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THE UNCERTAINTY PRINCIPLE IN THE SUPREME COURT

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To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.¹

This unexceptionable statement, made by Chief Justice Fred M. Vinson to the American Bar Association in 1949, is, most would agree, a reasonable explanation of why the Supreme Court decides to hear a case. As Chief Justice Vinson made clear, the purpose of hearing a case is neither to correct errors in lower court decisions nor to decide all interesting questions that come the Court's way, but to "*resolve* conflicts of opinion on federal questions that have arisen among lower courts [a]nd to pass upon questions of wide import under the Constitution, laws, and treaties of the United States."²

Although the resolution of such matters may be the ideal toward which the Court strives, it is not, in most cases, what the Court in fact achieves. It must be admitted that the Court frequently resolves the fact-specific issue presented to it, as well as certain narrow questions of statutory or regulatory law. In adjudication of constitutional issues, however, such resolution is in most cases inherently unattainable.³ Instead of

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1. Address of Chief Justice Vinson before American Bar Association (Sept. 7, 1949), *reprinted in* R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 259 (5th ed. 1978).

2. R. STERN & E. GRESSMAN, *supra* note 1, at 258 (emphasis added).

3. Of course, there are a few cases in which certain constitutional issues are truly resolved. Consider, for example, the recent case of *Maryland v. Macon*, 105 S. Ct. 2778 (1985). In *Macon*,

resolving constitutional issues, the Court merely stimulates or, perhaps, refocuses debate. It is nearly impossible to think of a constitutional issue that has been "settled" by the Court—to find a case where lawyers for interested parties to potential disputes packed up their briefcases and went home.⁴

This article will demonstrate that there is an uncertainty principle⁵ at work in the judicial process: any attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles. The process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines.⁶

This is not, as most commentators seem to assume, the result of poorly drafted decisions by the Court. Although poorly written opinions can certainly contribute mightily to the problem, it is an inherent feature of the adjudicative process, as the Court has always defined that process, that uncertainty will be a by-product of any attempt to decide constitutional disputes. If this thesis is true, then criticisms of the Court's inability to resolve issues miss a major point: even the best drafted, most perspicacious Supreme Court opinion will not lay difficult constitutional disputes to rest. The message to the Court, then, is to recognize these limits on its ability and not to take cases with the expectation that its

plainclothes policemen entered an "adult bookstore," purchased two magazines, compared the magazines to their criteria for obscenity, and immediately arrested the proprietor of the store without a warrant. The Court decided three issues in a brief opinion joined by seven Justices: (1) entry of such a store is not a "search" under the fourth amendment; (2) a purchase of such magazines is not a seizure; (3) and the validity of the warrantless arrest is not at issue because no evidence was obtained pursuant to it. *Id.* at 2782-83. The Court did not consider whether the magazines were actually obscene. Essentially, the Court was presented with three "yes or no" questions (the second of which was novel) and answered them with little elaboration. Although it is not clear that the Court's answers were correct, *see id.* at 2783-86 (Brennan, J., dissenting), it is certainly correct that they were clear. Few constitutional issues can, however, be addressed so succinctly.

4. To the extent that the Court *desires* its decisions to create controversy and, in that way, to promote doctrinal advancement, I offer no suggestions. Frequently, however, the Court decides cases in an attempt to resolve unanswered questions regarding given doctrine. This goal is rarely achieved; when it is achieved, the cost is the creation of more questions than were resolved.

5. The term is borrowed from the science of nuclear physics, where the uncertainty principle—often denoted the Heisenberg Uncertainty Principle—holds that it is impossible to ascertain with complete accuracy both the position and the velocity of a particle because the process of measuring one characteristic introduces great uncertainty in the measurement of the other.

6. *See, e.g., Oregon v. Elstad*, 105 S. Ct. 1285, 1299 (1985) (Brennan, J., dissenting):

The Court's decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule . . . the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally the Court reaches out once again to address issues not before us.

decision will "settle" an "important question of federal law."⁷ Instead, the Court ought to recognize that a decision will generally create more controversy and doctrinal confusion than it will resolve. As this discussion will show, in some areas this may be a desirable outcome.⁸ But if the Court does not desire unstable doctrine and decades of litigation over a series of issues raised by a decision, then it should forbear from taking the case at all.⁹

For example, the Court cannot, in one or two cases, decide the limits of civic participation in religious holidays.¹⁰ Unless the Court was prepared to decide a long series of cases on this issue—which is arguably of slight constitutional significance, but which stirs great public passions and considerable litigation¹¹—it should have stayed out of this area and

7. SUP. CT. R. 17(1)(c). See also *Michigan v. Clifford*, 464 U.S. 287, 289 (1984) ("We granted certiorari to clarify doubt that appears to exist as to the application of our decision in [*Michigan v. Tyler*.]"); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976) ("We granted certiorari to resolve the conflict on this important question.").

8. See *infra* notes 31-43, 57-60 and accompanying text.

9. Although this article stresses the virtues of passivity, it does not endorse the "passive virtues" expounded by Professor Alexander Bickel. In *The Least Dangerous Branch—The Supreme Court at the Bar of Politics*, Bickel discussed the constitutional validity of judicial review of legislative enactments and concluded that such review is only justifiable as a "process for the injection into representative government of a system of enduring basic values." A. BICKEL, *THE LEAST DANGEROUS BRANCH—THE SUPREME COURT AT THE BAR OF POLITICS* 51 (1962). Accordingly, Bickel urged the Court to avail itself more often of the devices by which a decision could be avoided—standing, ripeness, political question, and so on—where such avoidance would "turn the thrust of forces favoring and opposing a [particular position] toward the legislature, where the power of at least initial decision properly belongs in our system . . ." *Id.* at 148.

