EIGHT MEN OUT. MAKE THAT NINE.[1]

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I. INTRODUCTION

The Constitution provides that all civil officers of the United States are potentially subject to removal from office by impeachment.[2] The impeachment procedure[3] has been infrequently used in our nation's history. Only nineteen people—two presidents, a cabinet member, a senator, a justice of the Supreme Court, and fourteen federal judges— have ever been impeached by the House of Representatives and brought up for trial before the Senate.[4] Only eight of the nineteen were removed from office by the Senate,[5] although Judge George English avoided removal in 1926 by resigning his office, and Richard M. Nixon (not on the list of sixteen) avoided

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1. The word "men" is used in the title in an inclusive, gender-neutral sense in order to attempt a catchy reference to a well-known book (ELIOT ASINOF, EIGHT MEN OUT (1963)) and a 1988 movie with the same title, both concerning the 1919 Black Sox scandal in baseball.

2. U.S. CONST., art. II, § 4.

3. *See* U.S. CONST. art. I, § 2, cl. 5; *see* U.S. CONST. art. I, § 3, cl. 6.

4. U.S. SENATE, *Impeachment, Chapter 4: Complete List of Senate Impeachment Trials* (Mar. 7, 2012), http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#4 [hereinafter *Senate Impeachment Trials*]. Here is the complete list: William Blount, U.S. Senator, 1799; John Pickering, Federal District Judge, 1804; Samuel Chase, Associate Justice of the Supreme Court, 1805; James H. Peck, Federal District Judge, 1831; West H. Humphreys, Federal District Judge, 1862; Andrew Johnson, President of the United States, 1868; Mark W. Delahay, Federal District Judge, 1873; William W. Belknap, U.S. Secretary of War, 1876; Charles Swayne, Federal District Judge, 1905; Robert W. Archbald, U.S. Commerce Court Judge, 1913; George W. English, Federal District Judge, 1926; Harold Louderback, Federal District Judge, 1933; Halsted L. Ritter, Federal District Judge, 1936; Harry E. Claiborne, Federal District Judge, 1986; Alcee L. Hastings, Federal District Judge, 1989; Walter L. Nixon, Federal District Judge, 1989; William J. Clinton, President of the United States, 1999; Samuel B. Kent, Federal District Judge, 2009; G. Thomas Porteous, Jr., Federal District Judge, 2010.

5. *Id.* Pickering, Humphreys, Archbald, Ritter, Claiborne, Hastings, Walter Nixon, and Porteous.

almost certain impeachment and removal from office in 1974 by resigning the Presidency.[6]

Why are government officials so rarely impeached? The Constitution says that removal from office follows impeachment for, and conviction of, "treason, bribery, or other high crimes and misdemeanors."[7] Treason and bribery have fairly clear legal meanings from English common law and the American founding.[8] "High crimes and misdemeanors," as used in the Constitution, is less clear, and its meaning has generated both scholarly and popular discussion.[9] This has been especially true since the 1998-99 impeachment proceedings against President William J. Clinton.[10] In recent years, arguments about the broad or narrow meaning of "high crimes and misdemeanors"—and therefore about the legitimacy of the Clinton impeachment and proposals to impeach his successors in the Presidency—have often taken on a distinctly partisan tone.[11]

Subtle, difficult distinctions concerning which forms of official or private misconduct constitute impeachable high crimes and misdemeanors are unnecessary, however, in the case of government officials who have openly defied the Constitution of the United States in performing their official duties and, in the process, violated their oath of office. Whatever else may or may not be "high crimes and misdemeanors," surely that conduct meets the test.[12] In such a case, assuming that the charge can be proven, impeachment

6. Letter of Resignation from Richard M. Nixon, President of the United States, to Henry A. Kissinger, Secretary of State of the United States (Aug. 9, 1974) (on file with the National Archives and Records Administration), *available at* http://www.archives.gov/exhibits/american_originals/nixon.html.

7. U.S. CONST. art II, § 4.

8. 4 WILLIAM BLACKSTONE, COMMENTARIES 74-87 (1765); *Id.* at 139-141.

9. There is a significant volume of literature on this topic, and an explanation, or even a summary, of the possible meanings of "high crimes and misdemeanors" would be far outside the scope of this article. *See, e.g.*, H. LOWELL BROWN, HIGH CRIMES AND MISDEMEANORS IN PRESIDENTIAL IMPEACHMENT (1st ed. 2010); CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974).

10. *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 103 (2d ed. 2000).

11. *Compare* ANN COULTER, HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON (1998), *with* IMPEACH THE PRESIDENT: THE CASE AGAINST BUSH AND CHENEY (Dennis Loo & Peter Phillips eds., 2006).

12. Indeed, one could argue that violating the oath and defying the Constitution might even constitute treason, which is undoubtedly impeachable.

and removable from office would seem to be clearly mandated, almost automatic.

Is it possible that there are officials of the United States government who have openly defied the authority of the Constitution and who therefore present an open-and-shut case for impeachment and removal from office?

There are indeed, at least nine of them—the Justices of the United States Supreme Court.

II. The Standard

Defying the Constitution and violating one's oath of office are very serious charges. If there is any possibility that they are true, how can this be a subject of so little discussion? If all nine Supreme Court Justices have committed impeachable offenses, why are the newscasts, the blogs, and the internet so lacking in discussion of this fact? How could the entire nation have overlooked a state of affairs that could potentially make Nixon's Watergate[13] and Clinton's Monica affair[14] look trivial?

