's opinions.⁵⁷ More fundamentally, however, he rejected Hart's belief that "reason would replace the conflicting views now present on the Court if the Court had more time for 'the maturing of collective thought.'"⁵⁸ "There is no such process as this," he said, "and there never has been; men of positive views are only hardened in those views by such conferences."⁵⁹ The professor-turned-judge chided the professor for advancing a model of judicial decisionmaking perhaps appropriate for a court "found in a Trappist monastery," but one wholly inappropriate for the Supreme Court. That Court, he said, "is made up of men of deep-seated convictions in times of revolutionary change when an old order is giving place to a new. It is just that simple."⁶⁰

The differences between Judge Arnold and Professor Hart can be explained, in part, by their differences over the nature of judicial power in constitutional cases. While both assumed the propriety of judicial resort to nontextually based "impersonal and durable principles," Judge Arnold entertained a vastly more freewheeling, open ended conception of judicial power to act "in times of revolutionary change," a conception that at times makes the place of reason in constitutional adjudication unclear.⁶¹ More basic, perhaps, is Arnold's implicit challenge to Hart's institutional comparison between the Supreme Court and "ordinary" appellate courts. One

56. *Id.* A similar observation had been earlier made by Justice Jackson: [T]he increased volume of opinion affects the intrinsic value of many precedents They are made of baser metals when the pace is fast and the volume large You know that legal writing has no kinship with journalism [I]t is slow writing, that the best of it needs clarification by the candid and critical collaboration of several minds.

Jackson, *supra* note 47, at 335.

57. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960). It is interesting to note that Justice Douglas took what may be euphemistically characterized as the astonishing view that the Justices enjoy "vast leisure." See *Tidewater Oil Co. v. United States*, 409 U.S. 151, 178 (1972) (Douglas, J., dissenting).

58. Arnold, *supra* note 57, at 1312 (quoting Hart, *supra* note 55, at 100).

59. *Id.*

60. *Id.* at 1313.

61. *Id.* at 1311-13. Judge Arnold warns that if Professor Hart had ever tried to hold together a majority for a given opinion, "[h]e would find that men can sometimes agree on a result, but rarely on all of the reasons for that result, and that attempts to spell out reasons may be futile." *Id.* at 1312.

could, of course, emphasize the differences stemming from the nature of the issues over which the Supreme Court has final responsibility, surely an important factor in any comparison between the Supreme Court and other appellate courts. But I am not convinced that the nature of these issues is a crucial difference. Some attention should be focused on Hart's premise that in its internal processes the Supreme Court does not differ markedly from an "ordinary" appellate court, and accordingly, like any such court its opinions should be the end result of an adequately structured deliberative process.⁶²

Hart's formulation, attractive though it be as a conception, lacks clarity, for its mechanics are never defined.⁶³ At certain points, Hart can be read as portraying the Supreme Court as a never-ending graduate seminar in which, by dint of hard and vigorous debate, a consensus on fundamentals is reached.⁶⁴ Judge Arnold so interprets Hart when he asserts that "men of positive views are only hardened in those views by such *conferences*,"⁶⁵ and when he feigns despair at the prospect of being locked in a room with Hart to achieve a "maturing of collective thought."⁶⁶ In such a graduate seminar model, opinions that reflect the maturation process are periodically issued on behalf of seminar members. Such a model seems far too idealized to describe the way in which any appellate court of last resort generally functions; in any event it surely is not an accurate description of the Supreme Court's processes, at least not since Chief Justice Marshall and his five associates shared common lodgings. Indeed, the available data suggest a very different model of the Court's current internal practice. Recently, Justice Powell characterized the Court as an institution comprised of "nine small, independent law firms," and he noted that on occasion a Justice may not

62. Hart, *supra* note 55, at 100. (Collective thought "is the theory and the justification in principle of all collegial tribunals, and especially of tribunals of last resort.").

63. Hart's requirement that the opinions reflect "thought" need not detain us, for it simply restates the familiar and agreeable demand that the judicial opinion should be a form of rational thinking.

64. Professor Hart writes:

Ideas which will stand the test of time as instruments for the solution of hard problems do not come . . . in twenty-four hours Such ideas have ordinarily to be hammered out by a process of collective deliberation of individuals . . . who recognize that the wisdom of all, if it is successfully pooled, will usually transcend the wisdom of any.