This article deals not with how the Court must act in order to legitimate its power of judicial review or with the Court's proper place in the constitutional constellation, but with the more pragmatic consideration of how it can avoid, insofar as possible, causing undue confusion in the legal community and society at large. For my purposes, Bickel's quasi-jurisdictional devices for avoiding a decision on the merits are not passive. Invocation of such doctrines by the Court is an aggressive statement that this litigant and all future litigants in his position will not be heard in the federal courts. Such a decision may also lead to as much litigation and confusion as would a decision on the merits, as parties try to convince courts that *they* have standing or that *their* cause is ripe. For a more detailed critique of Bickel's view, see Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1 (1964). My view concerning the type of case the Court should resolve is in some ways the opposite of that advanced by Bickel. One commentator neatly summarized Bickel's conclusion: "[I]f the great political cases are incapable of principled resolution, then the Court ought to decline decision of such cases." Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel*, 1970 DUKE L.J. 591, 595. My thesis is that most constitutional issues, great and otherwise, simply cannot be resolved by the Court. There are, however, narrower issues that can be resolved, and unresolvable fundamental issues that are sufficiently important for the Court to want to stimulate and refocus debate over an extended period of time. These are the cases it should decide. It should avoid cases where its attempts to resolve issues will produce only confusion and litigation without the offsetting benefit of encouraging or redirecting controversy on issues where such controversy is desirable.

10. See *infra* notes 316-32 and accompanying text.

11. See, for example, Doerner, *Like Christmases Past*, TIME, Dec. 24, 1984, at 10, 10: "[*Lynch v. Donnelly*] failed to settle the matter. Crèche critics . . . are seeking to severely limit the [C]ourt's

denied certiorari in *Lynch v. Donnelly*. The alternative is intense litigation lasting a decade or two, until, exhausted by the ordeal, everyone gives up, with matters no more clearly resolved than they were at the start.

Recognizing its limitations, the Court should take two courses of action more frequently. First, it should deny certiorari or dismiss appeals for want of a substantial federal question¹² in cases such as *Lynch*, where extended confusion and debate over how far towns may go in celebrating Christmas is not sufficiently critical to the fundamental separation-of-church-and-state issue to warrant an extended series of decisions. Second, recognizing that doctrinal clarity and meaningful guidance to executive and legislative authorities are usually impossible to achieve, but that some resolution of particular issues may be necessary, the Court should resolve such cases by simply balancing the facts of each particular case without purporting either to rely on past cases or to declare guidelines for future ones.¹³ Thus the resolution of a particular case would not encourage lawyers to try to distinguish it nor the Court to try to clarify it in the future, because it would not have meaning beyond that case. Currently, all such "ad hoc" balancing by the Court involves reliance on past decisions¹⁴ and, frequently, creation of guidelines for future ones.¹⁵ Consequently, these determinations suffer from the uncertainty principle just as other decisions do.

As Dean Roscoe Pound observed in 1908, "[t]he nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions."¹⁶ In 1938, the Supreme Court rejected the transcendental view of the law, which had led to the

ruling. As a result, the jingle bells of the season were interrupted by the jangle of legal discord." This article then cited examples, from six cities, of litigation or potential litigation sparked by the Supreme Court's holding. *Id.*

12. Note that this course does not present the same problems in my approach that it did in Bickel's. See *supra* note 9. Bickel proposed that the Court dismiss the *most significant* cases for want of a substantial federal question—a contradiction in terms and, in Gunther's view, see Gunther, *supra* note 9, at 25, a dereliction of the Court's duty. I am merely proposing that the Court's conception of which questions are insubstantial be expanded somewhat from the current practice.

13. In Germany, for example, there is no doctrine of stare decisis; decisions are rendered on a case-by-case basis. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1037 (1983). "In practice, however, German courts rely on, distinguish, and overrule their prior opinions much as courts do in a 'common law jurisdiction.'" *Id.* See also Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 497 (1975) (discussing how continental legal systems approach and apply decisions).

14. See, e.g., *Oliver v. United States*, 466 U.S. 170, 181-82 (1984) (denouncing case-by-case balancing as a method of deciding fourth amendment cases and relying instead on a series of past decisions).

15. See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205, 209-12 (1975). *Erznoznik* is discussed *infra* notes 284-89 and accompanying text.

16. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620-21 (1908).

mischievous results that Pound decried.¹⁷ No longer could the judicial process be viewed as a “mechanical application of clear-cut rules to clear-cut categories to arrive at indisputably just solutions to unambiguously characterized problems,”¹⁸ as had previously been claimed. Although the Court today would make no such claim, it does consider itself competent to “resolve” disputes on important questions of federal law,¹⁹ to “clarify doubt,”²⁰ and to promulgate “bright lines”²¹ for lower courts and executive and legislative officials to follow. Yet the existence of such purported “bright lines” and “clarification” leads everyone—from the policeman in Gas City, Indiana, to the Supreme Court itself—to fall into the trap of mechanical jurisprudence. Patently unreasonable searches by law enforcement officials may be approved because they fall mechanically within the definition of “searches incident to arrest” or “automobile searches,”²² and a carefully drafted ordinance may be struck down because it fails to conform completely to the requirements of the “commercial speech” doctrine.²³ More commonly, however, the Court promulgates guidelines for others to follow, then later fails to follow those guidelines itself while attempting to do justice in a particular case.²⁴ The resulting confusion leads all affected parties, unsure of the

17. *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (rejecting view that there is “a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute”) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

18. This summary of the transcendental view is derived from Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 623 n.17 (1954).

19. SUP. CT. R. 17.

20. See, e.g., *Michigan v. Clifford*, 464 U.S. 287, 289 (1984).

21. For example, this term is found in *Robbins v. California*, 453 U.S. 420, 430 (1981), in Justice Powell’s characterization of the majority opinion in *New York v. Belton*, 453 U.S. 454 (1981). The *Belton* Court had stated that the “protection of the Fourth and Fourteenth Amendments ‘can only be realized if the police are acting under a set of rules which, in most cases, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interests of law enforcement.’” *Belton*, 453 U.S. at 458 (quoting LaFare, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142).