The answer, I think, is that over the past 75 years our nation's legal and popular culture has become so enmeshed in a false understanding of the role of judges in our constitutional order that we no longer even recognize the problem. Like the proverbial frog boiled to death after being dropped in a gradually-heating pot of water, we have over time come to accept an understanding of constitutional law that would have appalled the founders of our nation. To understand why this is so, we must take a brief look back into the history of Anglo-American law.[15]

The first national legal system in England was the common law. Before the common law, English law was local and feu-

13. *See generally* Barry Sussman, The Great Coverup: Nixon and the Scandal of Watergate (1974) (telling the story of the Watergate Scandal step-by-step).

14. *See generally* The Starr Report: The Evidence (Phil Kuntz, ed. 1998) (reviewing the information and interviews Ken Starr uncovered during his investigation of President Clinton during the Monica Lewinsky scandal).

15. Because the United States consisted at its founding of rebellious British colonies, the American legal system (except in Louisiana) is derived from English law and shares its history.

dal. The common law united England's villages and shires into a single nation under the King and his judges.[16] In the words of Professor Kirk, "The common law is founded upon custom and precedent, although upon *national* customs and usages, rather than upon local. . . . It is the fundamental body of law in England and in the countries that have received it from England."[17]

Common law is judge-made law.[18] In its early days, two litigants with a dispute would come into court, the judge would listen to their arguments and make a decision based on principles of justice and the established customs, rules, and maxims of the British people.[19] As further cases came up, the later judges would generally follow the legal rules from earlier cases unless the facts were sufficiently different as to dictate a changed outcome, until over the centuries an enormous body of detailed rules was created simply by the acts of judges attempting to achieve justice in the cases before them.[20] This procedure of later judges taking their legal rules from the decisions of judges in earlier cases is called "following precedent," or, in the Latin, *stare decisis*.

> The central distinction of the common law, then, is the rule of *stare decisis*, "to stand by decided cases": all judges are supposed to be bound by previous decisions, that is (a principle which, in theory, still governs the judiciary in the United States, most of the time). The purpose of *stare decisis* is to ensure that evenhanded justice will be administered from one year to another, one decade to another, one century to another; that judges will not be permitted to create laws or to decide cases arbitrarily, or to favor particular persons in particular circumstances. They must abide by the accumulated experience of legal custom, so that the law will be no respecter of persons, and so that people may be able to act in the certitude that the law does not alter capriciously.[21]

16. See RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 179-90 (1st ed. 1974)
17. *Id.* at 184.
18. *Id.* at 184-85.
19. 1 WILLIAM BLACKSTONE, COMMENTARIES 60 (1765).
20. KIRK, *supra* note 16, at 184-85.
21. *Id.* at 185.

The common law was enormously important, both in England and in the United States. It formed the core legal system for our new nation; for decades, Americans wanting to learn the law would study Blackstone's *Commentaries on the Laws of England*, which laid out the common law in a systematic fashion.[22]

As time passed, however, the British people gradually became aware of a significant problem with common law, a problem that still holds true today—common law is fundamentally undemocratic because judges are appointed for life terms.[23] English judges were appointed by the Crown;[24] American federal judges are appointed by the President following the "advice and consent" of the Senate.[25] To this day, the term of office for American federal judges is life, unless the judge retires, except under extraordinary circumstances.[26] Judges are by far the least politically accountable players in the American constitutional order. If judges make law and the people find that law to be oppressive or undesirable, there is very little that the people can do about it. When judges play a primary role as policy-makers, representative government turns into something more resembling an oligarchy.

Anglo-American law solved this problem through the development of a second line of legal authority: legislation.[27] The British Parliament, which in its early existence functioned primarily as a judicial and administrative body, morphed

22. HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 4 (1994).

23. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9-14 (1997); *but see* Matthew Steilen, *The Democratic Common Law*, 1 J. Juris 437 (2011) (discussing the democratic features of classical and modern common law).

24. *See* GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM: 2009-2010, 216 (10th ed. 2009) ("All judicial appointments remain, theoretically, at the hands of the Crown.").

25. U.S. CONST. art II, § 2, cl. 2.

26. Federal judges, including Supreme Court Justices, can of course be impeached—which is the whole point of this article!—but this has been done very rarely. *See supra* text accompanying notes 4-5.

27. GEORGE CRABB, A HISTORY OF ENGLISH LAW OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES OF THE COMMON LAW FROM THE EARLIEST PERIOD TO THE PRESENT TIME 4-5 (1829).

over time into its current form as a legislature, a body that makes laws.[28]

Along with the rise of Parliament as a legislative body came the legal doctrine of legislative supremacy. The idea is that statutes made by the peoples' representatives can effectively overrule the common law, thus making the entire legal system more responsive to the popular will. If the people are unhappy with legal doctrines and rules created by the judges, who are generally politically unaccountable, then the people's duly-elected representatives in the legislature can change those doctrines and rules by passing a statute. Blackstone said it this way: "Where the common law and a statute differ, the common law gives place to the statute."[29]

Or, in the words of a modern-day commentator:

> Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures.[30]

Thus, English law had two tiers, with statutory law controlling the common law made by judges:

Statutory Law
(Made by the Legislature)
↑
Common Law
(Made by Unelected Judges)

This, in general, has been the overall structure of the law of Great Britain up to modern times: common law subject to legislative override, but with the statutes of Parliament reigning supreme. Although the phrase "British Constitution" is applied to the governing law of England, that "constitution" is not a single document but rather a collection of statutes and other legal documents—none of which have higher legal au-

28. JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 111-117 (2009).

29. Blackstone, *supra* note 8, at 89.

30. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281-283 (1989).

thority than any other act of Parliament.[31] Thus, within the law of Great Britain there is no such thing as judicial review or an unconstitutional statute.[32] The power of the legislature is supreme. Parliament could repeal Magna Carta or the English Bill of Rights tomorrow—although this is not going to happen because of the huge political outcry that would undoubtedly follow.

