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Under-the-Table Overruling

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UNDER-THE-TABLE OVERRULING

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I. INTRODUCTION: THE PHENOMENON

In his paper-in-chief, Erwin Chemerinsky usefully describes a number of striking if unsurprising features that seem, at this early date, to

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characterize the Roberts Court.[1] Substantively, the Court has tended to reach results that will please political conservatives (with the arguable exception of decisions involving executive power in the "war on terror"), including in particular significant constitutional and statutory decisions favoring businesses over consumers and employees.[2] Institutionally, the number of cases decided by the Court has shrunk;[3] many of those cases have been decided by close votes;[4] and where they have, Anthony Kennedy has almost always been on the winning side,[5] suggesting that Justice Kennedy has replaced retired Justice Sandra Day O'Connor as the Court's de facto most powerful Justice.[6]

This essay will focus on another notable aspect of the still-nascent Roberts Court, a procedural phenomenon hinted at but not directly addressed in Dean Chemerinsky's paper.[7] The Court has, in several high-profile decisions, accomplished what I will refer to as "under-the-table overruling," or "underruling" for short. Consider the following cases:

In *Gonzales v. Carhart*,[8] the Court upheld the federal Partial-Birth Abortion Act of 2003 against a due-process challenge.[9] Among several grounds for challenging the statute was its absence of a "health exception"—a provision allowing an otherwise-banned procedure when necessary to protect the health of the pregnant woman.[10] Seven years earlier, in *Stenberg v. Carhart*,[11] the Court had invalidated a similar

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1. *See* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 974 (2008).

2. *Id.* at 962.

3. *Id.* at 948.

4. *Id.* at 953.

5. *Id.*

6. The sophisticated mathematical model employed by Paul Edelman and Jim Chen—sophisticated, at least, in the eyes of this mathephobe—suggests that Justice Kennedy (not Justice O'Connor) was "the most dangerous Justice" even on the Rehnquist Court. Edelman and Chen measure "not only the importance of the swing vote . . . but also the ability of individual Justices to muster a majority coalition that unifies behind a doctrinal standard or approach as expressed in a single opinion." Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Into the Sunset*, 24 CONST. COMM. 199, 219 (2007); *see also* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996); Paul H. Edelman & Jim Chen, *"Duel" Diligence: Second Thoughts about the Supremes as the Sultans of Swing*, 70 S. CAL. L. REV. 219 (1996); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131 (2001).

7. *See* Chemerinsky, *supra* note 1.

8. 127 S. Ct. 1610 (2007).

9. *Id.* at 1638-39.

10. *Id.* at 1625.

11. 530 U.S. 914 (2000).

Nebraska law in part because it lacked a health exception.[12] The Court in *Stenberg* had held that a health exception was necessary despite the relative rarity of threats to a woman's health from the unavailability of the banned procedure, stating that "the health exception question is whether protecting women's health requires an exception *for those infrequent occasions*."[13] Without attempting to distinguish *Stenberg* in this respect, however, the *Carhart* majority, in an opinion written by Justice Kennedy (who had dissented in *Stenberg*), held that the absence of a health exception was subject only to case-by-case, "as-applied" challenges because the plaintiffs had "not demonstrated that the Act would be unconstitutional *in a large fraction of relevant cases*."[14] In effect, the *Carhart* Court overruled—without saying so—*Stenberg*'s holding that abortion regulations must contain health exceptions so long as the health of *some* women might otherwise be at risk.

In *Federal Election Commission v. Wisconsin Right to Life*,[15] the Court held that applying the federal Bipartisan Campaign Reform Act of 2002 ("BCRA")[16] to prohibit certain "issue ads" funded by the plaintiffs would violate the Free Speech Clause of the First Amendment.[17] Section 203 of the BCRA bans corporate or union funding of "electioneering communications"—political advertisements that run within a certain number of days before a federal election and refer to candidates for federal office—thus superseding prior statutory provisions that had been interpreted to prohibit funding only of "express advocacy" for or against federal candidates.[18] In *McConnell v. Federal Election Commission*,[19] decided four years earlier, the Court had upheld section 203 against a facial challenge, ruling that Congress has a compelling interest in prohibiting ads that do not engage in express advocacy if they "are the functional equivalent of express advocacy"—that is, if they "are intended to influence the voters' decisions and have that effect."[20] *McConnell* had held that section 203 was not overbroad because "the record strongly supports the . . . conclusion" that most ads covered by the provision were

12. *Id.* at 945-46

13. *Id.* at 934 (emphasis added).

14. *Carhart*, 127 S. Ct. at 1639 (emphasis added).

15. 127 S. Ct.. 2652 (2007).

16. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

17. *Wis. Right to Life*, 127 S. Ct. at 2673-74.

18. *See* Bipartisan Campaign Reform Act of 2002, *supra* note 16; *see also* Buckley v. Valeo, 424 U.S. 1, 40-44 (1976).

19. 540 U.S. 93 (2003).

20. *Id.* at 206.

the "functional equivalent" of express advocacy,[21] and that the provision was not unconstitutionally vague because its requirements "are both easily understood and objectively determinable."[22]

In *Wisconsin Right to Life*, however, Chief Justice John Roberts asserted in his principal opinion that in order for section 203 to pass First Amendment muster, it could be applied only to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[23] In so doing, the Chief Justice rejected *McConnell*'s focus on the intent and the effect of political ads to determine if they are the "functional equivalent of express advocacy."[24] The alternative standard he articulated—"susceptible of no reasonable interpretation" other than advocacy—would be met by few, if any, ads not actually employing express advocacy; this standard thus gutted *McConnell*'s conclusion that section 203's prohibition of all "electioneering communications" would not ban many instances of protected speech and thus was not overly broad.[25] And, as Justice Scalia pointed out in his separate opinion,[26] the Chief Justice made hash of *McConnell*'s holding that section 203 was not unconstitutionally vague by replacing the statute's clear written standards with the amorphous "susceptible of no reasonable interpretation" formula.[27] Yet the Chief Justice purported merely to be applying *McConnell* rather than overruling it.[28]

In *Parents Involved with Community Schools v. Seattle School District No. 1*,[29] the Court applied the Equal Protection Clause to strike down two public school systems' use of race as a factor in student assignments for the purpose of achieving racial diversity in schools.[30]

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21. *Id.* at 206-07.

22. *Id.* at 194.

23. *Wis. Right to Life*, 127 S. Ct. at 2667. Chief Justice Roberts' opinion was joined only by Justice Alito. *Id.* Justices Kennedy and Thomas concurred in the judgment but joined an opinion written by Justice Scalia which argued, in essence, that *McConnell* should be overruled. *See id.* at 2674 (Scalia, J., concurring in the judgment).

24. *Id.* at 2665.

25. *Id.* at 2667.

26. *See id.* at 2674, 2679-84 (Scalia, J., concurring in the judgment).

27. *Wis. Right to Life*, 127 S. Ct. at 2674, 2679-84 (Scalia, J., concurring in the judgment).

28. For a detailed assessment of *Wis. Right to Life*'s effect on the jurisprudence of campaign-finance reform, including an evaluation of what I've called the "underruling" aspect of that decision, *see* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wis. Right to Life*, 92 MINN. L. REV. 1064 (2008).

29. 127 S. Ct. 2738 (2007).

30. *Id.* at 2767-68.

Four years earlier, in *Grutter v. Bollinger*[31] and *Gratz v. Bollinger*,[32] the Court had upheld racial diversity as a sufficiently compelling interest to support affirmative action in admissions to the law school and the undergraduate college of a public university.[33] Much of Chief Justice Roberts's opinion for the Court in *Parents Involved* was devoted to explaining why the public-school programs in question, unlike the plan in *Grutter*, were not narrowly tailored enough to survive strict scrutiny.[34] But the Chief Justice also suggested, without explanation, that the diversity rationale upheld in *Grutter* simply was inapplicable in the context of elementary and secondary education, asserting that the *Grutter* Court "relied upon considerations unique to institutions of higher education" such as "'the expansive freedoms of speech and thought associated with the university environment.'"[35] The Chief Justice did not explain why "expansive freedoms of speech and thought" were less valuable in elementary and high schools than in universities;[36] nor, more broadly, did he justify his suggestion that diversity was a compelling interest in the latter context but not in the former. And while his opinion never expressly precluded diversity as a compelling interest outside the university environment, it strongly implied as much, remarking that "reliance on *Grutter* cannot sustain" the public-school programs in question even before it rejected those programs as insufficiently narrowly tailored.[37] *Parents Involved* thus seems arbitrarily to have limited *Grutter* to its facts under the guise of applying it.

I think it is fair to say that the holding, the reasoning, or both in each of *Carhart*, *Wisconsin Right to Life*, and *Parents Involved* is directly inconsistent in some important way with the holding or reasoning of a recent, high-profile Court precedent on the same legal issue—*Stenberg*, *McConnell*, and *Grutter*, respectively. The inconsistencies cannot honestly be justified by some material difference in facts between the

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31. 539 U.S. 306 (2003).

32. 539 U.S. 244 (2003).

33. *Grutter*, 539 U.S. at 237-33; *Gratz*, 539 U.S. at 268. In *Gratz*, the Court invalidated the University of Michigan's use of race as a factor in undergraduate admissions because the particular program in question was not sufficiently narrowly tailored; but the Court nonetheless recognized diversity as a compelling interest in the undergraduate context. *See id.* at 268, 275.

34. *See Parents Involved*, 123 S. Ct. at 2759-61.

35. *Id.* at 2754 (quoting *Grutter*, 539 U.S. at 329).

36. And, in any event, he took this quote from *Grutter* out of context. The *Grutter* Court evoked the "special niche" occupied by universities "in our constitutional tradition" not to argue that universities have a unique interest in diversity, but rather to justify judicial deference to the expertise of university administrators and faculty with respect to the benefits of their admissions policies. *See Grutter*, 539 U.S. at 328-29.

37. *Parents Involved*, 127 S. Ct. at 2755.

cases in each pair; their only plausible explanation is, rather, a crucial intervening change in the Court's personnel. Justice O'Connor had voted with the majority in *Stenberg*, *McConnell*, and *Grutter*;[38] her replacement, Justice Samuel Alito, voted with the majority in *Carhart*, *Wisconsin Right to Life*, and *Parents Involved*;[39] and Justice Kennedy, the Court's new swing vote, had dissented in each of the former cases but joined the majority in each of the latter.[40] Simply put: the causal force behind the different result in each case was Justice Alito's replacement of Justice O'Connor.