22. See *infra* notes 70-107 and accompanying text.

23. See *infra* notes 129-65 and accompanying text.

24. A typical example of the differing approaches to the problem posed by precedent may be found in *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (aid to parochial schools). In a concurring opinion, Justice Powell felt compelled to strike down the educational programs in question—despite the fact that they had “done so much good and little, if any, detectable harm,” *id.* at 3239 (quoting *Felton v. Secretary, United States Dep’t of Educ.*, 739 F.2d 48, 72 (2d Cir. 1984))—because “precedents of this Court require . . . invalidat[ion],” *id.* at 3239. Three dissenting Justices, on the other hand, felt no such compunction and indicated that the precedents could easily be read not to require such a result. *Id.* at 3242 (Burger, J., dissenting); *id.* at 3243 (Rehnquist, J., dissenting); *id.* at 3243 (O’Connor, J., dissenting).

rules, to act on an ad hoc basis while claiming to follow the guidelines that the Court has declared.

The uncertainty inherent in Supreme Court decisions cannot be eliminated.²⁵ What can be eliminated is the secondary uncertainty that arises when everyone, from the Supreme Court on down, claims to know what the rules are. The Court should abandon, in all but certain leading or "fulcrum" cases,²⁶ the attempt to base its decisions on precedent, and it should simply balance the facts on the fulcrum (such as "reasonableness" in fourth amendment cases) that the leading case established. Lower courts and government officials—and the Supreme Court Justices themselves—would then be relieved of the impossible and harmful process of "finding" light where there is only darkness. Courts and government officials would be obliged to justify their actions and decisions in terms of common sense rather than allegiance to Supreme Court doctrines that can reasonably be cited to justify several possible results. Moreover, they would be disciplined by the knowledge that actions deemed unreasonable would be subject to reversal by the Court.

This article does not propose case-by-case balancing as the answer to all constitutional questions. Certain rights are absolute and cannot be balanced. For example, the sixth amendment right of a criminal defendant to counsel²⁷ and the fifth amendment right not to testify at one's own criminal trial²⁸ cannot be "balanced" or compromised, regardless of the facts of the particular case (though the Court has recognized a limit on the former right when imprisonment is not imposed).²⁹ Other areas of law, such as the school desegregation decisions, involve major doctrinal changes and thus require extended justification, as well as repeated reaf-

25. "[C]ertainty generally is [an] illusion, and repose is not the destiny of man." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Jerome Frank recognized long ago that uncertainty is an inevitable and necessary aspect of the law. In *Law and the Modern Mind*, he observed that "law . . . is uncertain, indefinite, subject to incalculable changes." J. FRANK, *LAW AND THE MODERN MIND* 5 (1930). Frank was reacting to the old view that law was immutable—something to be "discovered" by the courts. He recognized the uncertainty inherent in law, applauded it as being necessary to social progress, and offered a psychological explanation for the desire, shared by everyone, for certainty in the law. What Frank did not recognize is that court decisions create greater uncertainty than necessary and that the process of finding legal absolutes—supposedly abandoned in the 1930's—continues in a different guise today.

26. For a discussion of the types of cases appropriate for ad hoc balancing, see *infra* notes 306-08 and accompanying text.

27. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right to counsel guaranteed in misdemeanor cases where defendant is imprisoned); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (right to counsel guaranteed in felony cases).

28. See, e.g., *Griffin v. California*, 380 U.S. 609, 615 (1965) (neither court nor prosecution may comment on accused's exercise of his fifth amendment right against self-incrimination).

29. See, e.g., *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (indigent defendant may not be sentenced to prison term unless counsel was appointed for him).

firmation, supervision, and modification over a period of years. In cases such as these, ad hoc balancing has no place.

The majority of cases decided by the Court do not, however, involve the enunciation of absolute rights or major shifts in doctrine. Instead they involve attempts to explain when, for example, automobiles may be searched, billboards prohibited, religious observances curtailed, or admissions used against criminal defendants. The Court is attempting to clarify existing doctrine or to apply it to new fact situations; it is not making major doctrinal changes or pronouncing absolute rules. In these types of cases—the bread and butter of the Supreme Court docket³⁰—the Court fails miserably and consistently. It fails to provide guidelines; it fails to resolve doubt; it obfuscates rather than clarifies doctrine for reasons that are inherent in the judicial process. Rules and guidelines invariably degenerate into incomprehensibility; they serve only as a crutch for those who would limp toward a foolish consistency or as a mask for ideological preference. This article argues that such attempts at providing rules and guidelines should be abandoned and each case should be decided on its own merits; the Court should return only to the fulcrum established in the principal case, rather than to the convoluted discussions of precedent in that and subsequent decisions.

I. THE PROCESS OF CREATING UNCERTAINTY

A Supreme Court decision usually does not “resolve” a constitutional issue; it stimulates and sometimes refocuses debate. No one would claim that any sort of final resolution of the basic issues surrounding school desegregation or the fifth amendment rights of criminal suspects was attained by the seminal decisions in *Brown v. Board of Education*,³¹ and *Miranda v. Arizona*.³² Rather, the Court continues to “explain” what those cases and their progeny mean. For example, when the Court decided *Brown*, the problem of segregated schools did not disappear from the country or from the courts. On the contrary, efforts to enforce *Brown*

30. See SUP. CT. R. 17.1 (in exercising Court's discretion to grant certiorari, reasons that will be considered include resolving conflicts between two federal courts of appeals, between two state courts of last resort, or between a federal court of appeals and a state court of last resort); see generally Note, *Deciding Whether Conflicts with Supreme Court Precedent Warrant Certiorari*, 59 N.Y.U. L. REV. 1104 (1984) (Supreme Court is justified in granting certiorari to resolve conflict between lower court decision and Supreme Court precedent when such conflict threatens precedential authority or integrity of the judicial hierarchy); cf. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 791-92 (1984) (Court often grants review simply to undo perceived error or “to correct mere error when its judicial philosophy is at variance with philosophy prevailing in lower courts”).

