

TEXT VS. PRECEDENT IN CONSTITUTIONAL LAW

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Conservative constitutional law scholarship is divided into two camps. First, there are the originalists and textualists like myself, Randy Barnett, John Harrison, Gary Lawson, Judge Michael McConnell, Michael Stokes Paulsen, Saikrishna Prakash, and, at times, Akhil Amar. This camp believes that the text of the Constitution, as it was originally understood, is controlling in most constitutional cases. Second, there are the followers of Supreme Court precedent, who sometimes argue incorrectly that they are Burkeans.¹ The latter group includes Charles Fried, Thomas Merrill, Ernie Young, and, in some respects, Richard Fallon. These scholars all follow the doctrine over the document and believe in a fairly robust theory of *stare decisis* in constitutional law.² The key case in recent times about which the textualists and the doctrinalists have clashed is *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³

The argument in this Essay is that the doctrinalists are wrong in arguing for a strong theory of *stare decisis* for three reasons. First, there is nothing in the text, history, or original meaning of the Constitution that supports the doctrinalists' strong theory of *stare decisis*. Second, the actual practice of the U.S. Supreme Court is to not follow precedent, especially in important cases. In other words, precedent itself counsels against following precedent. And, third, a strong theory of *stare decisis* is a bad idea for policy reasons. Each of these three arguments is taken up in turn below.

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1. See Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 686–87 (2006).

2. See, e.g., Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008).

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

I. TEXTUALIST AND ORIGINALIST ARGUMENTS

Both textualism and originalism supply arguments as to why following precedent is wrong. As for the text, it is striking that there is not a word in the Constitution that says in any way that precedent trumps the text. Article V specifically sets forth a procedure by which the constitutional text can be changed through the amendment process.⁴ Amendment is the *only* process the constitutional text provides for making changes in the document. Five-to-four or even nine-to-zero Supreme Court decisions do not trump the text. Moreover, in the Supremacy Clause, the document says that the Constitution, laws, and treaties shall be the “supreme Law of the Land,”⁵ but makes no mention of Supreme Court decisions. It is clear that under the text of the Constitution the Supreme Court has no power to follow its own decisions when they conflict with the text. Moreover, the Supremacy Clause makes *this* Constitution the supreme law of the land, and this Constitution is the one that we know was submitted for ratification under Article VII. The text, then, simply does not support a strong theory of *stare decisis*.

The original history of the Constitution leads to the same conclusion. Records from the Philadelphia Convention and of the ratification debates do not mention anywhere a power of the Supreme Court to follow precedent over constitutional text.⁶ Had such a power been contemplated, surely it would have been discussed and debated during the heated and close fight over ratification of the Constitution. Alexander Hamilton does mention in *Federalist No. 78* that the courts might sometimes be bound by precedents, but he does not assert a power to follow precedent where it plainly conflicts with the text.⁷ At most, Hamilton’s comment and a few other early comments like it suggest a power to follow past interpretations of the constitutional text which are plausible and not in contradiction to the text.⁸ No one in the

4. U.S. CONST. art. V.

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

6. See 1–2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911); ELLIOT’S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1836).

7. THE FEDERALIST NO. 78 (Alexander Hamilton).

8. See Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 86–87 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535,

Framing generation, not even the most committed Anti-Federalists, imagined a doctrine of *stare decisis* trumping the constitutional text of the kind the Justices found in *Casey*.⁹

Moreover, early practice under the Constitution shows that the Framers themselves did not follow a strict theory of *stare decisis* on the most significant constitutional issue of their day—the constitutionality of the Bank of the United States. It is worth rehearsing quickly the history of the debate over the constitutionality of the Bank during the first forty years of the Republic. The Bank of the United States was created in 1791 on the recommendation of Alexander Hamilton. Almost two-thirds of the members of the first House of Representatives and all of the first Senate thought the Bank was constitutional,¹⁰ which is significant because the First Congress was full of delegates to the Philadelphia Convention and the First Congress's decisions thus have always been thought to be especially probative of constitutional meaning. The bill establishing the Bank was signed into law by President George Washington, who had presided over the Philadelphia Convention and without whose support the Constitution would never have been ratified. Washington signed the Bank bill even though his Secretary of State and Attorney General advised him that the bill was unconstitutional.