By itself, the idea that changes in Court personnel can bring changes in constitutional doctrine should not be surprising; it need not even be especially problematic, as I suggest in Part IV below. What makes these decisions troubling, however, is not that they changed doctrine, but that they did so without admitting it. In none of these decisions did the author of the principal opinion acknowledge that all or part of a precedential case was being overruled. These decisions, I believe, are examples of "under-the-table overruling," or "*underruling*." In each of them, the Court effectively gutted a core aspect of some recently decided precedent without confessing that it was doing so.

The phenomenon of under-the-table overruling raises at least two interesting and closely related questions. First, if the Court is deciding in a way that is in fact inconsistent with recent precedent, why does it not simply say so—that is, formally overrule that precedent in whole or in part? Second, is there anything normatively problematic about the practice of under-the-table overruling?

In this essay I will sketch an answer to this second, normative question and, in so doing, suggest also some possible answers to the first, descriptive one. My intuitive reaction, as a lawyer and law professor, to the idea of underruling is that it is somehow unseemly, and I suspect many readers of this essay will share that reaction. But is there really anything wrong with the practice, and if so, what? Underruling carries a whiff of judicial dishonesty, but is this kind of judicial dishonesty really all that bad? Lawyers know that judges often fib—when they write opinions to suggest that a particular result is mechanically dictated by text or precedent, for instance, a claim that is almost never true, at least not in constitutional cases. Some degree of judicial dishonesty might be necessary to grease the wheels of the system. Does underruling fall into this category of relatively benign deceit?

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38. *See Stenberg*, 530 U.S. at 914; *McConnell*, 540 U.S. 93; *Grutter*, 539 U.S. 306.

39. *See Carhart*, 550 U.S. 124; *Wis. Right to Life*, 127 S. Ct. 2652; *Parents Involved*, 127 S. Ct. 2738.

40. *See supra* text accompanying note 38; *see also id.*

In normatively assessing the practice of underruling, it will be helpful first to come to grips with the underlying practice of constitutional stare decisis, of following precedent in cases involving constitutional issues. What is the point of constitutional precedent, and does underruling somehow undermine that point? If so, this would provide a reasoned normative objection to underruling.

In Part II, I canvass two plausible rationales for the Supreme Court's practice of following its own precedential decisions in constitutional cases. I note that the practice of underruling seems to be inconsistent with at least one of these rationales in a way that straight overruling is not. I also describe a third, somewhat more nuanced rationale for constitutional stare decisis, one suggested by the Court itself in an influential (and controversial) discussion in *Planned Parenthood v. Casey*.[41] In Part III, I sketch an account of the function of constitutional adjudication that might support the *Casey* rationale. In Part IV, I argue that while the practice of underruling superficially seems compatible with this *Casey*-inspired account, that impression is illusory. In fact, underruling threatens to diminish, over time, the legitimacy of the Court as a constitutional decisionmaker, which is precisely the result the *Casey* rationale seeks to avoid. In Part V, I speculate a bit about why the Court might dabble in underruling despite its risks.

II. WHY CONSTITUTIONAL *STARE DECISIS*?

Is the practice of underruling compatible with the practice of stare decisis that seems to animate it? Or is the Court, by overruling constitutional precedent without saying so, undermining the efficacy of precedent itself? In particular, is there something about underruling that is more threatening to constitutional stare decisis, and to the reasons that justify it, than straight overruling? The answer must turn in part on what those justificatory reasons are.

A. The Noninstrumental Rationale

One possible justification of constitutional stare decisis is that there is something inherently valuable or good or just about treating like cases alike.[42] We can call this the *Noninstrumental Rationale* for constitutional precedent. On the Noninstrumental Rationale, deciding similar

41. 505 U.S. 833 (1992).

42. For an explication and critique of some arguments to this effect, see Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

constitutional cases similarly is simply the morally right thing to do; or, to be more precise, there are strong inherent moral reasons to decide similar constitutional cases similarly, even if those reasons might on occasion be outweighed by countervailing ones (e.g., the egregious incorrectness of a precedential decision).[43]

There is cause to be gravely suspicious of the Noninstrumental Rationale. It turns out to be very difficult to make a convincing case that treating like cases alike has any inherent moral value; in virtually every instance in which this idea of consistency seems to carry weight, that weight can be explained either by instrumental considerations like those discussed in the next section, or by normative factors that apply to each case individually, without regard to how another case has been treated.[44]

But let us assume, for present purposes, that the Noninstrumental Rationale has merit. It seems rather clear that the practice of underruling is unsupported by that rationale. The Noninstrumental Rationale suggests adhering to rather than overruling precedent. But underruling is not adhering to precedent; it is only *pretending* to adhere to precedent, that is, overruling precedent without saying so. If stare decisis has inherent moral value, that value is lost when the Court *in fact* fails to treat like cases alike, whether or not the Court admits its failure or succeeds in (falsely) convincing others that it *is* treating likes alike. What is important to the Noninstrumental Rationale is not the perception of consistency, but actual consistency.

Of course, the Court may, in any given case, have good (moral) reasons *not* to treat like cases alike: the harm or wrong of following an egregiously incorrect precedent, for example. Those reasons might be strong enough, in some cases, to justify the Court's overruling of a precedent. And perhaps sometimes there will be good reasons for the Court not only to overrule a precedent, but also to pretend not to do so. But those reasons, if they exist, will be counterweights to the Noninstrumental Rationale, not products of it. The Noninstrumental Rationale itself can justify neither overruling nor underruling precedent, and it certainly cannot justify underruling in place of overruling.

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43. *See id.* at 2040-41, 2043-44, 2047-50.

44. There is a sizable literature, to which I have made a small contribution, on the question whether "treating likes alike" has inherent moral value. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 217-44 (1986); PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693 (2000); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997); Peters, *supra* note 42.

At the same time, however, there seems no reason to think that underruling poses any greater threat to the Noninstrumental Rationale than does straightforward overruling. As I suggest below and in Part IV, the real-world consequences of underruling may differ in important respects from those of overruling; but this does not matter on the Noninstrumental Rationale, which is concerned solely with the inherent moral value of stare decisis, not with its consequences. If deciding like cases alike constitutes an intrinsic moral good, that good is compromised whenever like cases are decided differently, whether that is accomplished openly or surreptitiously.

B. The Predictability Rationale

Another way to justify constitutional stare decisis—the *Predictability Rationale*—is on certain instrumental grounds relating to the value of legal predictability. A robust practice of adhering to precedent means that people can predict with reasonable accuracy how similar cases will, or would, be decided in the future. That predictability might produce a number of benefits of the type associated, more broadly, with the existence of relatively clear legal rules.[45] Predictability can foster *efficiency* by avoiding or minimizing conflict over what legal standards will apply in particular circumstances: If people accurately can predict the legal consequences of their and others' actions, they will be less likely to bring costly lawsuits or criminal prosecutions, or costly claims or defenses within existing court cases, in order to adjudicate those consequences, and those lawsuits or prosecutions that are brought can be resolved more easily. Legal predictability also can promote individual *autonomy* and, in the constitutional context, collective *democracy*: Individuals who know the likely legal consequences of their actions, and democratic majorities that know the likely legal consequences of theirs, can more confidently plan their affairs without worrying about legal liability. Finally, legal predictability can promote *fairness* by preventing individuals (or democratic majorities) from being penalized for conduct they did not know was problematic when they engaged in it.[46]

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45. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001) (discussing the benefits (and pathologies) of legal rules more broadly); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996) (discussing same).

46. In this respect, however, we should keep in mind that reliance on precedential decisions would not be justified, and thus overruling would not be unfair, in a legal system that did not include a robust practice of following precedent. Fairness serves as a reason against overruling in a system that employs *stare decisis*; it does not constitute a reason for adopting such a system in the first place.

As I suggest below, underruling probably is no more consistent than outright overruling with these predictability-related benefits of stare decisis, and it may be less consistent with them.

1. Efficiency

Consider efficiency first. If underruling *works*, in the sense of actually overruling a precedent without being seen (by anyone but the Court) as doing so, it seems to pose no threat to efficiency. People will continue to treat the (supposedly) precedential decision as binding and will act accordingly, avoiding behavior that runs afoul of that decision; likewise, lower-court judges will continue to apply the (supposedly) precedential decision, thus avoiding the costs of formulating or speculating about the proper legal rule. But it is difficult to envision underruling actually "working" in this way. Future parties (private and government actors) and judges will, after all, have an additional Supreme Court decision to contend with besides the original precedential decision (D_P), namely the decision that accomplishes the underruling (D_U). If D_U is in fact inconsistent with some central aspect of D_P, despite the Court's not having said so, subsequent parties (or their lawyers) and subsequent judges eventually will figure this out. (Indeed, it seems unlikely that the Court would go to the trouble of underruling, rather than simply adhering in fact to D_P, unless it intends that D_U itself will have some precedential effect.[47]) Presented with two logically incompatible but nominally consistent Supreme Court decisions, D_P and D_U, subsequent parties and judges will have to guess which decision the Court is likely to follow in future cases. The uncertainty and controversy on that point will undermine the efficiency goal of stare decisis.

And note that underruling probably threatens efficiency to an even greater degree than straightforward overruling does. If the Court openly overrules a precedent, the result may be to shake people's confidence in the reliability of precedent generally, thus fomenting uncertainty and

47. There is at least one circumstance in which the Court might underrule a precedent, D_P, without intending the underruling decision, D_U, to have its own precedential effect: If the case producing D_U is seen by the Court as sufficiently unique to justify a failure to follow D_P in that one case only. Some commentators believe the Court's controversial decision in *Bush v. Gore* was such a case; there the Court stretched its equal-protection and justiciability precedents to order a halt to the recount of presidential votes in Florida, while in effect disclaiming any precedential effect for the decision itself. *See Bush v. Gore*, 531 U.S. 98, 109-10 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). For an assessment of *Bush v. Gore* along these lines, see Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 769-72 (2001).

controversy and undermining efficiency. But there is likely to be at least some confidence that the particular overruling decision (D_O) will not itself be overruled in the near future. The legal rule generated by D_O, that is, will be perceived as relatively stable and its application relatively predictable (except to the extent that the stability and predictability of *all* Court-generated legal rules are called into question by an act of overruling). In contrast, underruling not only threatens confidence in the general reliability of precedent, just as overruling does; it also creates confusion about the particular legal issue decided in the underruling case. When the Court underrules, future parties and judges have two conflicting legal rules – that generated by D_P and that generated by D_U— to contend with, both of which the Court professes to be valid law. The inefficiency fostered by underruling thus is likely to be both macrocosmic and microcosmic.