Hart, *supra* note 55, at 100.

65. Arnold, *supra* note 57, at 1312 (emphasis added).

66. *Id.*

enter the chambers of some other Justices during an entire term of Court.⁶⁷ The idealized nature of Hart's formulation is further illustrated by *The Brethren*, which shows not surprisingly, the pulling and hauling among the Justices on many cases, with the end result that decisionmaking seems all too frequently a simple event, a show of hands, rather than a process of collective thought in any recognizable sense.⁶⁸

Although these perceptions are descriptive in nature, they might be thought to have ascriptive consequences. More specifically, these perceptions may be thought to import a rather weak conception of the nature of the collective agreement actually contained in an "opinion of the Court." I think that any such inference from these facts is mistaken. Justice Powell's stay-at-home attitude may be assumed to reflect, more or less, the physical behavior of all the Justices, but, as I shall show, the collective character of the opinion is adequately secured by other institutional mechanisms. *The Brethren's* "revelations" may be assumed to be descriptive of more than the idiosyncracies of members of the Burger Court; they probably depict a tendency inherent in a body which, being at the center of the intersection between law and politics, necessarily wields great power. The tendency toward substitution of will — "I have five votes, that is how I distinguish the contrary decisions" — for reason is one which can be, if not eliminated, at least constrained. That at least is the faith of all those off the Court who place so much confidence in the Court's capacity to act in a principled fashion. This confidence is, indeed, *the* fundamental premise of constitutional theorizing in this country. If this premise of reasoned decisionmaking is systematically rejected, constitutional adjudication is thereby excommunicated from the legal system as lawyers deal with it. Our legal traditions reject as a working premise the view, variously framed, that the rational form of judicial opinions simply masks nonrational imperatives, the origins of which are explicable in terms of economic factors, motivational psychology, sociobiology, or other determinants. Whatever the explanatory power of these approaches in other contexts, the legal order posits as

67. Address by Justice Lewis F. Powell, Jr., American Bar Association Annual Meeting (1976), excerpts reprinted in *What the Justices Are Saying . . .*, 62 A.B.A.J. 1454 (1976). Two years later, Justice Powell's former law clerk made similar observations. See WILKINSON, *SERVING JUSTICE — A SUPREME COURT CLERK'S VIEW* (1978).

68. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979). See also TIME, Nov. 5, 1979, at 60-64 ("Inside the High Court").

an article of faith that there are rational aspects to human decisionmaking which the adjudicatory process seeks to maximize through its systematic reliance upon devices such as pleadings, evidence, oral and written argument, appeals, and — of central concern — written opinions publicly exposed for criticism as to the adequacy of their reasoning.⁶⁹ Indeed, *The Brethren* unwittingly discloses how seriously the Justices take the rational and collective character of the Court's opinions.⁷⁰

Even if one rejects a purely "political" view (in the bad sense) of the Court, one must still ask whether, even with ideally disposed Justices, difficulties comparable to those faced by the Reconstruction Court⁷¹ so inherently limit any process of collective thought that the opinions should not be viewed as reflecting the shared views of all the Justices on their significant points? Two factors, both relating to size, immediately come to mind. The first is, of course, the sheer volume of the Court's business. The second is the size of the Court itself; a busy nine-member tribunal, each of whose members has a "little law office" of clerks and secretaries, simply cannot regularly function in the collegial fashion potentially open to a tribunal with fewer members.⁷² These factors make plain that we cannot expect the Court to "conference" about much of what it does. Still, no overriding difficulty is presented with viewing the opinions as reflecting some important shared agreement that is a result of an adequate deliberative process. For it is surely apparent that, in theory at least, one can detach the latter concept from any explicit or implicit graduate seminar model. Modern technology, particularly the typewriter, the photocopy machine, and the printing press, permit — probably for the first time since Marshall — a view of the Court's opinions as containing a "collective" expression. Even nine separate law offices can produce collective thought, not by talking, but by writing. Memoranda and draft opinions can be readily circulated and recirculated, and the process can achieve in a satisfactory manner the reflective interchange of views posited by

69. See Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay For Lon Fuller*, 92 HARV L. REV. 410, 411-23 (1978); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364-72 (1978); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 982-83 (1978).