31. 347 U.S. 483 (1954); see also *Brown v. Board of Educ.*, 349 U.S. 294, 299-301 (1955) (discussing how integration decision was to be implemented).

32. 384 U.S. 436 (1966).

led to tremendous upheaval and made names such as James Meredith and Orval Faubus household words. On the legal side, a series of subsequent decisions was necessary to address the ramifications of the initial holding in *Brown*. A plan that allowed white students to transfer out of schools in which they were in the minority³³ was struck down, as was a plan that allowed "freedom of choice."³⁴ The case that rendered the latter decision, *Green v. County School Board*, made it necessary for the Court in subsequent cases³⁵ to discuss the implications of its requirement that a plan must be adopted that "promises realistically to work now."³⁶ *Brown* also gave rise to questions about such matters as faculty segregation³⁷ and busing.³⁸

All of these cases followed directly from *Brown* because each centered on the issue of how schools were to be desegregated. The decision that "separate but equal" was an invalid doctrine had far broader implications, affecting areas such as housing,³⁹ employment,⁴⁰ and welfare.⁴¹ Thus the original *Brown* decision, while resolving little, invited litigation and public debate on the issue of racial equality. Over the ensuing three decades, the debate was gradually shifted. Southern governors no longer bar the doors of schools to blacks, as they did following *Brown*. The Court's determination in this area—its willingness to pursue the many new avenues opened by the *Brown* decision—has pushed the debate away from whether blacks should attend separate schools to whether blacks should, for example, enjoy special consideration in school admissions⁴²

33. See *Goss v. Board of Educ.*, 373 U.S. 683, 688 (1963) (transfer plan that allowed white students to transfer from desegregated school was racially motivated and promoted discrimination).

34. *Green v. County School Bd.*, 391 U.S. 430, 441-42 (1968) (rejecting "freedom of choice" plan as ineffective desegregation method).

35. *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 13-14, 18-32 (1971).

36. *Green*, 391 U.S. at 439 (emphasis in original).

37. See, *e.g.*, *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-36 (1969) (upholding district court order instituting plan for system-wide faculty and staff desegregation).

38. See, *e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971) (holding it within district court's powers to order busing of students in implementing desegregation plan).

39. See, *e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 379-81 (1967) (Court's decisions condemning state statutes that condoned or authorized segregation in restaurant facilities and services illustrate the range of situations in which discriminatory state action can be identified).

40. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 240-45 (1976) (citing school desegregation cases to support the principle that statutes reflecting intent or purpose to discriminate against applicants on the basis of race violate the equal protection clause).

41. See, *e.g.*, *Jefferson v. Hackney*, 406 U.S. 535, 545-51 (1972) (upholding as rational and permissible a state constitutional limitation on amount of welfare assistance grants despite its alleged invidious effects on blacks and Mexicans).

42. See, *e.g.*, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 271-72 (1978) (invalidating university's special admissions program, but holding that race may be considered in admissions decisions).

and employment.⁴³

It is hardly surprising that *Brown* led to much litigation and debate, or that the debate is not yet over; *Brown* and its progeny sought to restructure society. Consider, by contrast, a far "simpler" case; a case that established a straightforward rule for public officials to follow and had no necessary societal implications beyond the narrow confines of the decision. Such a case is *Miranda v. Arizona*.⁴⁴ In *Miranda* the Court held that an incriminating statement made by a suspect in custody must be presumed involuntary—and is consequently not admissible against him at trial—unless "[p]rior to any questioning, the person [has been] warned that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."⁴⁵

It is hard to imagine a more clearcut pronouncement by the Court. Unlike *Brown*, the *Miranda* decision set forth a precise course of action (the warnings) for an identifiable group of public officials (the police) in a specified setting (custodial interrogation). The remedy (evidentiary exclusion) was also clear and already in place. Yet *Miranda*, like *Brown*, has led to endless litigation, and the Court now calls the decision "slippery"⁴⁶ and "murky."⁴⁷ What is "custody"?⁴⁸ What is "interrogation"?⁴⁹ Does the remedy apply if the defendant first invokes his right to silence or counsel and then talks?⁵⁰ May statements obtained in violation

43. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779-80 (1976) (victims of illegal hiring discrimination are entitled to retroactive seniority).

44. 384 U.S. 436 (1966).

45. *Id.* at 444.

46. *Oregon v. Elstad*, 105 S. Ct. 1285, 1293 (1985) ("[T]he task of defining 'custody' is a slippery one . . .").

47. See, for example, the dissenting opinion of Justice Brennan in *Oregon v. Elstad*, 105 S. Ct. 1285, 1319-20 (1985): "*Miranda* will become 'murky' . . . only because the Court's opinion today threatens to become a self-fulfilling prophecy. . . . The whole point of the Court's work in this area has been to prescribe 'bright line' rules to give clear guidance to the authorities." (footnote omitted).

48. See *Beckwith v. United States*, 425 U.S. 341, 345 (1976) (custody does not include interrogation in noncustodial circumstances after a police investigation has focused on the suspect).

49. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (concluding that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect") (footnotes omitted).

50. See *Edwards v. Arizona*, 451 U.S. 477, 485-87 (1981) (holding inadmissible a statement made by defendant without counsel after defendant had invoked his right to counsel); *Michigan v. Mosley*, 423 U.S. 96, 104-05 (1975) (no violation of *Miranda* principles where police stopped questioning defendant at his request, because when questioning was resumed after significant time lapse, defendant was given fresh *Miranda* warnings and was not questioned about the crime which was the subject of the first interrogation).

of *Miranda* be used to impeach the defendant's testimony at trial?⁵¹ Does the "fruit of the poisonous tree" doctrine apply to *Miranda* violations?⁵² And so on.