In the mid-to-late 18th Century, the British colonists in North America perceived a problem of political tyranny that went beyond the Crown and the politically unaccountable royal judges.[33] They realized that legislatures can be tyrannical, as well.[34] Many of their concerns related to their own lack of voting representation in Parliament, as focused in the famous revolutionary slogan, "No taxation without representation."[35] But it was not hard to see in the 1770s—and it is not hard to see today—that even those who cast a vote for the legislature may not have much influence over the policies of the government. As a result, members of Parliament or of the United States Congress may feel free to vote on issues in ways that are perceived by a majority—even a large majority—of their constituents as oppressive and tyrannical.

The founders of the American republic decided to deal with this problem by creating something new and unique in human political history: a written constitution.[36] Unlike the

31. Some documents comprising the English "constitution" include, *e.g.*, The Magna Carta (1215), The Petition of Right (1628), and The English Bill of Rights (1689). *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxxxix-cxliv (Liberty*Classics* ed. 1982) (1885).

32. Today there is some debate over whether the European Union functions in Great Britain as a construct of international treaties, or as a new overarching constitutional order, so that acts of Parliament may be held unconstitutional. *See* A.W. Bradley, *The United Kingdom, the European Court of Human Rights, and Constitutional Review*, 17 CARDOZO L. REV. 233 (1995). Because the focus of this article is on American law, the current state of English constitutionalism will not be examined.

33. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) ("[The present King of Great Britain] has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.").

34. *See* GAETANO FILANGIERI, 1 THE SCIENCE OF LEGISLATION 12-13 (1806).

35. DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21-23 (1998).

36. *See* George W. Carey & James McClellan, *Editors' Introduction to* THE FEDERALIST, at xvii (George W. Carey & James McClellan eds., Liberty Fund 2001). There have been, of course, two constitution-type documents in American history.

"British Constitution," the American version would stand as a third tier of law, trumping both the common law of judges and the statutes of the legislature.

The source of authority for this new source of law was not the legislature and not the judges, but rather "We, the People of the United States."[37] Additionally, the Constitution declared itself to be the "supreme law of the land."[38] Not only state laws, but also federal common law and even federal statutes must yield if they come into conflict with the provisions of the Constitution. Following its ratification, a third tier was added to the hierarchy of American law:

The United States Constitution
(Made by We the People)
↑
Statutory Law
(Made by the Legislature)
↑
Common Law
(Made by Unelected Judges)

One of the primary reasons for having this new Constitution was to put a box, a set of parameters, around the government—all government actors, including those in the legislative, executive and judicial branches.[39] There was no doubt that the Constitution conveyed only limited power and jurisdiction to the national government, and that any attempted use of power that went beyond the Constitution's authorization would be *ultra vires*.[40] The central debate among the Federalists and Anti-Federalists was whether the proposed Constitution achieved the appropriate balance between the unlimited national legislative power of England

The first, the Articles of Confederation, was rejected by the constitutional convention of 1787 because the national government that it created was too cumbersome and weak. MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 3-5, 239-45 (1959) (1940).

37. U.S. CONST., Preamble.

38. U.S. CONST. art. VI, cl. 2.

39. *See* THE FEDERALIST No. 47 (James Madison).

40. *See* THE FEDERALIST No. 51 (James Madison).

and the ineffective weakness of national power under the Articles of Confederation.[41] Even today, the most textually liberal "living Constitution" apologist would agree that where the Constitution's meaning is clear, it sets up a box and cuts off the discretion of all government actors.[42] No matter how great a political majority might support such ideas, the government may not:

- Allow any person to be placed into slavery;[43]
- Enact any *ex post facto* law;[44]
- Make it illegal to be a follower of any particular religion (however attractive this might have seemed to some in the aftermath of the September 11, 2001, terrorist attacks);[45] or
- Allow anyone under the age of thirty-five to serve as President of the United States.[46]

The very point of a written constitution as supreme law of the land is to tie the hands of all government actors in certain ways. Whether they believe the Constitution's requirements to be wise or foolish, legislators, judges and executive officials are all required to follow those requirements until such time as "We the People" amend the document using the specified procedure.[47] No other source of law, and no personal opinions, can overrule the "supreme law of the land."

III. The Charges

Up to this point, the discussion probably seems obvious. The idea that the Constitution is the supreme law of the land is very basic American legal and political theory. How do we make the leap from that statement to talk of impeaching Supreme Court Justices? To answer that question, we can turn

41. *See* The Federalist No. 45 (James Madison).

42. "The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution." *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

43. U.S. Const. amend. XIII.

44. U.S. Const. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1.

45. U.S. Const. amend. I.

46. U.S. Const. art. II, § 1, cl. 5; *but see* Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 Const. Comment. 217 (1996).

47. U.S. Const. art. V; U.S. Const. art. VI, cl. 2.

to one of the brightest stars in the constellation of Supreme Court constitutional case law: *Marbury v. Madison*.[48]

Marbury, as any undergraduate Political Science major knows, was the landmark decision growing out of the Federalist/Republican political animosity of 1800; the decision in which the Supreme Court declared that a statute of Congress conflicting with the Constitution was "void; and that *courts*, as well as other departments, are bound by" the Constitution.[49] Clearly the Court was right on that point. To Chief Justice John Marshall and his colleagues, the issue was self-evident:

> It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it . . . .
>
> . . . .
>
> . . . The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?[50]

The *Marbury* argument for judicial review rested on the premise that since the Constitution is the supreme law of the land, Supreme Court Justices are bound to obey the Constitution, as best they understand it, even if another branch of government (in this case, Congress by passage of a statute) has adopted a wrong interpretation. The Court reinforced this point by emphasizing the oath of office that they had taken as federal officers to uphold the Constitution:

> [I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? . . . Why does a judge swear to discharge his duties agreably [sic] to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn

48. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

49. *Id.* at 180.