The question of the constitutionality of the Bank would continue to be debated from when it was first enacted in 1791 until the 1830s. Throughout that period, most of the people who commented on the matter did not think that the question of the constitutionality of the Bank was settled by the first Congress and President Washington having participated in its creation. The Bank was allowed to lapse in 1811 after its twenty-year charter expired, and members of Congress continued to debate its constitutionality. A bill renewing the Bank was ultimately passed by Congress shortly after the War of 1812, and President James Madison signed it into law in 1816,¹¹ which was significant for several reasons. First, Madison is often called the Father

1571–76 (2000) (arguing that statements by Hamilton, Madison, and Anti-Federalist writer Brutus about precedent do not show a belief that the judiciary could “assign binding precedential weight to their decisions”).

9. See Paulsen, *supra* note 8, at 1576. *But see* Anastasoff v. United States, 223 F.3d 898, 901–03 (8th Cir. 2000).

10. See Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 248 n.28 (2003).

11. Act of March 3, 1819, ch. 73, 3 Stat. 266 (1816).

of the Constitution because of the important role he played at the Philadelphia Convention and as an author of the *Federalist Papers*. Second, Madison had said in Congress when the First Bank was approved that he thought the Bank was unconstitutional as a matter of original meaning.¹² Third, Madison ultimately let the Second Bank become law because he felt that practice and precedent had settled matters in favor of the Bank's constitutionality. Strikingly, Madison's conclusion on the importance of precedent was to be decisively rejected.

The question of the constitutionality of the Bank finally reached the Supreme Court in 1819 in *McCulloch v. Maryland*.¹³ Chief Justice Marshall could easily have said in *McCulloch* that the question of the constitutionality of the Bank had been settled by twenty-eight years of practice and precedent. The Supreme Court had said something similar in *Stuart v. Laird*,¹⁴ where the Court relied on precedent. Instead, Chief Justice Marshall reviewed the question *de novo*, making a number of famous textualist, structural, and originalist arguments. Chief Justice Marshall treated the constitutionality of the Bank as an open question, even after twenty-eight years.¹⁵

In 1832, a full forty years after President Washington and the First Congress had created the Bank, the question of its constitutionality arose again when the Bank came up for renewal a third time. President Andrew Jackson vetoed the renewal bill on the grounds that the Bank was unconstitutional, and he used key language in his veto message that bears on the issue of precedent. President Jackson said:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where

12. Smith, *supra* note 10, at 248.

13. 17 U.S. (1 Wheat.) 316 (1819).

14. 5 U.S. (1 Cranch) 299, 309 (1803).

15. *McCulloch*, 17 U.S. at 401.

the acquiescence of the people and the States can be considered as well settled.¹⁶

For Jackson, forty years after the First Congress and President Washington had approved the Bank, the question of its constitutionality was not well settled. Jackson's veto killed the Bank, and it would not reemerge until eighty-two years later during the administration of Woodrow Wilson, with the creation of the Federal Reserve Board.

Original practice, then, confirms that on the most contested constitutional issue of their day—the constitutionality of the Bank—the second generation of Americans did not follow a precedent set forty years before by the First Congress and President Washington. Early practice thus corroborates what the constitutional text and original history show. The Framers of the Constitution did not espouse a strong theory of precedent in constitutional cases.

II. ARGUMENTS FROM PRACTICE

Second, the actual practice of the Supreme Court is to not follow precedent, especially in significant cases. According to one count, the Court appears to have overruled itself 174 times, mostly in constitutional rather than statutory cases.¹⁷ D.C. Circuit Judge Laurence Silberman has suggested that the “Supreme Court is a ‘non-court court’” that “rarely considers itself bound by the reasoning of its prior opinions.”¹⁸ Judge Richard Posner, another prominent circuit court judge and scholar of the federal court system, has similarly remarked that “[t]he Supreme Court has never paid much heed to its own precedents—that’s nothing new.”¹⁹ To prove Posner’s point, consider ten big occasions from the last seventy years where the

16. Andrew Jackson, Veto Message to the Senate (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144–45 (James D. Richardson ed., 1896).

17. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 46, 47 (2005) (statement of Sen. Sam Brownback).

18. *Lederman v. United States*, 291 F.3d 36, 48 (D.C. Cir. 2002) (Silberman, J., concurring); *see also* Benjamin Wittes, *Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, at 39 (quoting this section of Judge Silberman’s opinion).

19. Wittes, *supra* note 18, at 40 (quoting Judge Posner).

Court explicitly or implicitly overruled itself relying upon textual first principles or originalist arguments.

The first is the Constitutional Revolution of 1937. The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique, thus displacing a body of case law that stretched back for almost forty years. In *West Coast Hotel Co v. Parrish*,²⁰ the Court explicitly overruled its decision in *Adkins v. Children's Hospital of the District of Columbia*²¹—a landmark case. The Court also adopted, as part of the Constitutional Revolution of 1937, a much broader reading of the Commerce and Necessary and Proper Clauses.²² It reached this reading after returning to first principles and a Marshallian originalist understanding of the scope of national power.²³ The New Deal Court's federalism case law explicitly overruled *Hammer v. Dagenhart*²⁴ and was also inconsistent with a forty-year-old line of precedent.²⁵ There can be little question that the Revolution of 1937 constitutes a big break with precedent.

Second is *Erie Railroad Co. v. Tompkins*,²⁶ which overruled the one-hundred-year-old doctrine of *Swift v. Tyson*²⁷ on originalist grounds. *Erie* is an unabashed triumph for originalism, because the Court's opinion asserts that *Swift* has been fatally undermined by the historical research of Charles Warren.²⁸ *Erie* embodies the doctrinalist's worst nightmare about where originalism might lead—a scholar emerges from the library with new evidence about the original meaning of a text and decades of practice gets upended.

20. 300 U.S. 379, 400 (1937).

21. 261 U.S. 525 (1923).

22. See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (expanding Congress's power under the Commerce and Necessary and Proper Clauses to regulate intrastate activities that, although insignificant individually, are substantial if aggregated); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (interpreting expansively the Commerce Clause to allow Congress to regulate intrastate activities that have a "close and substantial relation to interstate commerce").

23. Calabresi, *supra* note 1, at 642–47.

24. 247 U.S. 251 (1918).

25. See *United States v. Darby Lumber Co.*, 312 U.S. 100, 116–17 (1941).

26. 304 U.S. 64 (1938).

27. 41 U.S. (1 Pet.) 1 (1842).

28. *Erie*, 304 U.S. at 86.

Third, in the Flag Salute Cases, *West Virginia State Board of Education v. Barnette*²⁹ overruled *Minersville School District v. Gobitis*³⁰ on textual first principles. *Barnette* was a clear and sharp overruling of a recent and major constitutional precedent. Although it may not be an originalist victory, it is a victory for those who want to use the first principles implicit in the text of the Constitution to make radical changes to the doctrine.

Fourth is *Brown v. Board of Education*,³¹ which implicitly overruled *Plessy v. Ferguson*³² on textualist first principles. The opinion in *Brown* is openly non-originalist,³³ but *Brown* is again clearly a victory for those who want to use the first principles implicit in the text of the Constitution to change sharply the doctrine.

Fifth, the school prayer decision in *Engel v. Vitale*³⁴ cast aside a 172-year-old Burkean tradition of legal school prayer on the grounds that such prayer violated a hitherto unappreciated original meaning of the Establishment Clause. *Engel* may well be wrong as a matter of originalism, but it is certainly another example of the Supreme Court not caring a whit for precedent or practice.

Sixth, the Court in *Jones v. Alfred H. Mayer Co.*³⁵ implicitly overruled the *Civil Rights Cases*'³⁶ conclusions about Section Two of the Thirteenth Amendment for originalist reasons. In this instance, the triumph of the text is also a triumph of original meaning over decades of contrary precedent.