The Court has attempted to decide each of these sub-issues, but each decision discussing the ramifications of *Miranda* has further ramifications of its own that must be explored. For example, *Michigan v. Mosley*⁵³ held that after a warned defendant asserts his right to silence he may subsequently be questioned about an "unrelated" offense after a reiteration of the *Miranda* warnings.⁵⁴ What about a defendant questioned later about the *same* offense? Is the second set of warnings necessary? After what period of time may questioning resume once the defendant indicates that he does not want to talk? None of these questions was resolved by *Mosley*, and they remain unanswered by the Court today.⁵⁵ Although the Court has itself muddied the waters in this area by cutting back on *Miranda* without overruling it,⁵⁶ most of the questions raised by *Miranda* would have presented themselves regardless of the composition of the Supreme Court and regardless of the quality of the draftmanship of *Miranda* and its progeny.⁵⁷

The Court can hardly be said to have resolved the basic issues of *Brown* and *Miranda*: the extent of governmental involvement in bringing about racial integration, and the extent of the fifth amendment rights of criminal suspects. Nevertheless, these issues are of such import that they deserved the attention given to them. Although the Court has not resolved the basic issues, it has shifted the debate. No longer does anyone seriously claim that segregation, de jure or de facto, is appropriate in education, transportation, and other public facilities, or that use of the "third degree" is the proper way to interrogate criminal suspects.

In announcing major ideological shifts, *Miranda* and *Brown* required full-blown opinions, complete with references to the Constitution,

51. See *Harris v. New York*, 401 U.S. 222, 226 (1971) (defendant's earlier statements, taken in violation of *Miranda*, may be used to impeach his credibility on the stand).

52. See *Oregon v. Elstad*, 105 S. Ct. 1285, 1298 (1985) ("[A] suspect who has once responded to unwarned yet uncoercive questioning is not . . . disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.").

53. 423 U.S. 96 (1975).

54. *Id.* at 106.

55. For a discussion of the problems raised by *Mosley* and some lower courts' responses to those problems, see Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 129-37.

56. See *infra* notes 209-18 and accompanying text; see also Stone, *supra* note 55, at 106-25 (discussing *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Harris v. New York*, 401 U.S. 222 (1971)).

57. For a discussion suggesting that uncertainty is an inevitable result of every major Supreme Court decision, see *infra* notes 59-165 and accompanying text.

precedent, scholarly works, and other sources.⁵⁸ In the following years, further decisions reinterpreted *Miranda* and *Brown* and restated their holdings for the purpose of justifying the result reached in these subsequent cases. At some point, these later decisions no longer served to explain *Miranda* and *Brown*, but obfuscated their results and confused people about just where the Court now stood. This is an inevitable process, only partly explained by the fact that a subsequent Court may not like the earlier decision.⁵⁹ Cases that endeavor not to shift doctrine but merely to explain it, make up the major part of the Court's docket,⁶⁰ yet the effect of the Court's efforts at clarification has been obfuscation. A simple ad hoc balancing approach would serve the Court and the public far better in cases such as these.

Perhaps the most striking example of the Court's acknowledgement of its fundamental incapacity to "resolve" issues or declare rules that can be consistently followed arose recently in *Garcia v. San Antonio Metropolitan Transit Authority*.⁶¹ In that case, the Court abandoned the test of *National League of Cities v. Usery*,⁶² which held that a state or municipal government activity was not subject to regulation by Congress under the commerce clause when the activity in question was a "traditional governmental function" of those entities.⁶³ The Court abandoned the *Usery* test because it was "unworkable"⁶⁴ and led to distinctions that were "untenable."⁶⁵ The process of trying to do justice in each case had led to a recognition of the uncertainty principle—that no test could produce consistent, just results. Moreover, the Court concluded that no other test would produce better results.⁶⁶

The correct response would have been for the Court to deal with these issues case by case, balancing the interests in state sovereignty against the interests in uniform national policy under the commerce

58. Even these seminal cases would benefit from having shorter opinions than those the Court produced.

59. See *infra* notes 209-42 and accompanying text.

60. See *Estreicher & Sexton, supra* note 30, at 737, 777-78 (Court grants review of some cases to resolve questions left open by its previous decisions); see also *supra* note 30.

61. 105 S. Ct. 1005 (1985).

62. 426 U.S. 833 (1976).

63. *Id.* at 852.

64. *Garcia*, 105 S. Ct. at 1007, 1016.

65. *Id.* at 1013 (quoting Justice Frankfurter's description, in *New York v. United States*, 326 U.S. 572, 583 (1946), of the distinction between "governmental" and "proprietary" functions in analysis of state immunity from federal taxation—a distinction that was also abandoned as unworkable).

66. As the Court observed: "The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable." *Id.* at 1014.

clause.⁶⁷ Instead, the *Garcia* Court took the extraordinary step of declaring the issue of the scope of Congress's power under the commerce clause to be a political question, apparently immune from judicial scrutiny.⁶⁸ This conclusion, as Professor William Van Alstyne declared, was "a mistake of historic proportions" and clearly not within the contemplation of the framers.⁶⁹ Thus, the uncertainty principle can lead to truly momentous consequences when the Court fails to recognize it and deal with it appropriately.

A. *The Automobile Cases.*

In recent years, the Court has clung tenaciously to the principle that warrantless searches are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."⁷⁰ In fact, these exceptions are neither few—there are over twenty of them—nor well-delineated.⁷¹ Nevertheless, the Court's continued fealty to this faded principle requires that every lawful warrantless search not only meet the "reasonableness" standard of the fourth amendment but also, like a common law pleading, fit into one of the recognized cubbyholes of the warrant exceptions. If a case does not fit readily into a cubbyhole, either it is squeezed in or a new cubbyhole is created. This is how the "automobile exception" came to be.