2. Autonomy and Democracy

Partly for this reason, underruling also appears to threaten individual autonomy and democratic self-government to a greater extent than straight overruling does. Faced with two conflicting, and supposedly equally valid, constitutional rules, individuals and government officials will find it difficult to make and carry out their plans confidently.

And underruling threatens autonomy even if it somehow "works," that is, even if individuals and democratic officials are fooled into thinking D_U is in fact consistent with D_P. This is because both individual autonomy and democratic self-government seem to depend, not on the relevant actor's *belief* that it is controlling its own fate, but on the relevant actor's *actually* controlling its own fate. "Autonomy" literally means "self-law-giving"; on a common understanding, associated with Kant, the individual exercises autonomy to the extent she governs herself through the choices she makes.[48] Choices made based on false assumptions are not autonomous choices in this sense (except perhaps to the extent those false assumptions themselves are products of the individual's free choice). An individual who is convinced, through no fault of her own, that she has the ability to defy gravity, and who steps off a high-rise balcony based on this false belief, is not making an autonomous choice by doing so. Similarly, an individual who believes (through no fault of her own) that the legal rule announced in D_P constitutes valid law, and who acts based on that belief, has not autonomously chosen the consequences when it turns out that D_U has

48. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 98-99 (H.J. Paton ed., 1964).

surreptitiously invalidated the rule of D_P. The same can be said of democratic majorities: They are not exercising true self-governance if the legal premises upon which they base their choices are, through no fault of their own, false ones.

3. Fairness

As these observations suggest, underruling also may frustrate the goal of fairness in a way that straight overruling does not. In a system characterized by general adherence to precedent, straight overruling might be unfair because it frustrates people's (that is, individual actors' and democratic governments') reasonable expectations about the content of constitutional law.[49] But at least straight overruling frustrates expectations openly; in so doing it tempers future expectations and thus mitigates the unfairness of subsequent overrulings. Every time a D_P is expressly overruled by a D_O, the reasonable expectations of the public and the government change (or should change) to allow a little more room for the possibility of overrulings in the future. Future overrulings then become a bit less likely to frustrate reasonable expectations and thus a bit less unfair.

If the Court overrules D_P *sub rosa* with D_U, however, the signal that the Court sometimes overrules constitutional precedent is not clearly sent. People may continue to rely—reasonably but, as it turns out, falsely—on the unlikelihood of overrulings, only to have their expectations frustrated by a future D_O or D_U. In this macrocosmic sense, underruling is more unfair than overruling. And, microcosmically, underruling D_P with D_U—unlike overruling it with D_O—will (again, assuming it works) leave the impression that D_P remains good law, thus

49. We should not assume, though, that overruling always, or even typically, is unfair in this way. If overruling occurs occasionally, people will (or should) temper their expectations with this fact. It would be unreasonable to rely on the idea that the Court *never* overrules its precedents. And, as constitutional lawyers and scholars know, the Court rarely overrules precedents out of the blue; typically it first lays the groundwork for an overruling by limiting or chipping away at the precedential decision in various ways. So, for example, the Court spent roughly a generation shrinking the scope of the "separate but equal" doctrine laid down in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in a series of decisions before finally rejecting that doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), and subsequent cases. *See* Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) (invalidating state policy of paying for black students' attendance at public law schools in neighboring states rather than admitting them to state's own law school); Sweatt v. Painter, 339 U.S. 629 (1950) (finding hastily established blacks-only law school is insufficient to satisfy separate-but-equal); and McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-42 (1950) (invalidating a policy of physically segregating black graduate students within a state university).

encouraging reasonable (but false) reliance on D_P and risking greater unfairness if the Court, in a subsequent decision, fails to follow D_P.

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It is not simply the case, then, that the Predictability Rationale (or family of rationales) for stare decisis fails to provide greater support for underruling than for overruling, as the Noninstrumental Rationale fails to do. Underruling is in fact *less* compatible than overruling with the Predictability Rationale. The benefits of predictability—efficiency, individual autonomy and democratic self-government, fairness—are threatened to a greater degree by underruling than by straightforward overruling of precedent.

C. The Legitimacy Rationale

There is a third plausible rationale for the practice of stare decisis, one that applies (if it applies at all) with special force in constitutional cases.[50] This *Legitimacy Rationale* was described by the Court itself in a well-known and controversial portion of its (pre-Roberts) 1992 opinion in *Planned Parenthood v. Casey*.[51] In *Casey*, the Court affirmed what it characterized as the "essential holding" of *Roe v. Wade*—that a woman has a right to terminate her pregnancy, subject to reasonable health and safety concerns and to the government's interest in protecting the life of a viable fetus—and struck down Pennsylvania's spousal-notification requirement while upholding informed-consent, waiting-period, parental-notification, and recordkeeping requirements.[52] In explaining its refusal to overturn *Roe*, the Court referred extensively to the kinds of instrumental, predictability-based concerns described above, holding that various countervailing considerations (factual or legal obsolescence, practical unworkability) were insufficient to outweigh those concerns.[53]

But the Court also went farther. In a remarkable passage—remarkable because it directly engaged the question of the Court's role in a constitutional democracy to a degree rarely seen in majority opinions

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50. There may be other rationales as well, but these three strike me as the most plausible.

51. 505 U.S. at 864-69. The passage in question is Part III.C. of the joint opinion authored by Justices O'Connor, Kennedy, and Souter; that portion of the opinion was joined by a majority of the Court. *Id.* Several other portions of the joint opinion were joined only by a plurality of the Court. *Id.* at 841-42.

52. *Id.* at 846-901.

53. *See id.* at 854-64.

of the Court[54]—it argued that overruling *Roe* would undermine the Court's own legitimacy.[55]

The Court's power, it asserted in *Casey*, "lies . . . in its legitimacy, a product of substance and perception."[56] In tying its legitimacy to "substance," the Court appeared to mean that part of its power depends on widespread public acceptance of the *content* of its decisions, on the impression that the Court is getting things right most (or at least an acceptably high percentage) of the time.[57] In citing "perception," however, the Court meant something different and perhaps more complex. Some segment of the public inevitably will disagree with the substance of any constitutional decision by the Court; as the Court put it, "not every conscientious claim of principled justification [for a Court decision] will be accepted as such."[58] Thus "something more"—more than agreement with the substance of Court decisions—"is required" to support the Court's power.[59] That something more is a widespread perception that the Court is *procedurally* legitimate, that the *way* it makes constitutional decisions is generally acceptable, even to those who disagree with the substance of particular decisions.[60] And this procedural legitimacy "depends on making legally *principled* decisions," decisions that are "grounded truly in principle, not . . . compromises with social and political pressures."[61] Frequent overrulings of the Court's own constitutional precedents—or overrulings of highly controversial decisions that have produced extraordinary "social and political pressures," like *Roe*—would foster the impression that the Court is giving in to those pressures rather than making decisions of principle.[62] This "would subvert the Court's legitimacy" and thus its power.[63]

The central thrust of the *Casey* Court's Legitimacy Rationale for constitutional stare decisis, then, is this: Much of the Court's authority—its capacity to cause others (including the political branches of government) to implement and obey its decisions—rests on a widespread

54. Rarely enough, in fact, that those occasions on which the Court openly assesses its place in the constitutional system, in a way that goes beyond conclusory assertions and sound bites, tend to find their way into constitutional law casebooks for reasons other than the substance of the Court's decision. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958); *Casey*, 505 U.S. 833.

55. *Casey*, 505 U.S. at 865.

56. *Id.*

57. *See id.* at 865-66.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Casey*, 505 U.S. at 865-66 (emphasis added).

62. *Id.* at 867.

63. *Id.* at 866-67 (quoted text on 867).

public belief that the Court is making those decisions in a certain way. More specifically, the public and the political branches obey the Court's constitutional decisions because, and to the extent that, they believe the Court is basing those decisions on principle rather than on utilitarian political or social considerations. Frequent overruling of constitutional precedent, or overruling of especially controversial precedents, creates the impression that the Court is deciding based on something other than principle. This threatens the perception of the Court's legitimacy that is essential to its authority. Hence, the Court should avoid, or at least have very good countervailing reasons for, overruling constitutional precedents, particularly on highly controversial topics.

There is a salient and potentially powerful line of objection to this *Casey* reasoning, namely that *Casey* assumes a normatively problematic relationship between the Court's legitimacy and public opinion. The central worry here is that the question of how the Court should decide cases ought not to turn on how the public thinks the Court should decide cases. The Court as an institution is structured to be relatively insulated from popular opinion: Its members, while appointed by a highly politicized process, never are subject to popular election and remain on the Court (barring an impeachable offense) until they die or choose to retire.[64] If public opinion is to play an important role in constitutional decisionmaking, it thus is unclear why the relatively unaccountable Court, as opposed to the considerably more accountable elective branches, should be making those decisions. The very idea of constitutionalism, moreover, seems to suppose a set of legal norms that are resistant to transitory shifts in public opinion, a supposition that appears to be threatened if the Court makes constitutional decisions in part by reference to that opinion.

By tethering its own legitimacy to public perceptions, the *Casey* Court therefore seems to be questioning the central premises of constitutionalism and judicial review. This basic concern underlies many criticisms of the Legitimacy Rationale, including that leveled by Justice Scalia in his scathing dissent in *Casey*.[65] If the criticisms are right—if *Casey*'s Legitimacy Rationale for constitutional stare decisis is logically incoherent or normatively bankrupt—then there is not much point in asking whether the practice of underruling is compatible with that rationale. As I argue in the next Part, however, there is a plausible vision of the Court's role in our constitutional democracy that supports the Legitimacy Rationale against these objections.