70. Lewis, Book Review, N.Y. REV. BOOKS, Feb. 7, 1980, at 3, 4 (raising questions about the accuracy of the book).

71. See text accompanying note 51 *supra*.

72. Surely it is clear that size has process significance, as would be apparent were the Court's membership increased to twenty-five.

Hart.⁷³ Indeed, it is entirely probable that written exchanges of views are more productive to achievement of collective thought than are oral discussions; written exchanges offer the opportunity for time for lengthy reflective, careful second looks, synthesis of views with ideas that emerge later, and escape from the emotional pressure of face-to-face encounters. If, as Professor Amsterdam says, the Court's opinions are best viewed as the product of a "committee,"⁷⁴ his conclusion is clearly consistent with "a recognition that an opinion of the Court is the responsibility of the whole Court and not simply of the Justice who writes it."⁷⁵

There are, however, several features of the present opinion-drafting process, viewed at the behavioral level, which counsel against too expansive a view of what is meant by treating opinions

73. Indeed, a careful reading of Hart's *Foreword* makes clear that actual "seminar-like-conferences" played little role in his conception of the process behind a maturing of collective thought. See Hart, *supra* note 55, at 122-25. This is not to deny that more oral exchange is also necessary. See B. WOODWARD & S. ARMSTRONG, *supra* note 68, at 442-43.

74. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350 (1974). Professor Amsterdam admits to reading Supreme Court cases in the fourth amendment area "with the righteous indignation that only academics can consistently sustain." *Id.* at 349. However, he also finds that critics of the Supreme Court are not constrained by the institutional characteristics that make it difficult for the Court to produce a "coherent analytical framework." *Id.* at 350. Quoted at length, Professor Amsterdam explains:

[T]he Court is a committee. In various aspects of our social organization, decisionmaking power is given to committees rather than to single men because a committee is less likely to be despotic than a single man, and more likely than a single man to ponder all relevant considerations before coming to judgment. These characteristics of a committee are indispensable to the role that the Supreme Court plays in American government. But they have their price.

The wise joke that defines a camel as a horse drafted by a committee only begins to describe that price. Insofar as the Court observes — for excellent reasons — "series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision," and particularly the rule against deciding "constitutional issues . . . on a broader basis than the record . . . imperatively requires," the Court is in the unenviable posture of a committee attempting to draft a horse by placing very short lines on a very large drawing-board at irregular intervals during which the membership of the committee constantly changes. In addition, unlike most committees, the Court is expected to write a reasoned opinion explaining the placement of each of these short lines without unduly extending the lines so as to make perfectly comprehensible why, in its judgment, the resulting camel is a horse. You will appreciate, I think, that I question the entire fairness of a critic who rides merrily up upon his own horse and deprecates the Court's camel by comparison.

Id. at 351 (footnotes omitted). For illustrations of the "committee" character of some of the decisions, see B. WOODWARD & S. ARMSTRONG, *supra* note 68.

75. Hart, *supra* note 55, at 125.

as an embodiment of collective thought. To characterize the opinions as a "committee" product is only partially accurate. Any opinion "can be written in an infinite number of ways,"⁷⁶ and thus the opinion in any multimember court reflects the analysis, style, and use of supporting authorities of the opinion writer. "The subtleties may, and often do, express the meaning of the judge who wrote the opinion," observes Judge Schaefer. But, he cautions, "[t]hey do not in any realistic sense express the view of the Court as a whole."⁷⁷ An opinion, therefore, is a mix of individual and committee responsibility, and given the time and other pressures on the other Justices, I am reluctant on process grounds alone to charge each Justice with an excessively expansive view of "shared agreement." Perhaps the difficulty is met, for present purposes, by limiting the shared responsibility to "all points of significance" — leaving that purposely obscure formulation for future elaboration.⁷⁸