When prohibition agents came upon a bootlegger on a lonely road in rural Michigan in the middle of the night in the early 1920's, it was not practicable for them to obtain a warrant before searching the car.⁷² Thus the Supreme Court, in *Carroll v. United States*,⁷³ approved the warrantless search. The Court's statement that in "cases where the securing of a warrant is reasonably practicable, it must be used"⁷⁴ led some courts and commentators to conclude that where the vehicle and its occupant were

67. This is essentially the approach suggested by Professor Van Alstyne: "[I]f Congress is . . . allowed to interfere with . . . purely state and local programs, under *Usery* it would be required to back its authority with a judicially acceptable reason in every such case . . ." Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1718 (1985).

68. See *Garcia*, 105 S. Ct. at 1018-20.

69. Van Alstyne, *supra* note 67, at 1731-32.

70. *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

71. See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (listing over 20 exceptions to the probable cause or the warrant requirement or to both).

72. Or so the Court concluded in *Carroll v. United States*, 267 U.S. 132, 160-61 (1925). They did not consider the possibility of one agent's holding the car while another went for a warrant, presumably because obtaining one would have taken many hours, during which the remaining agent would have to hold the bootleggers at bay.

73. 267 U.S. 132, 158 (1925).

74. *Id.* at 156.

in custody—and thus where the exigent circumstances present in *Carroll* were dispelled—a warrant would be required to search an automobile.⁷⁵ In *Chambers v. Maroney*,⁷⁶ however, the Court disagreed, holding that an automobile could be searched without a warrant even when its occupants had been arrested and the car impounded. Because, under *Carroll*, the car could have been searched at the time it was stopped, the Court reasoned that it was no greater intrusion to search it later.⁷⁷ Thus an “automobile exception”—justified on the ground that cars were more mobile and less private than houses⁷⁸—was created that went beyond the obvious point of *Carroll* that a warrant would not be required if it was impracticable to obtain one.

With the automobile exception the Court set off on a long journey toward an uncertain destination. That journey still continues. Can a car parked at an arrestee’s house be seized and searched without a warrant?⁷⁹ Can paint scrapings be taken without a warrant from a car parked in a public lot?⁸⁰ Can a suitcase in a car be searched without a warrant as well?⁸¹ What about a paper bag or a gun case?⁸² These questions have gradually been answered by the Court. Many other questions remain unanswered.⁸³ The result of all this litigation is summarized by Professor Wayne LaFave:

Although the United States Supreme Court has had several occasions to speak to the issue of when a warrantless search of a vehicle for the fruits, instrumentalities or evidence of crime is permissible, the boundaries of this authority remain uncertain. The several decisions of the Court on this subject cannot be satisfactorily reconciled, and in recent years the Court has often been unable to muster a majority position on the issue. It is no exaggeration, therefore, to say that these

75. See 2 W. LAFAVE, SEARCH AND SEIZURE § 7.2 (1978) and cases cited therein.

76. 399 U.S. 42, 52 (1970).

77. *Id.*

78. *Id.* at 50. The “less private” rationale appeared later in *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

79. See *Coolidge v. New Hampshire*, 403 U.S. 443, 472-73 (1971) (plurality opinion).

80. See *Cardwell v. Lewis*, 417 U.S. 583, 592 (1974) (plurality opinion).

81. See *United States v. Chadwick*, 433 U.S. 1, 15-16 (1977). But see *United States v. Ross*, 456 U.S. 798, 823 (1982) (if there is probable cause to search a car, then any container in it can be searched as well).

82. In *United States v. Ross*, 456 U.S. 798 (1982), the Court stated that “a constitutional distinction between ‘worthy’ and ‘unworthy’ containers would be improper.” *Id.* at 822. Nevertheless, the Court adhered to the result of a prior case, which stated that a kit of burglar tools or a gun case would not “deserve the full protection of the Fourth Amendment,” because by their nature they “cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.” *Id.* at 814 n.19 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979)).

83. See 2 W. LAFAVE, *supra* note 75, § 7.2(a), at 508 (raising several questions concerning scope of the automobile exception).

decisions constitute a "labyrinth of judicial uncertainty"⁸⁴

Not only is the doctrine unclear, but this lack of clarity has led to an explosion of litigation. In the 1969-70 Term, when *Chambers* reinvigorated the automobile exception, there were five petitions before the Court raising auto search issues. By the 1981-82 Term, when the Court decided *United States v. Ross*,⁸⁵ the most recent major case in this area, there were thirty-five such petitions.⁸⁶

Would any other approach to the automobile cases have made matters better? Certainly a single exigent-circumstances exception to the warrant requirement is better than twenty-three exceptions that try, and fail, to spell out the exact circumstances where a warrant is unnecessary; this approach had produced relatively stable doctrine in the automobile area before *Chambers*.⁸⁷ Still, there are many problems with this test as well. First, it was not clear whether "exigent circumstances" or "impracticability" meant something different in the context of an automobile search under *Carroll* than in the context of a house search. Second, this rule, being essentially ad hoc, gave little guidance to the police. This is not a serious problem, because no fourth amendment rule that has gained acceptance has given effective guidance to the police,⁸⁸ but the Court obviously felt that it could do better. Third, the rule's timing requirements are fuzzy. At what point in the process of stopping an automobile and arresting the occupants are "exigent circumstances" to be determined? Finally, if the rule is clarified (e.g., if the Court defines just what factors constitute "exigent circumstances" and when those factors are relevant), then the rule becomes too cumbersome to apply.⁸⁹

84. *Id.* § 7.2, at 509 (footnote omitted). See also *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring) ("[T]he law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided.").

85. 456 U.S. 798 (1982).