Seventh, in *Gregg v. Georgia*³⁷ the Supreme Court reinstated the death penalty for originalist reasons after the Supreme Court's decision in *Furman v. Georgia*³⁸ had called it into question. The Court in *Gregg* quoted at length from the constitutional text and from originalist sources to prove that the death penalty was not always and everywhere unconstitutional.³⁹

29. 319 U.S. 624, 642 (1943).

30. 310 U.S. 586 (1940).

31. 347 U.S. 483, 494–95 (1954).

32. 163 U.S. 537 (1896).

33. *Brown*, 347 U.S. at 489, 492.

34. 370 U.S. 421, 431–32 (1962).

35. 392 U.S. 409, 433–40 (1968).

36. 109 U.S. 3 (1883).

37. 428 U.S. 153 (1976).

38. 408 U.S. 238 (1972).

39. *Gregg*, 428 U.S. at 169–70 & n.17, 173–78.

Eighth is the Supreme Court's Tenth Amendment line of cases. Here, the 1969 decision in *Maryland v. Wirtz*⁴⁰ was overruled in 1976 by the five-to-four decision in *National League of Cities v. Usery*,⁴¹ which in turn was overruled by the five-to-four decision in *Garcia v. San Antonio Metropolitan Transit Authority*.⁴² *Garcia* has itself been rendered a dead letter by *Seminole Tribe of Florida v. Florida*⁴³ and *Alden v. Maine*.⁴⁴ The number of overrulings in this one area of doctrine alone is staggering and suggests an unwillingness by the Justices to adhere to *stare decisis* in constitutional law.

Ninth is the Rehnquist Court's federalism cases, which displaced fifty-eight years of contrary post-1937 case law. *United States v. Lopez*⁴⁵ is inconsistent with almost six decades of Commerce Clause case law; *City of Boerne v. Flores*⁴⁶ explicitly limits and alters the meaning of *Katzenbach v. Morgan*,⁴⁷ *New York v. United States*⁴⁸ is inconsistent with *Garcia*; and *Seminole Tribe* overruled *Pennsylvania v. Union Gas Co.*⁴⁹ Federalism doctrine is clearly another significant area of constitutional law where the Court has acted in ways sharply inconsistent with precedent.

Tenth and finally is the Court's recent overruling of *Bowers v. Hardwick*⁵⁰ in *Lawrence v. Texas*,⁵¹ in which the Justices held that a Texas sodomy statute was unconstitutional as a matter of substantive due process.⁵² The Court's decision in *Lawrence* not only flew in the face of *Bowers*, but also was inconsistent in its substantive due process methodology with *Washington v. Glucksberg*,⁵³ the Court's 1997 decision on assisted suicide. *Lawrence* is wrong as a matter of originalism, as I have explained

40. 392 U.S. 183 (1968).

41. 426 U.S. 833, 855 (1976).

42. 469 U.S. 528, 557 (1985).

43. 517 U.S. 44, 77 (1996).

44. 527 U.S. 706, 739–40 (1999).

45. 514 U.S. 549, 552 (1995).

46. 521 U.S. 507, 516, 527–28 (1997).

47. 384 U.S. 641 (1966).

48. 505 U.S. 144, 210 (1992) (White, J., dissenting).

49. 491 U.S. 1 (1989).

50. 478 U.S. 186 (1986).

51. 539 U.S. 558 (2003).

52. *Id.* at 578.

53. 521 U.S. 702 (1997).

elsewhere,⁵⁴ but it is certainly an example of the Court not following—and indeed upending—long-established precedent.

Taken together, these ten explicit and implicit overrulings show that it is simply *not* the Supreme Court's practice to always follow precedent. To the contrary, the Court almost never follows precedent on big issues and in recent times has done so only in *Casey*⁵⁵ and in *Dickerson v. United States*.⁵⁶ All good Burkeans in this country must admit that we have a tradition here of following the written Constitution and not Supreme Court case law.⁵⁷ Thus, in the United States, Burkeanism leads back to the text.

III. POLICY ARGUMENTS AGAINST FOLLOWING PRECEDENT

Third, and finally, for two main reasons, it is not a good idea as a matter of policy for the Supreme Court to follow strictly its own precedents.