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64. *See* U.S. CONST. art. III.

65. *See* 505 U.S. at 979, 996-1001 (Scalia, J., dissenting).

III. CONSTITUTIONAL ADJUDICATION AS DISPUTE RESOLUTION

The *Casey* analysis forces us to ask the following fundamental question: What, if anything, makes the Supreme Court's constitutional decision-making legitimate?

Before we get to that question, I should make a semantic clarification. Although the terms "authority" and "legitimacy" often are used interchangeably in ordinary language, and sometimes are used in conjunction (as in "legitimate authority"), legal and political philosophers tend to treat them as distinct if related concepts. David Estlund, for example, defines *authority* as "the moral power of one agent (emphasizing especially the state) to morally require or forbid actions by others through commands," and *legitimacy* as "the moral permissibility of the state's issuing and enforcing its commands owing to the process by which they were produced."[66] So, says Estlund, "[i]f the state's requiring you to pay taxes has no tendency to make you morally required to do so, then the state lacks authority in that case. And if the state puts you in jail for not paying, but it is morally wrong for it to do so, then it acts illegitimately."[67]

Estlund's distinction will suffice for our purposes, particularly since I will treat authority and legitimacy as coextensive in the remainder of this essay.[68] I will assume in what follows that a Court decision that is legitimate (i.e., morally permissible owing to the process that generated it) also is, for the same reasons, authoritative (i.e., tending to make the person subject to it morally required to obey it); and I will use the terms "authority" and "legitimacy" more or less interchangeably.

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66. DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 2 (2008).

67. *Id.*

68. It is conceivable that legitimacy may sometimes exist without authority—that it may be morally right both for the state (or, for our purposes, the Court) to command you to do something, and for you to disregard that command. (For an extensive and useful discussion of this possibility, *see* ALEXANDER & SHERWIN, *supra* note 45, at 53-95.) If such instances occur, however, they are likely to be relatively few and far between, especially if we acknowledge that even if the Court has authority, that authority sometimes may be overridden by competing moral considerations. (The possibility of morally justified civil disobedience, for one, seems to require such an acknowledgment.) If we acknowledge this, then an instance in which it is morally permissible to disobey a legitimate Court decision—because, for example, obeying it would result in profound moral wrong or harm—is not necessarily an instance in which that decision lacks authority. The decision may be both legitimate and authoritative and still be overridden by countervailing moral reasons.

A. A Dispute-Resolution Account

With this prologue, imagine what I will call a *Dispute-Resolution Account* of constitutional adjudication. On the Dispute-Resolution Account, a central function of constitutional adjudication (not necessarily its only function) is to provide acceptable avoidance or resolution of potentially costly disputes involving certain kinds of questions. For our purposes, we need not linger over the problem of exactly which kinds of questions qualify; likely candidates include issues involving the meaning and terms of democratic government or claims that certain individual or minority interests are immune to sacrifice for the common good. What characterizes both of these types of questions is the apparent unacceptability of trusting their resolution to the very process that they are questioning *about*.[69] Allowing a majority of democratic citizens to decide, for example, whether a certain minority are disqualified from full citizenship seems like self-judging, and as such is unlikely to be acceptable to the excluded minority. Allowing a majority of the public to determine whether an individual's interest in proving her innocence may be sacrificed to national security seems to present the same problem. There are many similar examples, real and imaginable, that are suggested by a glance through the case law under the rights-bearing provisions of our Constitution.[70]

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69. The notion that judicial review might be justified as serving a sort of referee's function, policing the democratic process to avoid or remedy distortions in that process, was of course inspired by the Court's famous "footnote four" in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and has been developed most influentially by John Hart Ely. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). I suspect that the scope of constitutional adjudication on the Dispute-Resolution Account, as I outline it here, is somewhat broader than a pure Elyian account would allow. For example, Ely was critical of the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), arguing that it could only be explained by the Court's substitution of its own substantive moral or political preferences for those of the democratic majority. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). But, if one views the question of abortion and other issues of physical and sexual autonomy as problems of individual claims of immunity from the majority's calculation of the public interest, one might defend the Court's intervention (if not necessarily the result of that intervention) as an attempt to resolve a dispute that could not be resolved impartially by majoritarian politics.

70. The Dispute-Resolution Account also might justify the Court's enforcement of the Constitution's structural provisions—those establishing the institutions and procedures of government—although in a more modest and, I think, less controversial way. Many structural provisions address issues that simply need to be resolved one way or another for democratic government to function; in many cases it is more important that these issues be resolved than that they be resolved correctly. Some degree of judicial enforcement of structural constitutional provisions thus seems necessary simply to

The American system of constitutional adjudication might be justifiable in part as a way to solve, or at least to mitigate, the self-judging problems that afflict these kinds of questions. The existence of a written Constitution subjects these issues to norms generated by Americans of previous generations and publicly approved using a supermajoritarian process. This injects a certain *impartiality* into the process of deciding the issues: The decision is at least partly governed, not by a political majority or some other faction from among the "people of the here and now"[71]—which would be an act of self-judging—but rather by the people of an earlier generation.[72] That impartiality might be reinforced by assigning the task of interpreting and applying these written constitutional provisions (which, it turns out, typically are vague and open-ended) to an institution, the Court, whose members are insulated to a degree from everyday majoritarian politics and thus are less susceptible to self-judging than an unfettered political majority would be.

Of course, the relative impartiality of constitutional adjudication as compared to majoritarian politics probably is not sufficient, by itself, to confer plausible dispute-resolving authority on that process. For one thing, the impartiality of the process will be imperfect even in the best of real-world scenarios. Supreme Court Justices typically, and perhaps even constitutional Framers sometimes, have a stake in the controversies they help decide; they too are members of our society (or, in the case of the Framers, of an earlier society facing issues similar to our own) and thus were or will be bound by the decisions they make. As such, the judging they provide cannot be entirely neutral. That in itself may not be a fatal problem, so long as we can say that constitutional adjudication is significantly *more* impartial than majoritarian politics as a way to decide a particular issue.

The larger problem is that a procedure that is impartial, *tout court*—without anything else to recommend it—is unlikely to be acceptable as a

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constitute democratic government. There are of course many subtle difficulties here, but I believe they pale in comparison to the difficulties associated with judicial enforcement of constitutional rights against the democratic majority.

71. The phrase comes from ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (2d ed. 1986) (1962).

72. The possibility of this kind of impartiality with respect to contemporary disputes, I believe, is the primary normative catalyst behind originalist and textualist approaches to constitutional interpretation like those espoused in ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-47 (Amy Gutmann ed., 1997), and ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

means of deciding issues of significant magnitude. A coin toss, after all, is a perfectly impartial procedure, and yet we would not trust it to decide important issues involving membership in the democratic community or immunities from sacrifice to the common good.[73] What is missing from a coin toss is any sense that the procedure tends to produce good or right answers. (A coin toss produces the right answer, assuming there is one, only fifty percent of the time.) A system of constitutional adjudication that is widely perceived to be generating results only stochastically probably would not be acceptable to a large majority of the public who will be bound by those results. Of course, members of the public will disagree about whether any given result *is* the right one; that is the point of having a dispute-resolving procedure in the first place. But they probably will agree that a random chance of getting the result right is unacceptably low for such important matters.

And suppose the Court, over time, persistently makes decisions with which a large majority of the public disagrees. The Court may then lose the support of that majority and, along with it, its capacity to manage constitutional disputes effectively. According to the Dispute-Resolution Account, a chief function of the Court is, in essence, to placate the minority by impartially deciding issues in which the majority is strongly self-interested. This task of impartial decisionmaking creates the risk of sometimes deciding against the majority and in favor of the minority; in fact that is precisely its point. Thus its success depends on the majority's being able to live with losing on occasion—to accept Court decisions with which it disagrees. If, however, the majority comes to believe that the Court in fact is partial *in favor of* the minority, it may as a result refuse to accept disagreeable Court decisions. And that belief might take hold if the overall substance of the Court's decisions diverges too widely, over time, from the views of the political mainstream. (This worry may be what the Court was alluding to in *Casey* by asserting that its legitimacy is "a product of *substance* and perception.")[74] From the perspective of dispute resolution, the Court must strike a delicate balance between the appearance of its immediate impartiality and the impression that its decisions, over the long run, tend to accord with majority values.

In attempting to strike this balance, our constitutional system tempers the relative political impartiality of the Court with a diverse array of avenues for political participation in the decision-making

73. On this basic point, *see* ESTLUND, *supra* note 66, at 66.

74. *Casey*, 505 U.S. at 865 (emphasis added).

process.[75] At any given moment, this participation may be somewhat attenuated and the Court's response to it somewhat sluggish (which is, again, part of the point of the system). Over time, however, the various avenues combine to prevent stark divergence between the Court's jurisprudence and public opinion. The Court's members, while not popularly elected, are appointed by a process that is intensely political; that process tends to produce relatively centrist Justices who hew closely to the American mainstream.[76] The Court also must rely on the elective branches of government to implement its decisions, and on state-court and lower federal-court judges to interpret them; these factors too tend to channel constitutional doctrine toward the popular center.[77] Indeed, Congress has some degree of direct power over the Court by virtue of its control over the Court's jurisdiction and number of members;[78] while that power is rarely used today, the threat of its use may itself be significant.[79] And the very process of constitutional adjudication before the Court has become increasingly participatory as the impact of its decisions has expanded, with large numbers of litigants representing a broad spectrum of interests joining, intervening, or submitting amicus curiae briefs in high-profile cases.[80]

When we juxtapose these many and varied popular inputs against the background of the Justices' relative political insulation, we get a picture

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75. Two good general overviews of political influences on Court decisionmaking are LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988), and NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004).

76. *See* FISHER, *supra* note 75, at 135-43.

77. *See id.* at 221-30.

78. Article III of the Constitution does not specify the number of Justices who will make up the Court, and it subjects the Court's appellate jurisdiction to "such Exceptions[] and . . . Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. There has never been much doubt that Congress has the power to alter the numerical composition of the Court by ordinary legislation (so long as it does not deprive any sitting Justice of his or her tenure), and it did so frequently during the first century of the republic, although the number has remained at nine since 1869. *See* FISHER, *supra* note 75, at 208. The nature and extent of Congress' power to alter the Court's jurisdiction has been more controversial, though nobody doubts the power exists to some extent. *See id.* at 215-21.