86. Compare *Final Supreme Court Index, Topical Index, 1969-70 Term*, 38 U.S.L.W. 12 (1970) (five petitions before the Court raising auto-search issues) with *Final Supreme Court Index, Topical Index, 1981-82 Term*, 51 U.S.L.W. 33 (1982) (35 petitions before the Court raising auto-search issues). Nor was the 1981-82 Term atypical. In the 1980-81 Term there were 35 such cases, and there were 20 in the 1982-83 Term. See *Final Supreme Court Index, Topical Index 1980-81 Term*, 50 U.S.L.W. 23-24 (1981); *Final Supreme Court Index, Topical Index, 1982-83 Term*, 52 U.S.L.W. 40 (1983).

87. See *supra* notes 85-86 and accompanying text.

88. See Bradley, *supra* note 71, at 1468 ("The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck.").

89. In *United States v. Dorman*, 435 F.2d 385, 392-93 (D.C. Cir. 1970), the court attempted to delineate what factors went into a determination of exigent circumstances. Professor LaFave strongly criticized this approach. See 2 W. LAFAVE, *supra* note 75, § 6.1(c), at 390-95.

Recognizing that the old approach could lead to suppression of evidence even when the police behavior had not been unduly intrusive of individual rights, the Court in *Chambers* abandoned the impracticability rule. In its place, the Court adopted the disastrous test that automobiles could sometimes (but not always)⁹⁰ be lawfully searched without a warrant if there was probable cause, whether or not a warrant *could* have been obtained. Recently, in *Ross*, the Court refined the test by dispensing with the "sometimes" qualification.⁹¹ Yet *Ross* has not given us a test that is even reasonably clear or that yields relatively just and consistent results.

The first problem is that *Ross* itself left many questions unanswered. Does a recreational vehicle, which has the privacy aspects of a house but the mobility of a car, fall within the automobile exception?⁹² Is the scope of a search incident to arrest greater when one is arrested in an automobile than when one is arrested at home?⁹³ May packages taken from a vehicle at the time of arrest be searched later without a warrant?⁹⁴ Finally, there is the question explicitly left open in the *Ross* decision: what, after *Ross*, is the scope of "less than probable cause" searches, such as inventory searches?⁹⁵

The second problem with *Ross* is that, in abandoning the warrant requirement, the Court adopted a new rule that may lead to injustices in other cases. Prior to *Ross*, in *United States v. Chadwick*,⁹⁶ the Court recognized that "[n]o less than one who locks the doors of his home against intruders, one who [locks his possessions in a footlocker] is due the protection of the Fourth Amendment"⁹⁷ The placement of a

90. In *Chambers*, the Court suggested that a search of a car, even on probable cause, is not always justified without a warrant. *Chambers*, 399 U.S. at 50.

91. *Ross*, 456 U.S. at 825.

92. The Court, in *California v. Carney*, 105 S. Ct. 2066, 2070 (1985), held that a mobile home was to be treated like a car rather than a house for fourth amendment purposes.

93. The Court answered this question affirmatively in *New York v. Belton*, 453 U.S. 454, 460-61 (1981) (holding that policeman who has made lawful custodial arrest of occupant of automobile may search the passenger compartment, and discussing prior holding that policeman could not search all drawers in arrestee's home simply because the arrest occurred at home). In the process, however, the Court left a new series of unanswered questions. See 2 W. LAFAVE, *supra* note 75, § 7.1, at 206-14 (Supp. 1985).

94. See *United States v. Johns*, 105 S. Ct. 881, 885-87 (1985) (officers may conduct warrantless search of suspected marijuana-laden packages even though search does not take place immediately upon seizure of vehicles in which packages were found).

95. See *Ross*, 456 U.S. at 809 n.11 ("Many of these searches do not require a showing of probable cause We are not called upon to—and do not—consider in this case the scope of the warrantless search that is permitted in those cases.").

96. 433 U.S. 1 (1977).

97. *Id.* at 11.

suitcase or footlocker in a car did not diminish its privacy protection.⁹⁸ After *Ross*, every such container found in a car may be subject to search,⁹⁹ notwithstanding *Chadwick's* recognition that such warrantless intrusions constitute serious invasions of personal privacy. This result was reached because the Court believed clear rules were necessary in this area, even at the expense of the "reasonable expectation of privacy" that had previously been the (troublesomely flexible) basis of fourth amendment protections. Greater clarity always means that some potentially important factors must be ignored. Thus the automobile exception, which was originally developed to allow a flexible response in place of the mechanistic warrant requirement where the police behavior seemed reasonable, has developed a life of its own as a mechanistic rule.¹⁰⁰

The problems with the automobile exception can be found throughout fourth amendment law. Another example is the "search incident to arrest" exception to the warrant requirement. This doctrine permits an arrestee and "the area within his immediate control" to be subject to a warrantless search for weapons and evidence.¹⁰¹ A myriad of questions arises. May such searches be conducted without at least some suspicion

98. See *Arkansas v. Sanders*, 442 U.S. 753, 765 (1979) ("We therefore find no justification for the extension of [the automobile exception] to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.").

99. See *Ross*, 456 U.S. at 824 ("The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found."). The container will be subject to search unless the police have waited for the container that they wanted to search to be put into a car. *Arkansas v. Sanders* apparently still maintains sufficient vitality to prevent this practice. See Kamisar, *United States v. Ross: The Court Takes Another Look at the Container-in-the-Car Situation*, in J. CHOPER, Y. KAMISAR, & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82*, at 71, 83.

100. Even if, in a particular case, it would not seem reasonable to search a car and its contents without a warrant, the automobile exception has created a new rule that can be applied mechanically to render patently unreasonable behavior "reasonable" under the fourth amendment:

Suppose the police suspect *A* of committing a crime on a particular date. They have probable cause to believe that a suitcase belonging to *B*, which is locked in the trunk of *B's* car, which is parked in front of *B's* house, contains *B's* locked diary, which has references to *A's* whereabouts on that date. Under the automobile exception, the police, having only probable cause, may conduct a warrantless search of the car for the suitcase and the suitcase for the diary even though they have no reason to believe that the car is about to be moved. Yet there are few instances in which one would have a greater expectation of privacy than in a locked diary in a locked suitcase in the locked trunk of one's own car parked in front of one's own house.