50. *Id.* at 176.

> mockery. To prescribe, or to take this oath, becomes equally a crime.[51]

In short, because the Constitution itself is the supreme law of the land and because of their oath of office to uphold it, Supreme Court Justices are bound to follow the Constitution itself, and not anyone's wrong interpretations.

The obvious implication of the Supreme Court's reasoning is that *none of the branches* of the federal government have the power to make and enforce a policy or decision that is in conflict with the United States Constitution. The Constitution is the supreme law of the land for Congress and the President, just as it is for members of the judicial branch. Presidents, Senators, and Representatives also take an oath to uphold the Constitution itself, not the interpretations of the Supreme Court or anyone else. It has to be equally wrong for any of the branches of the federal government to follow someone's opinion about the Constitution, rather than the Constitution itself.[52] In the words of Professor Michael Paulsen:

> What is truly arresting about Marshall's arguments here—at least to eyes not conditioned to reading Marbury through judicial supremacist lenses and shut to what Marbury actually says—is that the exact same reasoning would seem to apply with equal force to executive and legislative constitutional review of the propriety of acts of the judiciary. If the nature of a written constitution implies enforceable limitations on the powers exercised by the organs of government created thereunder, it implies limitations on the powers of courts, as well as Congress and the President. (Just a few paragraphs later, Marshall will write that the Constitution is an instrument "for the government of courts, as well as of the legislature.") If requiring courts to carry out acts of the legislature contrary to the limits set by the Constitution "would overthrow in fact what was established in theory" and constitute "an absurdity too gross to be insisted on," so too in principle requiring the political branches to

51. *Id.* at 179-80.

52. Since we are discussing the Justices of the Supreme Court, who stand at the pinnacle of the judicial branch, I leave aside the institutional point that lower actors in one of the branches of federal government may have to defer to decision-makers at the top of their branch, even if they believe that those decision-makers may have interpreted the Constitution incorrectly.

> carry out decisions or precedents of the courts contrary to the limits set by the Constitution likewise would, absurdly, "overthrow in fact what was established in theory."[53]

There is one final step in the analysis. When a Supreme Court Justice accepts the opinions of other government officials over the text of the Constitution itself, it defies the very nature of a written Constitution as supreme law and violates the oath of office. Thus, the same must also be true if the "other government officials" in question are the Justices of an earlier Supreme Court.[54] This brings us to the issue of *stare decisis*.

As discussed above, *stare decisis* is the method of the common law.[55] Judges deciding common law cases follow the opinions of other judges in earlier cases. Over time, judicial opinions built a comprehensive body of uncodified law that had consistency, predictability, and stability.[56]

The role of a judge is quite different, however, when he or she is interpreting a statute or a constitution. Here it is not the judge's job to make up law, or even (as Blackstone might have said) to apply God's principles of eternal justice to the case at hand.[57] When there is a statute or constitution at issue, the law has already been established by a higher authority — the legislature or We the People, respectively — and the judge is bound to follow that law. A judge may have to interpret the text of the written statute or constitution, but only with the goal of correctly understanding and applying the document. If this is not true, then the doctrines of legislative and constitutional supremacy have been abandoned.

Consider, for a moment, what it really means to follow the doctrine of *stare decisis* in a constitutional case. For simplicity's sake, assume that we are looking at a particular provision of the Constitution's text, and that there is a dis-

53. Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2716 (2003). I am grateful to Professor Paulsen for his article which, in addition to giving my Constitutional Law students something to read every fall, has impacted my thinking on the issues discussed in this article.

54. Or, for that matter, the same nine Justices in a case decided earlier.

55. *See supra* text accompanying notes 17-22.

56. 20 AM. JUR. 2D *Courts* § 129 (2005).

57. 1 WILLIAM BLACKSTONE, *supra* note 19, at 38-39.

pute concerning two possible meanings or interpretations of that text —call them "X" and "Y." If it helps to use a real-world example, try one of these:

- The right to "keep and bear arms"[58] means an individual right to possess at least some types of firearms for private purposes[59] (X) or could merely mean the right to use firearms in military or militia contexts[60] (Y).
- The right to "free exercise" of religion[61] means the right of religious believers to be exempted from laws that interfere with their religious practice, unless the government can meet a very high standard[62] (X), or could merely mean the right to be free from laws specifically targeted at religion[63] (Y).
- The government may take private property away from its private owner[64] and transfer it to another private owner, so long as this accomplishes some "public purpose"[65] (X), or it may only take private property if it is to be held open for public use[66] (Y).

So assume that the Supreme Court is interpreting some particular provision of the Constitution, and it has the choice between meaning X and meaning Y. Assume further that there is an earlier Supreme Court decision—or perhaps even a whole line of cases—holding that the correct answer to the question is X.