In addition to characterizing the scope of "shared agreement" in a written opinion, the concept of "all points of significance" provides a framework for dealing with the systemic difficulties in the Supreme Court's opinion-drafting process which result from the Court's work product. Hart is unanswerable in his insistence that the Court produces far too many opinions every term.⁷⁹ It is hard to give serious reflection to so many issues, even assuming that some issues are so easy that quick resolution would not impinge upon the values inherent in the process of collective thought. Justice White is surely correct in asserting that the Court simply cannot increase the volume of its written work.⁸⁰ The Court should, in fact, reduce the volume of its writings, particularly its opinions. Instead of taking that course, the Court presents us with an ever-increasing torrent of writing — from increasingly prolix "opinions of the Court," through long concurring and dissenting opinions, to elaborate individual opinions on such matters as dissents from denials of certiorari and

76. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 379-80 (1975). The Justices are well aware of this fact. See B. WOODWARD & S. ARMSTRONG, *supra* note 68.

77. Schaefer, *supra* note 20, at 9-10.

78. That term might be used to cover one or more of the following: material facts, rules, principles, doctrines, or reasons. Other possibilities certainly exist.

79. See note 55 and accompanying text *supra*.

80. Justice White made this assertion in his dissent from the denial of certiorari in *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1023. See notes 53 & 54 and accompanying text *supra*. For statistics as to the written workload of each Justice, see *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 327 (1978).

rulings on stay applications.⁸¹ The Court as a whole is, to my eye, insufficiently disciplined in these matters. The means (if not the cause) seems apparent — the vast increase in the number of available law clerks. To recognize that law clerks frequently draft opinions seems to me to prove little, for the ultimate responsibility is that of the Justices, not of the law clerks. There is only so much to which one can give serious attention, and most Justices produce far too much writing for me to feel comfortable with a view that they give serious attention to all that is issued bearing the Court's imprimatur.

Finally, the Court hears cases far too late in its term. If we are ever to avoid the incredible deluge of opinions at the middle and end of June, some statutory relief for the Court is necessary. The pressure to "get these out" inevitably produces well-known intellectual disasters in every term. Still, what does one do about that? No principled theory of *stare decisis* could allow for a heavy discount of "shared agreement" in opinions after June 1 of every term.

Taking the factors described above into account, I do not view the process of formulating opinions as so unstructured that a Justice could view an opinion as in no way representing collective thought; neither do I view it as so structured that all aspects of each opinion can be so viewed. Some accommodating line, such as the difference between holding and supporting principles, or between principles and "dicta," can be formulated between these extremes. I have suggested tentatively a line that process considerations at least leave open: the opinions may fairly be taken to represent agreement on "all points of significance." In thinking about the necessity for some line, however, I submit that Hart was fundamentally correct in his insistence upon "collectivity" as an aspect of the Court's work. Collective thought is more than an academic abstraction about the nature of a court; it is a mandatory goal. I view it as an intrinsic aspect of the "Supreme Court" established by article III. To say that each member of that Court takes an oath to support the Constitution as he sees it, not as others see it,⁸² does not detract from this point.

81. Justice Stevens expressed his dissatisfaction with the increasingly common practice of writing opinions with regard to the denial of certiorari in *Singleton v. Commissioner*, 439 U.S. 940 (1978). Characterizing such opinions as "examples of the purest form of dicta," *id.* at 945, Justice Stevens felt that they were "potentially misleading." "Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered, and therefore typically appear to be more persuasive than most other opinions." *Id.*

82. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401-02 (1937) (Sutherland, J. dissenting) ("The oath which a [Supreme Court Justice] takes as a judge is not a composite oath, but an individual one . . . [H]e discharges a duty imposed upon *him*.").

For an appointment is to a Supreme Court, and that concept embodies something very different from viewing each Justice as a Leibnitzian monad colliding with eight other isolated, independent monads only at the point of voting.⁸³

The collegial conception of a Supreme Court carries with it specific normative consequences for its members. Professor Hart rightly insists that the votes taken after hearing argument should be viewed as far more tentative than they are in present practice now.⁸⁴ And I believe substantially more effort should be made to reduce the volume of concurring opinions.⁸⁵ This reduction can occur, of course, only if circulated drafts are taken seriously by the other members of the Court and if, in turn, the opinion writer seeks to accommodate the objections and suggestions of others. To what extent any of the foregoing in fact will occur is, of course, a function of docket size, as well as of personnel (the Justices)⁸⁶ and occasion (the issues). Nonetheless, my study of the Court's work for the last fifteen years leaves me with a distinct impression that there is considerable unnecessary fragmentation within the Court — that the potential for unity has been insufficiently realized.