First, it is almost impossible to amend the Constitution.⁵⁸ The United States has the most difficult constitutional amendment process of any major democratic country.⁵⁹ Constitutional amendments must receive a two-thirds vote in both Houses of Congress and be ratified by thirty-eight states (three-fourths of the current fifty) to become law.⁶⁰ If only one house of thirteen state legislatures rejects a constitutional amendment, the amendment is dead. The thirteen least populous states have a combined total of less than 5 percent of the U.S. population,⁶¹ which means that, in theory, constitutional amendments in the

54. See Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1108–09 (2004).

55. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

56. 530 U.S. 428, 432 (2000).

57. See Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1438–42 (1997).

58. See Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 126 n.31 (1996).

59. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 369 (1994).

60. U.S. CONST. art. V.

61. See U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006*, at tbl. 1 (2006), <http://www.census.gov/popest/states/tables/NST-EST2006-01.xls>.

United States could be supported by more than 95 percent of the American people, and they could still fail to be ratified.

A strict rule of *stare decisis* in constitutional cases, therefore, would make it impossible to ever correct the Supreme Court's errors, even by appointing new members and hoping for overrulings. It would eliminate the only formal check on the Supreme Court that actually works. The other two checks are the amendment process, which as I have already explained does not work, and, in theory, impeachment, which could be a check on the Supreme Court but has never been used successfully in two hundred years. So, if one thinks the Supreme Court is going to make mistakes, it is necessary to be able to correct those mistakes by getting them overruled.

It simply cannot be good public policy to allow less than 5 percent of the population to have an absolute veto on changes in Supreme Court doctrine, but it is, in practice, the result of a strict rule of *stare decisis*. Given the casual way in which the Court decides cases, and given the Court's frequent refusal to be bound by text, original meaning, or precedent, it would be a mistake to eliminate the only effective check on the Supreme Court.

Second, a strict rule of *stare decisis* is a mistake for policy reasons because it fails to take account of the long time horizon one should have in constitutional law. Thus, the need for a long-term view invalidates the arguments of leading doctrinalists like Professor Thomas Merrill, who argue that the Supreme Court ought to follow precedent because it: (1) promotes the rule of law; (2) preserves continuity with the past; (3) reflects an appropriate skepticism about powers of human reason; (4) enhances democratically accountable lawmaking; and (5) promotes judicial restraint.⁶² Let us examine each of Professor Merrill's five arguments in turn, asking whether they would countenance overruling the thirty-five-year-old precedent of *Roe v. Wade*,⁶³ a case that Professor Merrill thinks *stare decisis* protects.⁶⁴

First, would the rule of law be promoted by retaining or overruling *Roe*? The answer depends on the length of the time horizon. Is it more important to the rule of law to be consistent

62. See e.g., Merrill, *supra* note 2.

63. 410 U.S. 113 (1973).

64. See Merrill, *supra* note 2, at 977.

with the constitutional law on abortion of the last thirty-five years or is it more important to be consistent with the tradition of banning abortions outright from the mid-nineteenth century to 1973? Is it more important to the rule of law to maintain abortion rights or more important to get rid of the doctrine of substantive due process, which led to *Dred Scott v. Sandford*⁶⁵ and to *Lochner v. New York*?⁶⁶ In constitutional law, one ought to take the long view. Being consistent with centuries of law regulating abortion and getting rid of the destabilizing constitutional monstrosity of substantive due process does more to promote the rule of law values of stability and consistency than following a thirty-five-year-old precedent that was controversial from the day it was handed down.

Second, is continuity with the past best promoted by retaining or overruling the thirty-five-year-old precedent of *Roe v. Wade*? Again, the answer depends on whether one adopts a long- or a short-term time horizon in constitutional law. Do we want to be consistent with the past thirty-five years or with centuries of laws regulating and forbidding abortions? In constitutional law, one's time horizon must be multi-generational and not confined to the past thirty-five years. The whole point of constitutional law is to allow one generation to bind its descendants by enshrining fundamental rights in the Constitution.⁶⁷ The enterprise of inter-generational lawmaking would become impossible if one preserved continuity with only the recent past and not with the last few centuries. Again, continuity with the past is best preserved by overruling *Roe*.