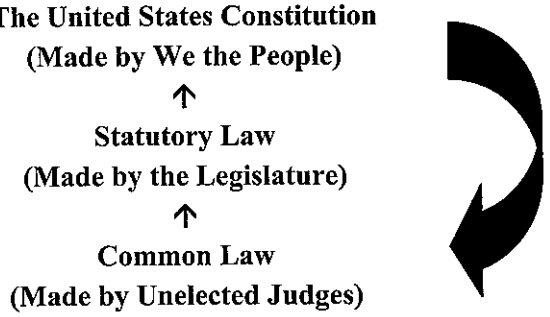
Now suppose that Justice Smith believes that the correct understanding of the provision in question is X. He writes an opinion to that effect, citing the earlier case law as support for his position because those earlier cases came to the correct X position. Is Justice Smith applying the doctrine of *stare decisis*? Not really. He may cite the earlier decisions because they support his conclusion, but they are not the reason for the decision. He decided the case the way he did

58. U.S. CONST. amend. II.
59. District of Columbia v. Heller, 554 U.S. 570, 625-26, 635-36 (2008).
60. *Id.* at 636-37 (Stevens, J., dissenting).
61. U.S. CONST. amend I.
62. Sherbert v. Verner, 374 U.S. 398,401-403, 406 (1963).
63. Emp't Div. v. Smith, 494 U.S. 872, 877-78 (1990).
64. U.S. CONST. amend. V.
65. Kelo v. City of New London, 545 U.S. 469, 480-83 (2005).
66. *Id.* at 505-23 (Thomas, J., dissenting).

because of his conviction that X is the correct meaning. *Stare decisis*, if it means anything, is a guide to deciding cases, not merely window-dressing support for a conclusion already reached.

No, the test of *stare decisis* is this: What if Justice Jones believes that the correct interpretation of the constitutional provision is Y, but the earlier case law says X? Of course, Justice Jones can follow the correct meaning of the Constitution and vote to overrule the earlier wrong cases. But if the Justice follows the precedent and ignores what he believes to be the true meaning of the Constitution, he is following the doctrine of *stare decisis*. Unfortunately, he is also disregarding *Marbury v. Madison*, ignoring the very nature of a written constitution as supreme law of the land, and violating his oath of office. A federal judge who would knowingly misinterpret the Constitution just because earlier judges made a mistake has violated the public trust just as surely as one who knowingly misinterprets the Constitution because Congress passed a statute—the outcome that Chief Justice Marshall deemed unthinkable in *Marbury*.

To apply *stare decisis* in a constitutional case is to turn our hierarchy of law on its head. Instead of the elected representatives of the legislature controlling unelected judges, and the Constitution written under the authority of We the People controlling all branches of government, the judges are now in charge. In effect, they become the Constitution, because they are permitted to rewrite its provisions to match their personal preferences as to right and justice. Constitutional law morphs all the way back into common law:



Here is the central rationale for the impeachment charges: that any Supreme Court Justice who would knowingly decide a case in accordance with a wrong interpretation of the Constitution, merely because of prior judicial precedents, has defied constitutional authority and violated his or her oath of office. Such an act is unconstitutional,[67] and merits immediate impeachment.[68] Furthermore, for a Justice (or a judicial nominee in Senate confirmation hearings) to express a desire or willingness to commit such a treasonous act should also be an impeachable offense—and certainly it is a clear reason for the Senate not to confirm a judicial appointment.

The reader may ask, "But would anyone really do such a thing? Would any Supreme Court Justice, or future Supreme Court Justice, actually defy the United States Constitution by following wrong judicial precedents, or publicly express a willingness to do so?"

It is time to bring the nine defendants to trial and present the evidence against them.

V. The Evidence

A. Justice Anthony Kennedy

We will begin with Justice Kennedy, because he is the most dramatic example. In 1992, when *Planned Parenthood of Southeastern Pennsylvania v. Casey*[69] was before the Supreme Court, Court-watchers on both sides of the abortion debate fully expected it to be the decision that overruled *Roe v. Wade*.[70] This expectation was based on the fact that a majority of the nine Justices had, at one time or another,

67. *See* Gary S. Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J. L. & Pub. Pol'y 23, 24 (1994); Paulsen, *supra* note 53, at 2731-34.

68. The only rare situation in which the use of *stare decisis* might be legitimate in a constitutional (or statutory interpretation) case would be if the Justice truly believes that the two possible interpretations, X and Y, are equally defensible as the original meaning of the text, and that there is simply no way to choose between them. If there is no right answer, then I suppose it would be appropriate to look to court precedents (as opposed to flipping a coin). It seems unlikely that this situation has ever occurred or ever will occur.

69. 505 U.S. 833 (1992).

70. 410 U.S. 113 (1973). *See, e.g.*, David Mills, *Abortion: The Issue of the 90's, Says Pro-lifer*, Wash. Times, July 18, 1989, at E1 ("'We think that the court is very close to overturning Roe,' Miss Smith says. 'Very, very close. It's just a matter of time.'").

expressed a pretty clear view that *Roe* had been wrongly decided. Specifically, the Chief Justice Rehnquist's lead opinion three years earlier in *Webster v. Reproductive Health Services*[71]—joined in its entirety by Justice Kennedy—contained clear suggestions that *Roe* had been a bad constitutional decision and would be overruled in an appropriate case:[72]

> We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases . . . making constitutional law in this area a virtual Procrustean bed. Statutes specifying elements of informed consent to be provided abortion patients, for example, were invalidated if they were thought to "structur[e] . . .the dialogue between the woman and her physician." . . . [S]uch a statute would have been sustained under any traditional standard of judicial review, or for any other surgical procedure except abortion.
>
> . . . .
>
> We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." We think the *Roe* trimester framework falls into that category.
>
> In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. As Justice White has put it, the trimester framework has left this Court to serve as the country's "ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States."
>
> . . . .

71. 492 U.S. 490 (1989).

72. The Court found it unnecessary to overrule *Roe* in *Webster* because it could uphold Missouri's abortion restrictions even if *Roe* were good law.