79. Franklin Roosevelt's threat to "pack" the Court—increasing its membership to allow the appointment of Justices friendly to the New Deal—may have had some influence in the Court's mid-1930s shift to more regulation-friendly decisions. *See id.* at 209-15. That shift seems to have begun, however, prior to emergence of the court-packing plan, and indeed the plan itself did not have much chance of political success. *See id.*; RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 431-32 (2008).

80. I discuss a prominent recent example—the broad participation in the litigation of the University of Michigan affirmative-action cases—later in this article. *See infra* Part IV.B.1. For general discussions of the trend toward increasingly broad participation in constitutional litigation before the Court, *see* FISHER, *supra* note 75, at 20-24; DEVINS & FISHER, *supra* note 75, at 34-37.

of constitutional adjudication as: *(a)* far from perfectly *impartial*, but significantly so compared with the everyday political process; and *(b)* reasonably *participatory* and subject to long-term political controls, if not as participatory or as political as everyday politics. Of course there are many ifs, ands, or buts that would have to be dealt with in a more comprehensive account; and I want to make clear what I am *not* claiming here, namely that American-style constitutional adjudication is anything close to the perfect way to resolve constitutional issues. I am offering, rather, what I think is a plausible general interpretation of that process as an acceptable way to avoid or resolve certain issues that might not otherwise acceptably be resolved or avoided.

Before I connect this Dispute-Resolution Account to the *Casey* Court's Legitimacy Rationale for constitutional stare decisis,[81] allow me to pause for two brief asides. First, I have been referring to constitutional adjudication as a way to "resolve" certain kinds of disputes. But, the concept of "managing" those disputes probably is more apt. Experience shows that Court decisions by themselves very rarely actually "resolve" constitutional disputes in the sense of finally terminating social or political conflict over the underlying issues.[82] Sometimes, as with the issue of de jure racial segregation in public schools, a dispute is resolved only after many years of struggle in the Court, the state and lower federal courts, the political branches, and perhaps even the streets.[83] Some constitutional issues—abortion comes quickly to mind—have yet to be resolved in any real sense despite many relevant Court decisions.[84] What constitutional adjudication does is place these issues on a decision-making track that is separate, if not entirely disconnected, from the ordinary political process, a track that (if the Dispute-Resolution Account has any truth to it) ultimately can be more successful as a venue for addressing those issues than ordinary politics.

Second, if we focus on constitutional adjudication's dispute-resolving function (in the macrocosmic, societal sense—not just in the obvious sense of involving competing litigants), we have a thread that connects that process to the underlying democratic values of our political

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81. *See* 505 U.S. at 854-70.

82. *See* discussion *infra*.

83. DEVINS & FISHER, *supra* note 75, at 154-61, offers a concise account of the post-*Brown* struggles for school desegregation; *see also* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 57-58, 124-34 (2004).

84. For a relatively recent account of the durability of the American abortion controversy despite, and perhaps in part because of, the Supreme Court's frequent interventions, *see* N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (2001).

system. Majoritarian democracy itself might be understood as a means of resolving certain kinds of disputes: disputes about the general rules that should guide behavior in our society, about the joint projects that we should undertake as a society, about the duties members of our society owe to each other, and the like—that is, the lion's share of social disagreements we are likely to face. Democracy too features the aspects of impartiality and participation that characterize constitutional adjudication, albeit in different forms and in a different balance.[85] We might then conceive of constitutionalism and democracy not as warring dichotomous forces, as both the scholarly and popular imaginations often portray them, but as complementary implications of the same dispute-resolution impulse.

B. Dispute Resolution and the Casey *Rationale*

If the Dispute-Resolution Account of constitutional adjudication is plausible, then the *Casey* Court's Legitimacy Rationale for constitutional stare decisis becomes plausible too.[86] The *Casey* Court suggested a certain kind of relationship between the Court's legitimacy and public

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85. Majoritarian politics typically operates according to a "one person, one vote" rule (which is, for most purposes, constitutionally required in the United States; *see, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964)). Unlike adjudication, "one person, one vote" is, by definition, completely impartial with respect to individual participants in a decision procedure, in that it allocates decision-making authority equally among them. Majoritarian politics also typically is much more broadly participatory than constitutional adjudication; in the most recent U.S. presidential election, for example, more than 125 million people cast votes, outstripping the numbers of participants in constitutional litigation by several orders of magnitude. *See* http://elections.nytimes.com/2008/results/-president/votes.html (last visited Feb. 21, 2009). By the same token, however, majoritarian politics also (by definition) operates by majority rule, which is, in a sense, partial with respect to groups: In any given vote, the majority *as a group* always has more power than the minority *as a group*. And, since members of the political majority will be affected by the results of the votes they cast, political majorities inevitably engage in self-judging, a fact recognized by Madison when he noted in *Federalist No. 10* that citizens and legislators not only are "advocates and parties" but also are "themselves the judges" of disputes determined by majoritarian politics. James Madison, *Federalist No. 10*, *in* JAMES MADISON ET AL., THE FEDERALIST PAPERS 123, 124-25 (Isaac Kramnick ed., 1987) (1788). One application of constitutional adjudication might be to temper this majority self-judging problem. And while democratic politics is broadly participatory, it is not necessarily deeply so: Most citizens do not have a meaningful opportunity, by themselves, to influence public policy. A single vote cannot make a difference among 125 million; for its part, political speech typically requires an expensive platform in order to be heard. Constitutional (and other forms of) adjudication may serve to fill gaps in democratic politics by giving citizens a chance to participate more consequentially in addressing issues that matter to them.

86. *See* 505 U.S. at 854-70.

opinion: For the Court to operate legitimately in constitutional cases, the public (or at least a sufficiently large portion of it) must believe that the Court is deciding those cases in a certain way, namely according to "principle" rather than political or social expediency.[87] As I suggested in the previous Part, it might seem mysterious why the Court's legitimacy should turn on the public's perception of it. Is it not the whole point of a politically insulated judiciary to immunize the Court from the effects of public opinion?

The Dispute-Resolution Account makes this possibility less mysterious. On that account, the Court's legitimacy depends in large part on its capacity to avoid or resolve (or, better, manage) certain disputes more successfully than they can be managed through ordinary democratic means. And the Court's capacity to acceptably manage these disputes itself turns in part on public perception, namely on a widespread belief that the Court is deciding cases in a relatively impartial way. A key ingredient in the necessary perception of impartiality may be what the *Casey* Court refers to as "principle":[88] the Court's practice of guiding its decisions with norms laid down by previous generations, perhaps including norms embodied in longstanding precedents of the Court itself. A Court seen as deriving its decisions from longstanding norms is, to that extent, a Court that is impartial with respect to the competing sides of a current political controversy—and thus a Court (potentially) capable of managing that controversy acceptably.

Frequent overrulings, however—or overrulings that, in context, may be interpreted as surrenders to current political forces—are likely to undermine the impression that the Court typically decides based on impartial principle. It seems implausible that constitutional norms laid down by the Framers or by prior Courts can change suddenly and radically, or that a Court seriously interested in interpreting and applying those norms could deviate wildly in the course of doing so. A more likely explanation is that the Court is merely blowing with the political winds—precisely what the Court must not be seen as doing if its dispute-resolution function is to be effective and its existence therefore legitimate. The imperative of avoiding this impression thus serves as a powerful reason to resist overruling precedents in constitutional cases.

In this way the Dispute-Resolution Account lends gravitas to the *Casey* Court's Legitimacy Rationale for constitutional stare decisis. Does that account also tell us anything useful about the practice, not of overruling precedents, but of underruling them?

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87. *Id.* at 865-66.

88. *See id.*

IV. UNDERRULING AND CONSTITUTIONAL DISPUTE RESOLUTION

The difference between overruling and underruling is, of course, not what the Court is doing, but what the Court *says* it is doing. And the primary source of information for most Americans about what the Court does is what the Court says it does in its written opinions. More precisely, most Americans' primary source of information about the Court is the media's reporting of what the Court says it does in its opinions. This is simply a function of the fact that most nonlawyers, indeed most lawyers other than those who practice or teach constitutional law, lack the time and expertise necessary to parse Court opinions and analyze their treatment of precedents. What this means, among other things, is that if the Court announces in an opinion that it is overruling a constitutional precedent, most Americans will assume that it has in fact overruled a precedent; but if the Court does not announce that it is overruling a precedent, most Americans will assume that it has not in fact done so.

This reality has implications—some obvious, some more subtle—for the relationship between underruling and the Court's legitimacy that is suggested by the Dispute-Resolution Account and its adjunct, the Legitimacy Rationale for constitutional stare decisis. The Dispute-Resolution Account and the Legitimacy Rationale hold that public perception of the Court's legitimacy is likely to be undermined by frequent or high-profile overrulings;[89] but public perception cannot be swayed by overrulings if the public is not aware of them. The Dispute-Resolution Account thus creates, or reveals, an incentive for the Court to overrule precedents it believes to be wrong without being seen to do so—that is, to underrule. By tying the Court's legitimacy to public beliefs about its decision-making, the *Casey* Legitimacy Rationale, and the Dispute-Resolution Account that animates it, seem to justify the practice of underruling in a way that other rationales for stare decisis cannot.

But in fact things are not so simple.

A. Underruling and Impartiality

Casey argues that the Court's being seen to frequently overrule constitutional precedents threatens public perception of its impartiality, and thus compromises the Court's legitimacy as a resolver of constitutional disputes.[90] This suggests the possibility of a sort of arbitrage between perception and reality: By underruling—overruling

89. *See id.* at 865-68.
90. *Id.*

without saying so—the Court might gain the benefits of overruling (declining to follow a precedent the Court believes was wrongly decided) without suffering its costs (diminished public perception of the Court's impartiality). If a central function of constitutional stare decisis really is to maintain the popular belief that the Court is impartial,[91] that function is not threatened by underruling. Thus, underruling appears wholly compatible with *Casey*'s Legitimacy Rationale. Indeed, on that rationale, underruling seems to be normatively permissible in a way that overruling is not. The Legitimacy Rationale thus differs markedly from the Noninstrumental Rationale,[92] on which underruling and overruling are equally egregious, and from the Predictability Rationale,[93] on which underruling is, if anything, more normatively problematic than overruling.