Third, is skepticism about the powers of human reason most enhanced by retaining or overruling *Roe*? Once again, the answer is clear. For hundreds of years, it has been our tradition to forbid abortion from the moment we first knew that fetal life had come into being.⁶⁸ The common law banned abortion from the time of quickening onward, and it was outlawed altogether in the nineteenth century once we learned that fetal life starts before quickening.⁶⁹ Skepticism about the powers of human

65. 60 U.S. (19 How.) 393 (1856).

66. 198 U.S. 45 (1905).

67. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

68. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 281–82 (1992).

69. *Id.*

reason should counsel in favor of deference to longstanding practice and not to a controversial thirty-five-year-old dictate. Conservatives tend to agree with Friedrich Hayek that tradition embodies the wisdom of the ages and is a spontaneous source of order that ought to be followed.⁷⁰ Calling a Harry Blackmun opinion from 1973 the wisdom of the ages, however, strains credulity. Skepticism about the powers of human reason suggests *Roe* ought to be overruled.

Fourth, is democratically accountable lawmaking enhanced or diminished by overruling *Roe*? Again, the answer is obvious: *Roe* took the highly charged question of abortion and removed it from the legislatures of the fifty states while creating a sweeping and congressionally unalterable rule. Overruling *Roe* would not make abortion illegal, but would simply return the question to the fifty state legislatures, most of which would probably keep abortion legal.⁷¹ Supporters of *Roe* argue that there are powerful reliance interests on the part of women that have grown up around *Roe* and counsel in favor of keeping abortion legal.⁷² If their argument is true, then there is every reason to expect that state legislatures will respond to the wishes of women, who are a majority of the population. There is no question that democratically accountable lawmaking is enhanced by overruling *Roe* and not by retaining it.

Fifth and finally, does judicial restraint counsel in favor of overruling or retaining *Roe*? Overruling *Roe* means no more invalidations of state and federal laws regulating abortion, and it is the striking down of democratically-initiated, constitutionally-permissible laws that constitutes judicial activism. The defenders of *Roe* like to play on words by implying that it is "activist" for the Supreme Court to overrule *Roe* because the Court would be taking action.⁷³ To the contrary, refusing to continue a practice of striking down abortion laws is not activist; it is restrained. Judicial restraint counsels in favor of overruling *Roe*.

70. See, e.g., F.A. von Hayek, *The Trend of Economic Thinking*, 40 *ECONOMICA* 121, 129 (1933).

71. See Mary Ann Glendon, *A World Without Roe: How Different Would it Be?*, *HASTINGS CENTER REP.*, July–Aug. 1989, at 30, 30.

72. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

73. See, e.g., Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 *MD. L. REV.* 118, 135–36 (1987).

Constitutions are about inter-generational lawmaking where one generation binds the next.⁷⁴ Accordingly, it is a mistake to think that it demonstrates restraint for the Court to follow a thirty-five-year-old precedent rather than the tradition of the last millennium where we never condoned aborting a life in the womb once we knew it had begun. Judicial restraint and the rule of law are promoted when we follow the fundamental constitutional principles of our great-grandfathers, secure in the knowledge that if we pass an Equal Rights Amendment or a Balanced Budget Amendment, it will be followed by our great-grandchildren. This is what constitutional government is all about.

CONCLUSION

In summary, the text of the Constitution, its original meaning, the early practice of the Framers, the modern practice from 1937 to 2008, and policy arguments all counsel in favor of textualism and against a strong theory of *stare decisis* in constitutional cases. Conservatives in the United States ought to embrace textualism and originalism in place of rule by a biased, lawyerly elite on the Supreme Court. True Burkeans in the United States will realize that America's tradition is one of following the written Constitution, and not the decisions of five superannuated life-tenured lawyers. It is not our practice slavishly to follow precedent and there is no good reason why we should suddenly make that our practice today.

74. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).