> In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. . . . "[T]he State's interest, if compelling after viability, is equally compelling before viability."
>
> . . . .
>
> Both appellants and the United States as amicus curiae have urged that we overrule our decision in *Roe v. Wade*. The facts of the present case, however, differ from those at issue in *Roe*. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized the performance of all abortions, except when the mother's life was at stake. This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.[73]

Casey, three years later, directly challenged the validity of the *Roe* decision, so it seemed clear that Justice Kennedy would join a new five-Justice majority to overrule.

Instead, to the surprise of just about everyone, when the *Casey* decision was announced, Justice Kennedy joined Justices O'Connor and Souter in an unusual three-author plurality opinion — and that opinion upheld *Roe v. Wade*![74] How could Justice Kennedy, who had already expressed the belief that *Roe* was wrongly decided, now cast the crucial vote to uphold it? *Stare decisis*, of course:

> While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.
>
> . . . .

73. *Webster*, 492 U.S. at 517-19, 521 (plurality opinion) (citations omitted).

74. Albeit with some modifications. *See* Casey, 505 U.S. at 873 (rejecting the "trimester" framework).

> Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.
>
> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> . . . .
>
> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.
>
> . . . .
>
> A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.[75]

No prosecuting attorney could ask for a clearer confession of guilt. Justice Kennedy essentially reaffirms his previous view that *Roe* was wrongly decided, but then states that it is more important for the Supreme Court to enhance its own prestige by refusing to admit error than to correctly follow the Constitution. Kennedy not only affirmed the unconstitutional use of *stare decisis*; he applied it.

75. Casey, 505 U.S. at 853, 864-65, 868-69.

Verdict: Guilty as charged.

B. Justice Ruth Bader Ginsburg and Justice Stephen Breyer

Justices Ginsburg and Breyer were not on the Court when *Casey* was decided, but they had a later opportunity to affirm Justice Kennedy's heresy. In 1986, thirteen years after *Roe v. Wade*, the Supreme Court ruled that there is no fundamental right to engage in homosexual sodomy.[76] In 2003, eleven years after *Planned Parenthood v. Casey*, the Court addressed another case involving the constitutionality of a statute criminalizing homosexual sodomy.[77] The irony would have been humorous were it not so tragic. In *Casey*, in order to get the desired outcome of affirming abortion rights, the majority drafted a lofty paean to the essentiality of *stare decisis*. This time, in order to get the desired outcome of constitutional protection for homosexual conduct, the Court had to overrule its earlier precedent. In both *Casey* and *Lawrence*, the issues involved constitutional interpretation and were subject to hot public debate on both sides.

Justice Kennedy wrote the majority opinion in *Lawrence*, which overruled *Bowers*. In the process, however, he was careful to affirm *Casey*'s discussion of *stare decisis*:

> The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. ("Liberty finds no refuge in a jurisprudence of doubt.")[78]

Justices Ginsburg and Breyer joined Justice Kennedy's *Lawrence* majority opinion, thereby affirming his unconstitutional commitment to *stare decisis*.

In addition, at the Senate confirmation hearing for her appointment as a Supreme Court Justice, Ruth Bader Ginsburg

76. Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

77. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

78. *Id.* at 577 (citations omitted).

affirmed the applicability of *stare decisis* in a constitutional case. She said:

> The soundness of the reasoning is certainly a consideration. But we shouldn't abandon a precedent just because we think a different solution more rational. Justice Brandeis said some things are better settled than settled right, especially when the legislature sits . . . . Reliance interests are important; the stability, certainty, predictability of the law is important. If people know what the law is, they can make their decisions, set their course in accordance with that law. So the importance of letting the matter stay decided means judges should not discard precedent simply because they later conclude it would have been better to have decided the case the other way. That is not enough. If it is a decision that concerns the Constitution, . . . [and if] the judges got it wrong, it may be that they must provide the correction. But even in constitutional adjudication, stare decisis is one of the restraints against a judge infusing his or her own values into the interpretation of the Constitution.[79]

Justice Breyer's confirmation hearing testimony on the subject of *stare decisis* was even more damning. In response to a question from Senator Hatch, he said:

> My view is that stare decisis is very important to the law. Obviously, you can't have a legal system that doesn't operate with a lot of weight given to stare decisis, because people build their lives . . . on what they believe to be the law . . . . If you, as a judge, are thinking of overturning or voting to overturn a preexisting case, what you do is ask a number of fairly specific questions. How wrong do you think that prior precedent really was as a matter of law; that is, how badly reasoned was it? . . You ask yourself how have the facts changed, has the world changed in very important ways. You ask yourself, insofar, irrespective of how wrong that prior decision was as a matter of reasoning, how has it worked out in practice[?] . . . I think you ask those questions in relation to the Constitution.[80]

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79. *Nomination of Ruth Bader Ginsburg to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong., 196-97 (1993) (statement of Nominee Ginsburg).

80. *Nomination of Stephen G. Breyer, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 291 (1994) (statement of Nominee Breyer).

Amazing! Instead of asking whether the prior decision was wrong, Justice Breyer wants to quantify how wrong it was. And even if it was very wrong as a matter of law, he suggests that the precedent should stand if it worked out well "in practice."

There is no question that these two jurists have confessed to abandoning the Constitution.

Verdict: Both guilty as charged.

C. Justice Sonia Sotomayor

Justices Sotomayor and Kagan are the newest members of the Court, and as such have had little opportunity to display their judicial philosophy in Court opinions. Both, however, made their views on *stare decisis* clear during the confirmation process.