Notice, though, that the compatibility between underruling and perceived impartiality depends on whether the technique of underruling actually works—on whether it actually convinces the public, or most of it, that the Court has not overruled a precedent. And it is true that there is perhaps less reason for skepticism in this regard than on the Predictability Rationale. The value of predictability generated by adherence to precedent depends primarily on the views of legal professionals—lawyers—who are experts at understanding what the Court has done and how it impacts the law in a particular subject area. Under-the-table overruling seems unlikely to fool the professionals, at least in the medium to long term, and so it probably threatens predictability at least as much as straight overruling does, as I suggested in Part II.[94] The Legitimacy Rationale, however, rests on the perception of the Court in the eyes of the general public,[95] not in the eyes of a small group of legal experts. Because most of the general public relies on media-filtered accounts of the Court's own descriptions of its decisions, it seems plausible that underruling might fool the masses even if it does not fool the pros.

I remain somewhat skeptical about the feasibility of underruling as a means of upholding the Court's perceived impartiality. Most journalists who follow the Court are experts, too, and often they report underrulings as the threats to precedent that they really are.[96] For example, the *New*

91. *Id.*
92. *See supra* Part II.A.
93. *See supra* Part II.B.
94. *Id.*
95. *See supra* Part I.C. *See also Casey*, 505 U.S. at 865-68.
96. *See* discussion *infra*.

York Times articles reporting the decisions in *Gonzales v. Carhart*,[97] *Wisconsin Right to Life*,[98] and *Parents Involved*[99] all emphasized the respective rulings' deviations from existing doctrine, and their headlines focused on the decisions' bottom lines: either an upholding or an invalidation of some controversial government policy.[100] And if the Court builds on these decisions in future cases, departing even more diametrically from the precedents supposedly left intact, it seems likely the public will take notice; the Court will, after all, be causing an ever-greater on-the-ground impact in the highly visible and controversial arenas of abortion, campaign finance reform, and affirmative action. That is more or less what happened in the school desegregation cases decided by the Court during the first half of the twentieth century: The Court gradually undermined the "separate but equal" doctrine of *Plessy v. Ferguson*[101] in a series of cases culminating in *Brown v. Board of Education*[102]—never once directly overruling *Plessy*, not even in *Brown*[103]—but this indirect approach did not forestall a huge public outcry when *Brown* was decided.

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97. 505 U.S. 127.

98. 127 S. Ct. 2652.

99. 127 S. Ct. 2738.

100. *See* David Stout, *Supreme Court Upholds Ban on Abortion Procedure*, N.Y. TIMES (April 18, 2007), *available at* http://www.nytimes.com (last visited Feb. 21, 2009) (describing *Carhart* as "a change of course from a Supreme Court ruling in 2000, when the lineup of justices was different"); Linda Greenhouse & David D. Kirkpatrick, *Justices Loosen Ad Restrictions in Campaign Finance Law*, N.Y. TIMES (June 26, 2007), *available at* http://www.nytimes.com (last visited Feb. 21, 2009) (describing the decision as "a sharp turn away from campaign finance regulation" and noting that the "dissenters' argument that the court had effectively overruled its 2003 decision in [*McConnell*] . . . found agreement among election law experts"); Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES (June 29, 2007), *available at* http://www.nytimes.com (last visited Feb. 21, 2009) (citing Justice Breyer's assertion that "the decision was a 'radical' step away from settled law").

101. 163 U.S. 537.

102. 347 U.S. 483; *see supra* note 49.

103. The Court in *Brown* "rejected" "any language in *Plessy* . . . contrary" to its finding that segregation was psychologically damaging to black schoolchildren. 347 U.S. at 494-95. But it confined its formal holding, rejecting "separate but equal," to "the field of public education," *id.* at 495, and thus never expressly overruled *Plessy*, which involved segregation on railroad trains, or the doctrine of "separate but equal" more broadly. *Id.* In a series of subsequent decisions, however, the Court perfunctorily applied *Brown* to invalidate *de jure* segregation in non-educational contexts. *See, e.g.*, Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1955) (invalidating segregation of public beaches and bathhouses); Homes v. City of Atlanta, 350 U.S. 879 (1955) (regarding public golf courses); and Gayle v. Browder, 352 U.S. 903 (1956) (regarding city buses).

Still, I am prepared to admit that reporters for the *New York Times* might not be typical of journalists who report on the Court, and that readers of the *Times* might not be typical of Americans generally. And I recognize the possibility that the Court, by underruling and thus allowing its departure from precedent to sink in slowly rather than splashing down suddenly, can take the edge off what is in fact an act of overruling, thus at least mitigating any damage to the Court's impartial image if not wholly preventing such damage. Indeed, I have to assume that a primary explanation for the Court's tactic of underruling in *Gonzales*, *Wisconsin Right to Life*, and *Parents Involved* is that the Court itself believes this is possible. But I nonetheless think that underruling ultimately is incompatible with the basis for the Court's legitimacy, understood according to the Dispute-Resolution Account.

B. Underruling and Participation

The difficulty is that the practice of underruling poses a significant threat to the efficacy of political participation in constitutional adjudication. This element of participation, remember, is vital to the Dispute-Resolution Account of the Court's legitimacy: Mere impartiality cannot ensure that the Court, over time, will produce results that a substantial majority of the public can accept. The various avenues for political input into the adjudicative process assure that the substance of the Court's decisionmaking doesn't depart too widely from the medium- to long-term democratic mainstream.

In order for the public and its political representatives to participate in constitutional decisionmaking, they must, as it were, know the rules of the game they will be playing. But the Court, by underruling, conceals those rules; it plays one game while purporting to play another. This has the effect of devaluing participation in the process.

1. Direct Participation in Litigation

Consider first the effect of underruling on direct citizen participation in constitutional litigation. From a dispute-resolution perspective, a primary advantage of litigation that is broadly participatory (through joinder, intervention, and *amicus* briefs) is that it can place the particular constitutional case being decided in a larger political and social context. The Court then can do a better job of taking that context into account—the likely real-world impact of its decision, how the decision might be publicly received—in deciding the case. In essence, broad participation can inject elements of the political, the social, and the moral into a proceeding that otherwise might be narrowly and drily legal. The result

should be constitutional decision-making that is unlikely—or less likely than without this kind of participation—to stray very far from the democratic mainstream, and thus is more likely to be publicly acceptable in the medium to long run.

For example, the lawsuits that ultimately produced the Court's 2003 affirmative-action decisions in *Grutter v. Bollinger*[104] and *Gratz v. Bollinger*[105] featured remarkably broad and diverse participation by individuals, groups, and organizations interested in the underlying constitutional issues. The plaintiffs in each case were white applicants denied admission to, respectively, the University of Michigan Law School (in *Grutter*)[106] and the University's undergraduate college (in *Gratz*),[107] allegedly because race-based affirmative-action programs admitted less-qualified minority applicants. In each case, the named plaintiffs were certified by the trial court as representatives of a larger class of similarly situated applicants.[108] In each case, the trial court allowed intervention, as defendants, by a large number of pro-affirmative-action students, prospective students, and groups – forty-one intervenors in *Grutter*, seventeen in *Gratz*.[109]

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104. 539 U.S. 306.

105. 539 U.S. 244.

106. 539 U.S. at 306.

107. 539 U.S. at 244.

108. The *Grutter* class was defined as:

> all persons who (A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered [in the lawsuit]; and (B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.

Grutter v. Bollinger, 137 F. Supp. 2d 821, 824 (2001). The *Gratz* class was defined as:

> [t]hose individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission.

Gratz v. Bollinger, 122 F. Supp. 2d 811, 814 n.2 (2000).

109. In *Grutter*:

> 41 individuals and three pro-affirmative action student groups . . . intervene[d] in the case as defendants. The individual intervenors include[d] 21 undergraduate students of various races who . . . attend[ed] the University of Michigan, Wayne State University, the University of California at Berkeley, or Diablo Valley Community College in Pleasant Hill, California, all of whom plan[ned] to apply to the law school for admission; five black students who . . . attend[ed] Cass Technical High School or Northwestern High School in Detroit and who plan[ned] to apply to the law school for admission; twelve students of various races who . . . attend[ed] the law school; a paralegal and a Latino

And the Supreme Court, after it granted certiorari in both cases, allowed the filing of *ninety-one* different amicus curiae briefs in either *Grutter*, *Gratz*, or both: seventy supporting the University, seventeen supporting the plaintiffs, and four supporting neither party.[110] (The actual number of *amici* was even higher than this, as many of the amicus briefs were filed on behalf of multiple parties.) The amici supporting the University included—to name only a few—the NAACP "Inc." Fund; the ACLU; the AFL-CIO; a group of "former high-ranking officers and civilian leaders of the Army, Navy, Air Force, and Marine Corps";[111] more than twenty states and territories; various other law schools, colleges, universities, and administrators and faculty thereof; members of Congress; a long list of major corporations; the governor of Michigan; a coalition of Indian tribes; the American Psychological Association and the American Sociological Association; groups of minority lawyers and law students; and the College Board.[112] Amici on the other side included a number of conservative think-tanks and activist organizations such as the Cato Institute and the Center for Individual Freedom; various scholarly groups, including a coalition of anti-affirmative-action law professors; the State of Florida and its governor, Jeb Bush; and the United States government as represented by the Solicitor General.[113] (The Solicitor General also participated in the oral argument of both cases, in each case splitting time with the plaintiffs' counsel.)

It is, of course, impossible to say for sure how much any given decision of the Court has been influenced by the participation of others besides the original litigants (or by that of the original litigants, for that

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> graduate student at the University of Texas at Austin who intend[ed] to apply to the law school for admission; and a black graduate student at the University of Michigan who [was] a member of the Defend Affirmative Action Party.

137 F. Supp. 2d at 824-25. The pro-affirmative action groups were "United For Equality and Affirmative Action (UEAA), the Coalition to Defend Affirmative Action By Any Means Necessary (BAMN), and Law Students for Affirmative Action (LSAA)." *Id.* at 824 n.4. In *Gratz*, the intervenors were:

> seventeen African American and Latino students who ha[d] applied for, or intend[ed] to apply for, admission to the University, joined by the Citizens for Affirmative Action's Preservation, a nonprofit organization whose stated mission is to preserve opportunities in higher education for African American and Latino students in Michigan.