In any event, it is reasonable to insist that the significant points in the "opinion of the Court" be understood as the result of a deliberate process which reflects the views of the members joining that opinion. Of course, some opinions will be insufficiently principled in the sense that they will contain obscurities. At times this will result from the necessity for compromise if the opinion writer truly seeks to issue a collective product.⁸⁷ On other occasions,

83. This is true even though prior to 1800 the practice of rendering opinions seriatim prevailed. One still looked for that to which the Court as a whole had agreed. See Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 73 n.70.

84. Professor Hart warned:

To call upon judges to vote on complex and often highly controversial issues after only a couple of hours, more or less, of private study of briefs and record is to invite votes which are influenced more strongly by general predilections in the area of law involved than they are by lawyerlike examination of the precise issues presented for decision.

Hart, *supra* note 55, at 124. Perhaps I overstate this point, however, see Stewart, *Inside the Supreme Court*, N.Y. Times, Oct. 1, 1979, at 1, cols. 2 to 4. See also B. WOODWARD & ARMSTRONG, *supra* note 68.

85. Cf. Davis & Reynolds, *supra* note 83, at 75-76 ("strategically placed" concurring opinions sometimes have a "very special value").

86. Schmidhauser, *Stare Decisis, Dissent and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194 (1962).

87. See Arnold, *supra* note 57, at 1312.

the obscurity will appear in hard cases — situations in which an acceptable controlling principle cannot be adequately perceived until fleshed out by a series of cases.⁸⁸ Seeking the goal of an adequately principled opinion reflecting shared agreement is, after all, not a demand for impossible perfection. The premises of our legal system do assume that in practice an adequately principled opinion is a generally achievable goal, and in any event, a necessary aspirational feature of the judicial process. Accordingly, the inevitable imperfections in the opinion-making process do not support Professor Amsterdam's contention that the opinion may properly omit factors in fact relied upon by the Justices.⁸⁹ Although I recognize the pragmatic attractions of such a view, it seems to me wholly inconsistent with the root concepts of principled decision-making resulting in an opinion publicly exposed for criticism. To be meaningful, these concepts must govern the reality as well as the appearance of judicial opinions. If justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment. A Justice who initially reached a decision on the basis of factors he is unwilling to assert publicly as a justification is, to my mind, under a duty to reconsider his decision with the impermissible factors excluded so far as is humanly possible. Unlike Professor Greenawalt, I would not permit even an "occasional sacrifice" of this principle in order to advance other "most compelling" goals.⁹⁰

IV.

I recognize that this article has some of the quality of a production of Hamlet without its Prince. This is a necessary consequence of addressing the subject of stare decisis in constitutional cases without advancing, even in tentative form, a substantive theory of the topic. But that effort must await another day — and it must be undertaken with a mind open to the possibility that no meaningful theory can be formulated. My goals here have been

88. See Amsterdam, *supra* note 74, at 351-52; Greenawalt, *supra* note 76, at 1001-02 (quoting Freund, *Rationality in Judicial Decisions*, in NOMOS VII: RATIONAL DECISION 109, 119-21 (C. Friederich ed. 1964) & E. ROSTOW, THE SOVEREIGN PREROGATIVE — THE SUPREME COURT AND THE QUEST FOR LAW 33 (1962)).

89. Amsterdam, *supra* note 74, at 350-51. *But see* B. WOODWARD & S. ARMSTRONG, *supra* note 68, at 406-07.

90. Greenawalt, *supra* note 76, at 1013. On efforts to justify some prudential (read here: unprincipled) limits on the need for principled decisionmaking, compare A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) with Gunther, *The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency In Judicial Review*, 64 COLUM. L. REV. 1 (1964).

more modest: first, to demonstrate that the subject is an important one that deserves fresh consideration and, second, to suggest that nothing intrinsic to the process of formulating Supreme Court opinions precludes an *initial* view of the opinion as a principled product that represents both collective thought and collective agreement "on all points of significance." Discovery of an appropriate content to a "points of significance" approach to the problem remains in the process of gestation: the labor is hard, but the task is attractive.