When questioned about the various Supreme Court decisions, nominee Sotomayor repeatedly refused to state her substantive views on various topics, instead making the following statements:

> As a Supreme Court judge, I must give it the deference that the doctrine of the stare decisis would suggest.[81]
>
> . . . .
>
> All precedents of the Supreme Court I consider settled law subject to the deference with doctrine of stare decisis would counsel.[82]
>
> . . . .
>
> And under the deference one gives to stare decisis and the factors one considers in deciding whether that older precedent should be changed or not, that's what the Supreme Court will do.[83]
>
> . . . .
>
> The Doctrine of [Stare] Decisis, which means stand by a decision, has a basic premise. That basic premise is that there is a value in society to predictability, consistency, fairness, evenhandedness in the law.
>
> This society has an important expectation that judges won't change the law based on personal whim. But they will be guided by a humility they should show and the

81. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81 (2009) (statement of Nominee Sotomayor).

82. *Id.* at 85.

83. *Id.* at 88.

> thinking of prior judges who have considered weighty questions and determined as best as they could given the tools that they had at the time to establish precedent. There are circumstances under which a court should reexamine precedent and perhaps change its direction or perhaps reject it. But that should be done very, very cautiously and I keep emphasizing the "verys" [sic] because the presumption is in favor of deference to precedent. The question then becomes what are the factors you use to change it, and then courts have looked at a variety of different factors, applying each in a balance in determining where that balance falls at a particular moment. It is important to recognize, however, that the development of the law is step by step, case by case. There are some situations in which there is a principled way to distinguish precedent from application to a new situation. No, I do not believe a judge should act in an unprincipled way, but I recognize both that the Doctrine of [Stare] Decisis starts from a presumption that deference should be given to precedents, and that the development of the law is case by case. It is always a very fine balance.[84]

In Justice Sotomayor's worldview, *stare decisis* is an important tool to reign in the otherwise unfettered discretion of judges to make the law be whatever their personal whims dictate. They are limited in their omnipotence, not by the necessity of following the actual text of a written legal document, but merely by the policy of upholding their own prior decisions—except, of course, if they see a good reason not to do so.

Verdict: Guilty as charged.

D. Justice Elena Kagan

Justice Kagan also affirmed the principle of *stare decisis* repeatedly in her confirmation hearings, but often by implication in her responses to questions asking whether various cases constituted "established precedent." The implication was clearly that "established precedent" is binding, except in exceptional circumstances as determined by the judge. In response to a question from Senator Edward Kaufman of Delaware quoting Chief Justice Roberts for the proposition that in constitutional cases, "stare decisis doesn't overrule

84. *Id.* at 96.

everything, but it is a major consideration," Kagan replied: "Stare decisis is a major consideration."[85]

In response to further questioning, Kagan stated that the factors to be considered in deciding whether to overturn precedent are:

- The workability of the precedent, asking whether it has made the law erratic and unstable;
- Whether the precedent has been eroded over time, such as by other doctrinal change;
- Whether facts have changed so as to make the precedent "sort of silly"; and
- The length of time that the precedent has been in place. "The more times that a precedent is affirmed and reaffirmed and reaffirmed and nobody has found anything wrong with it, and to the contrary maybe people have specifically reconsidered the precedent and said, 'Yes, we think that this is a good precedent,' that that would be a factor."[86]

Like Justice Sotomayor, Justice Kagan repeatedly discussed *stare decisis* without ever suggesting that adherence to the actual text and meaning of the Constitution is the critical issue. Her factors for overruling precedents are policy judgments, based on notions of whether the law is working well. Along with Justices Kennedy, Ginsburg, Breyer, and Sotomayor, she has made it clear that she considers it appropriate for the Court to follow precedent over the Constitution, unless various practical policy factors suggest that it is time for a different outcome.

Verdict: Guilty as charged.

E. Chief Justice John Roberts and Justice Samuel Alito

The clearest statement of the views of Chief Justice Roberts and Justice Alito, the two George W. Bush appointees to the Supreme Court, on the subject of *stare decisis* is found in Roberts' concurring opinion (joined by Alito) in the 2010 case

85. *Nomination of Elena Kagan, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 212 (2010) (statement of Nominee Kagan).*

86. *Id.* at 212.

of *Citizens United v. Federal Election Commission*.[87] In *Citizens United*, the Court overruled an earlier decision concerning the constitutionality of a portion of the Bipartisan Campaign Reform Act of 2002.[88] The Chief Justice wrote a separate concurring for himself and Justice Alito "to address the important principles of judicial restraint and *stare decisis* implicated in this case."[89] Their discussion in worth examining at some length:

> Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification."
>
> At the same time, *stare decisis* is neither an "inexorable command," nor "a mechanical formula of adherence to the latest decision," especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms.
>
> *Stare decisis* is instead a "principle of policy." When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."
>
> In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal

87. 130 S. Ct. 876 (2010).

88. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

89. Citizens United, 130 S. Ct. at 917.

> than to advance it, we must be more willing to depart from that precedent.
> Thus, for example, if the precedent under consideration itself departed from the Court's jurisprudence, returning to the "'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it." Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.
> Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.[90]

It is tempting to give Roberts and Alito the benefit of the doubt here. After all, their discussion of *stare decisis* comes in a case in which they overruled a constitutional precedent, and they are careful to affirm that the doctrine is not absolute. Still, they do not show any understanding that following *stare decisis* rather than the Constitution itself is unconstitutional. Their list of factors to consider in deciding whether to overrule precedent ("preserve the law's coherence"; "stable and orderly adjudication of future cases") is a pragmatic one similar to the Kagan list described above.[91] They never affirmatively state that they should always overrule precedents that conflict with the correct textual meaning of the Constitution.

Verdict: Guilty as charged.