122 F. Supp. 2d at 815.

110. This does not count the three *amicus* briefs filed in support of the petition for certiorari in one or the other case.

111. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 1, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) 2003 WL 1787554.

112. *See Grutter*, 539 U.S. 306; *see also Gratz*, 539 U.S. 244.

113. *See* 539 U.S. 306; *see also* 539 U.S. 244.

matter). In *Grutter* and *Gratz*, though, it seems likely that broad participation made a real difference. In her opinion for the *Grutter* majority, Justice O'Connor cited amicus briefs filed by, respectively, a group of law school deans and a coalition of colleges for the point that a great many schools have relied on the permissibility of affirmative action to achieve diversity.[114] Later, Justice O'Connor rested her holding that racial diversity is a compelling interest in part on assertions by corporate and military amici of diversity's importance in global business and in military training.[115] It may then be no accident that the Court's decisions in *Grutter* and *Gratz*—allowing affirmative action for the purpose of diversity, but approving the use of race only as one among multiple factors and disapproving anything that looks like a numerical "quota"[116]—probably accord with the mainstream views of the American public on the issue.

Why did *Grutter* and *Gratz* attract so much public attention and participation? Because there was a widespread perception that important issues of constitutional principle were at stake. The Court had not decided a case involving affirmative action in education since *Regents of the University of California v. Bakke*[117] in 1978—the case that spawned the "diversity" rationale[118]—and thus the University of Michigan cases were seen as likely vehicles for a broad Court decision either approving or rejecting affirmative action.[119] The matter was viewed not as a technical legal issue of interest primarily to lawyers and perhaps a small group of potential litigants, but rather as a fundamental question of morality and policy of vital importance to society as a whole. This sense of deep normative importance and broad social significance was reflected not only in the quantity of participation in the cases, but also in

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114. *See Grutter*, 539 U.S. at 323.

115. *See id.* at 330-31.

116. *See Grutter*, 539 U.S. 306; *see also Gratz*, 539 U.S. 244.

117. 438 U.S. 265 (1978).

118. Justice Powell, who provided the crucial fifth vote to invalidate the set-aside program challenged in *Bakke*, wrote approvingly in his opinion of the diversity rationale, *id.* at 311-15, and of the use of race as a "plus" factor in admissions, *id.* at 315-19. Because the other four Justices who voted to invalidate the *Bakke* plan did so on statutory rather than constitutional grounds, *see id.* at 408-21 (Stevens, J., concurring in part and dissenting in part), Justice Powell's opinion became the touchstone for designing and evaluating affirmative-action programs prior to *Grutter* and *Gratz*. Post-*Bakke* decisions in non-educational contexts had effectively eliminated most rationales other than diversity as possible "compelling interests" to justify affirmative action. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

119. *Id.*; *see also* discussion *infra*.

the ambitious arguments based on morality, policy, and history featured in many of the amicus briefs.[120]

I use the example of *Grutter* and *Gratz* to suggest how things might be different if the Court adopts a practice of frequent underruling in constitutional cases. Underruling seems likely to dilute the intensity of the constitutional issues the Court decides, or at least the public perception of that intensity. By underruling *Grutter* in the *Parents Involved* case, for example, the Court has effectively shifted the focus in affirmative-action litigation away from broad and deep questions of morality and policy (What are the social benefits or moral goods of affirmative action? What are its costs or evils? Do the former outweigh the latter?) and toward relatively narrow, technical issues involving the application of law to fact (Does a case present facts that are sufficiently similar to *Grutter*'s "unique context of higher education"[121] for that decision rather than *Parents Involved* to control?). It is difficult to imagine these legalistic questions exciting the kind of broad and enthusiastic public participation in future cases that was present in *Grutter* and *Gratz*.

Of course, constitutional adjudication often *does* boil down to relatively narrow, technical issues: Once a germinal case has been decided, subsequent cases typically involve lawyerly analogizing or distinguishing of that precedent by, for example, arguing over precisely how an applicable level of scrutiny should be applied. This is, formally speaking, what the Court claimed to be doing in *Parents Involved* with respect to the strict scrutiny mandated by *Grutter*.[122] But this kind of narrowing of the issues usually occurs only after the Court has spoken reasonably clearly on the underlying issue of constitutional principle.

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120. The NAACP "Inc." Fund and the ACLU, for instance, argued broadly that affirmative action was necessary to remediate the lingering societal effects of historical discrimination. *See* Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) 2003 WL 398820. A coalition of corporations contended that affirmative action was vital to the success of American business in the global marketplace. *See* Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516) 2003 WL 399056. A group of law students argued that racial diversity contributed to "a wide, robust exchange of ideas, essential to the discovery of truth and to the critical debate necessary to legal education." *See* Brief of 13,922 Current Law Students at Accredited American Law Schools as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) 2003 WL 554404. There are many equally apposite examples from among the 91 *amicus* briefs filed in the cases.

121. *Parents Involved*, 127 S. Ct. at 2755.

122. *Id.* at 2752-54.

Underruling, as in *Parents Involved*, disguises macrocosmic changes in constitutional principle as microcosmic applications of existing doctrine. If the Court in *Parents Involved* had acknowledged the inconsistency in principle between that decision and *Grutter*, future affirmative-action cases might take on the importance that *Grutter* had: Litigants and amici might see them as opportunities to participate in the continuing evolution of fundamental tenets of constitutional law. As it is—the *Parents Involved* Court having purported only to apply and refine *Grutter*'s diversity rationale rather than to reject it[123]—future cases might be viewed not as components of evolving constitutional principle, but simply as technocratic exercises in lawyerly craft, and the kind of wide and deep involvement we saw in *Grutter* and *Gratz* will be missing.

In short: Underruling threatens to stifle, by misdirection, meaningful public participation in constitutional adjudication. Indeed, it is difficult to shake the suspicion that this is a large part of its point.

2. Indirect Participation through Appointments and Implementation

Much the same can be said about the effects of underruling on indirect forms of political participation in constitutional adjudication, through the judicial appointments process at the front end and political implementation of Court decisions on the back end. Consider first the politics of appointments to the Court. A primary focus of the appointments process typically is the nominee's views on the correctness of high-profile constitutional decisions (such as *Roe v. Wade*)[124] or constitutional doctrines more generally (such as the right to privacy).[125] While nominees these days tend to be cagey in responding to these

123. *Id.* at 2754-57.

124. 410 U.S. 113.

125. For examples from the two most recent Court nomination hearings, of Chief Justice Roberts and Justice Alito, see *Roberts Fields Senators' Queries for Second Day*, CNN (Sept. 14, 2005), *available at* http://www.cnn.com/2005/POLITICS/09/13/roberts.-hearings/index.html (last visited Feb. 21, 2009) (regarding Roberts on *Roe* and right to privacy); Adam Liptak, *Roberts Drops Hints in "Precedent" Remarks*, N.Y. TIMES, Sept. 18, 2005, § 1, at 30, *available at* http://www.nytimes.com (last visited Feb. 21, 2009) (regarding Roberts on *Roe*); *"When a Precedent is Reaffirmed, That Strengthens the Precedent,"* N.Y. TIMES, Jan. 11, 2006, § A, at 26, *available at* http://www.nytimes.com (last visited Feb. 21, 2009) (regarding Alito on *Roe*). For examples from probably the most contentious judicial nomination hearings in American history—those relating to Robert Bork in 1987—*see* Ronald J. Ostrow & David Lauter, *Bork Assures Senators He Respects Precedent; Testifies He Was Acting as "Theorist" in Criticizing High Court Decisions; Unsure on Abortion Issue*, L.A. TIMES, Sept. 16, 1987, pt. 1, at 1.

inquiries,[126] usually a fairly clear picture of their jurisprudential beliefs can be pieced together from their lower-court opinions, work as an attorney, academic writings, and the like.[127]

Imagine, however, a world in which the Court makes significant use of underruling in place of overruling. That would be a world in which many areas of constitutional doctrine would appear to remain essentially unchanged for long periods of time, subject only to the interstitial tinkering that underruling wrongly purports to be. A world in which basic constitutional doctrine rarely changes is a world in which judicial nominees' views on the soundness or wisdom of that basic doctrine lose much of their relevance; it is a specialists' world, a lawyers' world, in which Court appointments seem likely to get substantially less political and public attention than they now (justifiably) receive. But of course this impression of constancy in constitutional doctrine, and thus of the limited importance of judicial appointments, would be a false one. The Court would in fact be making wholesale changes to constitutional law, and the individual members of the Court would of course be instrumental in making those changes; it's only that the public and the political branches would not clearly perceive these facts. The connection between popular participation and the Court's decision-making, and thus between the real content of that decision-making and what the majority, over time, finds acceptable, would become attenuated.

Perhaps somewhat less hypothetically, consider the fact that every contemporary Supreme Court nominee inevitably is asked, multiple

126. For examples, *see Roberts Fields Senators' Queries for Second Day*, *supra* note 125 (Roberts); Liptak, *supra* note 125 (Roberts); *"When a Precedent is Reaffirmed, That Strengthens the Precedent," supra* note 125 (Alito); on Alito's evasiveness generally (and for a comparison with that of other recent nominees), *see* Jim Puzzanghera, *The Art of Saying Nothing*, SAN JOSE MERCURY NEWS, Jan. 15, 2006, at PE1. Bork was unusually frank and straightforward with his answers to Senators' questions, *see* Ostrow & Lauter, *supra* note 125, a fact that may have doomed his nomination given the tenor of his views, *see* Puzzanghera, *supra*.

127. Bork, for example, had written extensively on constitutional issues in more than two decades as a government lawyer, law professor, and court of appeals judge by the time he was nominated to the Court in 1987; his paper trail laid the groundwork for a titanic battle over his nomination. *See* Edward Walsh & Al Kamen, *Ideological Stakes High in Bork Fight; On Eve of Hearings, Both Sides Seem Eager to Keep Calm*, WASH. POST, Sept. 13, 1987, § 1, at A1; Ruth Marcus, *Regard for Precedent Will Be Critical Issue; Study Lists 31 Areas of Bork's Disagreement*, WASH. POST, Sept. 15, 1987, § 1, at A9. Alito too had an extensive written record as a court of appeals judge and government lawyer. *See* Adam Liptak, *Issues and (Possible) Answers: A Primer on the Alito Hearings*, N.Y. TIMES, Jan. 9, 2006, at A1, *available at* http://nytimes.com (last visited Feb. 21, 2009). Roberts' record as an appellate judge was more sparse, but his work as a Reagan Administration lawyer provided substantial fodder. *See Roberts Fields Senators' Queries for Second Day*, *supra* note 125.

times, about his or her attitude toward stare decisis in constitutional cases.[128] Underruling allows a nominee to profess his or her strong commitment to the principle of stare decisis and then, as a Justice, effectively to ignore that principle without being seen as breaking a promise. If this tactic succeeds, it pushes the confirmation process, and the political participation it embodies, ever closer to irrelevance.

The misdirection of underruling also may take its toll at the implementation end. An important aspect of political participation in constitutional adjudication is the ability of the elective branches of government to assess the real-world consequences of constitutional decisions and determine how to deal with them. For example, the Court's invalidation of a type of affirmative action in the *Bakke* decision,[129] one with a broad remedial rationale and a methodology of numerical set-asides, inspired the development of diversity-focused, "race-plus" programs like that eventually upheld in *Grutter*.[130] A dialectic process like this, however—a process by which the Court renders a decision, the political branches respond to that decision, the Court then responds to the political branches' actions, and so on—requires that the political branches know what the consequences of a Court decision actually are. How are public universities and school districts now supposed to respond to *Parents Involved*?[131] If that decision really is the de facto overruling of *Grutter* I fear it to be, it will lay the groundwork for piecemeal judicial invalidation of a wide variety of affirmative-action programs that would have been upheld under an honest application of *Grutter*. But universities and school districts cannot be sure of this until it happens; they cannot know, until the Court tells them so, whether their particular use of diversity is justifiable under the reasoning of *Grutter* or impermissible under that of *Parents Involved*. And so they will have difficulty being proactive in bringing their programs into line with the Court's reading of the Constitution.

Nor, in the face of an underruling, can citizens and their political representatives know whether to mount political resistance to the Court's

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128. For extensive examples, *see* Marcus, *supra* note 127 (Bork); Ostrow & Lauter, *supra* note 125 (Bork); *Roberts Fields Senators' Queries for Second Day*, *supra* note 125 (Roberts); Liptak, *supra* note 137 (Roberts); Liptak, *supra* note 127 (Alito); *"When a Precedent Is Reaffirmed, That Strengthens the Precedent,"* *supra* note 127 (Alito). As the contexts of most of these examples suggest, "respect for precedent" often is used as a stalking horse for "support for *Roe v. Wade*." *See* Liptak, *supra* note 125 (asserting that senators asking Roberts about precedent "talked in a sort of code. Whenever they talked about precedent, they were talking about *Roe*").

129. 438 U.S. at 318-20.

130. 539 U.S. at 334-38.

131. *See id. See also Parents Involved*, 127 S. Ct. at 2752-59.

(unintelligible) reading of the Constitution. We now see the widespread, sometimes violent resistance to the Court's desegregation decision in *Brown v. Board of Education*[132] as wrongheaded, even evil, but our reaction seems largely a product of our contemporary recognition that *Brown* was in fact rightly decided. We are unlikely to have the same strongly negative perspective on popular resistance to pre-Civil War decisions ordering the return of fugitive slaves,[133] or to the Court's disastrous *Dred Scott* ruling,[134] or to the "separate but equal" doctrine of *Plessy v. Ferguson*[135] that *Brown* effectively overruled. The fates of *Scott* and *Plessy*—and of *Lochner v. New York*,[136] which eventually was swamped by the tide of pro-regulation public opinion during the New Deal—show that popular and political resistance of various kinds to Court decisions can, over time, change the course of constitutional law. That kind of participation is likely to be dampened (though probably not extinguished entirely) by underruling, because underruling makes the target of resistance that much harder to identify.

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There is, then, good reason to think that the apparent compatibility of underruling with *Casey*'s Legitimacy Rationale for constitutional stare decisis, and with the Dispute-Resolution Account of the Court's legitimacy that underwrites that rationale, is illusory. Underruling might preserve the appearance of the Court's impartiality, but only if it works. And if it works, underruling probably reduces the efficacy of popular participation in constitutional adjudication, which over time may be as great a threat to the Court's legitimacy as a breakdown in public perception of its impartiality. The Court cannot acceptably resolve constitutional disputes if it blows back and forth with every political

132. For a description of the many-faceted resistance to *Brown*, *see* OGLETREE, *supra* note 83, at 124-34.

133. On abolitionist resistance to enforcement of the Fugitive Slave Act, *see* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 214-19 (1975).

134. Scott v. Sandford, 60 U.S. 393 (1856). For analyses of the political and historical significance of *Dred Scott*, *see* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); *see also* DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE (1981).

135. 163 U.S. 537 (1896). Resistance to "separate but equal" came primarily in the form of legal challenges to the doctrine, which culminated in *Brown*. *See supra* note 49; *see also supra*, text accompanying note 103.

136. 198 U.S. 45 (1905).

wind; but it also can't do so if it loses touch with the substantive values of the democratic majority that must live with its decisions.

So underruling flunks the legitimacy test; it flunks the predictability test; and it performs no better as a way of treating like cases alike than straight overruling. Which begs the obvious question: Why then would the Court do it?

V. SO WHY UNDERRULE? (OR, "IN THE LONG RUN WE ARE ALL DEAD")

I have suggested already some possible motivations for under-the-table overruling. For a Court that accepts the Legitimacy Rationale for stare decisis, underruling may allow the Court to have its cake and eat it too, preserving the appearance of impartiality while still correcting what the Court perceives as a wrongly decided precedent. More mundanely, given the intense focus on stare decisis in contemporary judicial confirmation hearings, underruling (if it works) avoids the impression that recently confirmed Justices are casually overturning nearly as-recent precedents. This fact may go a long way toward explaining the particular underrulings in *Gonzales v. Carhart*, *Wisconsin Right to Life*, and *Parents Involved*:[137] all three decisions underruled precedents that were less than a decade old, and in all three the two newest members of the Court (Chief Justice Roberts and Justice Samuel Alito)—both of whom were confirmed after the underruled precedent was decided—joined the underruling opinion.[138]

Underruling also may reduce the social and political salience of the Court's decision-making, freeing up some room for the Court to pursue its agenda without the public and the elective branches looking quite so closely over its shoulder. In this sense, underruling may simply be a logical extension of a trend toward minimalism—narrowness and gradualism in the construction of constitutional doctrine—that appeared in the Rehnquist Court and was led by Justices O'Connor and Kennedy. There are good reasons in favor of judicial minimalism, as well as reasons to be cautious about it, that have little or nothing to do with how the Court is perceived.[139] But both minimalism and underruling do, or

137. *See Gonzales*, 550 U.S. 124; *Wis. Right to Life*, 127 S. Ct. 2652; *Parents Involved*, 127 S. Ct. 2738.

138. *Id.*

139. For an influential description and evaluation of this "judicial minimalism," *see* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For further normative evaluation of minimalism, *see* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000); Christopher J. Peters & Neal Devins, *Alexander Bickel and the New Judicial Minimalism*, *in* KENNETH D. WARD & CECILIA R. CASTILLO, THE JUDICIARY AND AMERICAN DEMOCRACY:

may, affect perceptions of the Court, fostering the impression that the Court is not doing much to change constitutional law (an impression that is reasonably accurate with respect to minimalism but false with respect to underruling). The possibility that this impression is useful to the Court might conceivably explain, at least in part, the recent emergence of both techniques. (It might also shed some light on another phenomenon pointed out by Dean Chemerinsky, namely the Court's ever-dwindling docket.)[140]

And then there is the possibility that the Court's internal dynamics sometimes push toward underruling. It may be that underruling rather than outright overruling is necessary in some cases to get that fifth vote for a result. But of course this just recasts the question as: Why would that fifth Justice favor underruling rather than overruling? The factors suggested above might explain the actions of individual Justices as well as those of the Court as a corporate entity—indeed they could not apply in any other way, as the Court is simply the sum of its individual members.

If my analysis in this article is correct, underruling probably hurts the Court's legitimacy in the medium to long term. Eventually the public is likely to catch on to the fact that the Court has been drastically changing constitutional law without saying so—perhaps as the Court upholds (or denies review of) ever-more-aggressive abortion restrictions despite lip service to *Stenberg*[141] and *Roe v. Wade*,[142] or strikes down ever-more-modest affirmative-action programs and campaign-finance regulations despite lip service, respectively, to *Grutter* and *McConnell*.[143] Then the public and its political representatives may feel alienated from what is, after all, *their* constitutional law. This kind of alienation can be threatening to the Court, as the experience of the New Deal suggests.

Why would the Court risk long-term damage to its reputation and efficacy for the short-term gratification of overruling without saying so? Perhaps the Court's conservative majority is making a bet that the trend of public opinion on these issues (abortion, affirmative action, campaign finance reform, perhaps others) is moving in its favor. The results of the 2008 presidential election make it somewhat less likely, one might think, that such a bet will pay off—and note that if the Court loses the bet, its strategy of underruling actually will make it easier for subsequent

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ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY, 45-70 (2005).

140. *See* Chemerinsky, *supra* note 1, at 948-53.

141. 530 U.S. 914.

142. 410 U.S. 113.

143. *Grutter*, 539 U.S. at 306; *McConnell*, 540 U.S. at 93.

Courts, staffed by new Justices with different views on these issues, to reverse course in these areas. Subsequent Courts, after all, will not have to overrule precedent in order to do so; they can simply ignore previous underrulings and revert to faithful applications of the original, never-formally-overruled precedential decisions. In this respect underruling is a double-edged sword.

Or perhaps the Court's majority simply agrees with John Maynard Keynes that "[i]n the long run we are all dead."[144] As I write this, John Roberts has yet to turn 55 and Samuel Alito has yet to turn 60. Their respective runs on the Court may be very long indeed; and so there may be plenty of time for the tactic of under-the-table overruling, if it persists, to come back and haunt them.

144. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (Prometheus Books 2000) (1924) (emphasis in original altered).