F. Justice Antonin Scalia and Justice Clarence Thomas

As in the cases of other Justices, the subject of *stare decisis* came up in the Senate confirmation hearings when first

90. *Id.* at 920-21 (citations omitted).

91. *See Nomination of Elena Kagan*, *supra* note 86 and accompanying text.

Antonin Scalia, and later Clarence Thomas, were nominated for the Supreme Court.

Judge Scalia was asked how the role of a Supreme Court Justice would differ from his current job as a judge on the United States Court of Appeals. He noted that lower federal judges are bound to follow the decisions of the Supreme Court,[92] but:

> At the Supreme Court that is not quite the situation, as the Supreme Court is bound to its earlier decisions by the doctrine of *stare decisis*, in which I strongly believe.[93]

One could, perhaps, end the discussion there. "I strongly believe in *stare decisis*"—including, presumably in constitutional cases—is sufficient evidence to convict. Either Justice Scalia, the Court's most outspoken textualist, is not as much a textualist as we might think,[94] or else he is being disingenuous, perhaps referring to some soft version of precedent as support for correct textual interpretation,[95] and not true *stare decisis*. He went on to say that:

> To some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on. Now, which of those you think are so woven in the fabric of law that mistakes made are too late to correct, and which are not, that is a difficult question to answer.[96]

So at least some wrong Supreme Court decisions are "so woven in the fabric of the law" that they should not be corrected.

By the time Clarence Thomas was nominated for the Court, the confirmation process had become more contentious, and the nominee's earlier comments on natural law made his respect for precedent an important issue for some of the

92. *But see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's 'Justice Accused,'* 7 J.L. & RELIGION 33, 73-88 (1990).

93. Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 99th Cong. 32 (1986) (statement of Nominee Scalia).

94. *See* Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595 (2007).

95. *See supra* text preceding notes 67 and 68.

96. *Nomination of Judge Antonin Scalia*, *supra* note 93, at 38.

Senators. Here are nominee Thomas' clearest statements on *stare decisis*:

> I think overruling a case or reconsidering a case, Senator, is a very serious matter. Certainly, . . .you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate. There are some cases that you may not agree with that should not be overruled. *Stare decisis* provides continuity to our system, it provides predictability, and in our process of case-by-case decision-making, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of *stare decisis*, to make that additional step of overruling that case.[97]

And later, along similar lines:

> Senator, I think that the principle of *stare decisis*, the concept of stare decisis is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: We have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can rethink it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a precedent would be the development of institutions as a result of a prior precedent having been in place.[98]

In case law, Justices Scalia and Thomas have taken an approach very similar to that of Roberts and Alito:

> "*Stare decisis* is not an inexorable command" or "a mechanical formula of adherence to the latest decision." It is instead "a principle of policy," and this Court has a "considered practice" not to apply that principle of policy "as rigidly in constitutional as in nonconstitutional

97. *Nomination of Judge Clarence Thomas, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, Pt. 1*, 102d Cong. 134-35 (1991) (statement of Nominee Thomas).

98. *Id.* at 246.

> cases." This Court has not hesitated to overrule decisions offensive to the First Amendment (a "fixed star in our constitutional constellation," if there is one)—and to do so promptly where fundamental error was apparent. Just three years after our erroneous decision in *Minersville School Dist. v. Gobitis*, the Court corrected the error in *Barnette*. Overruling a constitutional case decided just a few years earlier is far from unprecedented.
>
> Of particular relevance to the *stare decisis* question in these cases is the impracticability of the regime created by *McConnell*. *Stare decisis* considerations carry little weight when an erroneous "governing decisio[n]" has created an "unworkable" legal regime . . . .
>
> The modest medicine of restoring First Amendment protection to nonexpress advocacy—speech that was protected until three Terms ago—does not unsettle an established body of law.
>
> Neither do any of the other considerations relevant to *stare decisis* suggest adherence to *McConnell*. These cases do not involve property or contract rights, where reliance interests are involved. And *McConnell*'s § 203 holding has assuredly not become "embedded" in our "national culture."[99]

One detects a greater openness on the part of Justices Scalia and Thomas to overruling constitutional precedents than many of the other Justices (notably Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) have displayed. Perhaps in a perfect world, if they were making the rules without history or outside observers, Scalia and Thomas—and maybe Roberts and Alito as well—would acknowledge that the Constitution must rule and that no precedent should ever be followed if it is inconsistent with the meaning of the document's text. But that is not the position that these Justices have taken. With some caveats and disclaimers, all have communicated both in their confirmation hearings and in decided cases that they accept some form of *stare decisis*, even in constitutional decision-making.

Verdict: Guilty as charged.

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99. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 500-502 (2007) (Scalia , J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in the judgment) (citations omitted).

V. Conclusion

Because the United States Constitution is the supreme law of the land, its text must always be the highest legal standard in our nation. As *Marbury v. Madison* establishes, no informal or formal decision by anyone in government—not a statute of Congress, not a presidential executive order, and not a case decision of the Supreme Court—has any validity if it contradicts the Constitution. If the Supreme Court follows any of these other sources of law over the Constitution itself, such as using the doctrine of *stare decisis* to decide a current case, it has acted unconstitutionally and its members have violated their oaths of office to uphold the Constitution.

Unfortunately, all nine current members of the Court have stated clearly—during confirmation hearing questioning, in their judicial opinions, or both—that at least under some circumstances they would follow the doctrine of *stare decisis* in constitutional decision-making. This means that at least some of the time they would allow prior incorrect precedents to lead them knowingly to a wrong constitutional decision. Nowhere is this clearer, of course, than in Justice Kennedy's ode to *stare decisis* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

The evidence is clear, and the verdicts certain. It is time to impeach the entire Supreme Court.