Bradley, *supra* note 71, at 1478 (footnotes omitted). It is clear that a car parked in such a "public place" is subject to the automobile exception. See *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974) (plurality opinion); see also *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978) (innocent third parties are not exempt from searches of their premises for evidence).

101. See, e.g., *Chimel v. California*, 395 U.S. 752, 763 (1969) (police may search arrestee and area within his immediate control).

that evidence will be found?¹⁰² May all containers possessed by an arrestee be searched incident to arrest?¹⁰³ What about a container abandoned just prior to the arrest? What about the automobile in which a person was arrested?¹⁰⁴ Professor LaFave devotes over sixty pages of his treatise to questions raised by the search-incident-to-arrest doctrine,¹⁰⁵ and the Supreme Court admits, with modest understatement, that "courts have discovered the principle difficult to apply in specific cases."¹⁰⁶

Obviously, no policeman on the street (or magistrate or court) can have a clear grasp of the doctrine. Consequently the police will make many errors that will either be punished by the courts through the exclusionary rule or will be overlooked—though the Supreme Court theoretically demands that all such errors be punished. Decisions will tend to be made on an ad hoc basis, according to the judge's view of what is just, what the rules "really" demand, how "bad" the defendant is, how much the judge likes the police, or other irrelevant and unpredictable factors that stray from the main point of the fourth amendment—that the search must be reasonable.¹⁰⁷ The vagaries of the current rule drive courts to adopt one of two alternative undesirable approaches: either slavish adherence to the letter of the rule despite unjust results, or ad hoc and unprincipled tinkering with the rule to make it appear that the rule commanded the result that the Court desired to reach.

B. *The Obscenity Cases.*

Obscenity is another area of the law where the Court has tinkered for years without ever producing a cogent doctrine. From 1957 to 1973 the Court decided a series of cases in which it tried to define "obscenity,"¹⁰⁸ only, in the words of Professor Laurence Tribe, to produce "a

102. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

103. See 2 W. LAFAVE, *supra* note 75, § 5.2(j), at 301 (answering this question in the negative).

104. See *New York v. Belton*, 453 U.S. 454, 460 (1981) (yes).

105. See 2 W. LAFAVE, *supra* note 75, §§ 5.2, 7.1 (discussing police powers to search persons and places incident to an arrest).

106. *New York v. Belton*, 453 U.S. 454, 458 (1981).

107. For a discussion of the uncertainty inherent in the open field doctrine, see Bradley, *supra* note 71, at 1479-80.

108. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-83 (1973) (Brennan, J., dissenting). Brennan stated: "No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards." *Id.* at 73. Brennan discussed *Roth v. United States*, 354 U.S. 476, 489 (1957) (adopting as a test for judging obscenity "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"), *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.*, 383 U.S. 413, 418 (1966) (applying a three-part test: dominant

formula likely to be as unstable as it is unintelligible."¹⁰⁹ The lack of significant change in the Court's obscenity doctrine,¹¹⁰ announced in 1973 in *Miller v. California*,¹¹¹ is due less to a final resolution of issues by the Court than to the Court's decision simply to stop tinkering with the test.¹¹² Moreover, as Justice Harlan observed in 1968, the process of tinkering with the doctrine has produced no gains comparable to those arguably achieved in *Brown v. Board of Education*:¹¹³ "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment."¹¹⁴

Could the Court have established a test in the obscenity cases that could have been consistently applied in new cases? I think not. The easiest view to apply consistently is the absolutist position of Justices Black and Douglas that the first amendment protects all speech, including speech that the Court may deem obscene.¹¹⁵ Under this view, no governmental efforts to regulate obscenity would be constitutional. But this approach, as even Justice Brennan concedes, would strip "the States of power to an extent that cannot be justified by the commands of the Con-

theme, offensiveness, and social value of the material), and *Redrup v. New York*, 386 U.S. 767, 770-71 (1967) (per curiam decision holding disputed materials not to be obscene regardless of which of the enumerated tests is applied), as cases reflecting disagreement, rather than consensus, on an appropriate test for determining whether or not material is obscene. *Paris Adult Theatre*, 413 U.S. at 78-83 (Brennan, J., dissenting). According to Justice Brennan, the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech." *Id.* at 80-83 (Brennan, J., dissenting).

109. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 656 (1978). For a discussion of the progress of the obscenity decisions from *Roth v. United States*, 354 U.S. 476 (1957), to *Miller v. California*, 413 U.S. 15 (1973), see L. TRIBE, *supra*, at 660-70.

110. The test announced in *Miller v. California*, 413 U.S. 15 (1973), requires the trier of fact to consider:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

111. 413 U.S. 15 (1973).

112. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1368-73 (10th ed. 1980). For example, "*Hamling v. United States*, 418 U.S. 87 (1974), illustrates the modern Court's recurrent struggles with the problem of the proper scope of the community whose standards govern in obscenity cases." G. GUNTHER, *supra*, at 1368 n.2. The Court in a 5-4 decision opted for defining "community" standards of obscenity as meaning local rather than statewide or national standards. *Id.* Obviously, the *Miller* test, with phrases such as "contemporary community standards" and "patently offensive," has not settled the issue. See *supra* note 110.

113. 347 U.S. 483 (1954).

114. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 707 (1968) (Harlan, J., concurring in part and dissenting in part).

115. See *Roth v. United States*, 354 U.S. 476, 513 (1957) (Douglas, J., joined by Black, J., dissenting).

stitution.”¹¹⁶ More importantly for this discussion, it would not have solved any doctrinal problems. As soon as the Court announced such an expansive view of “freedom of speech,” it would have been beset by cases involving child pornography, flashers asserting a constitutional right to expose themselves, and people shouting “Fire!” in crowded theaters, so that even the most strong-stomached civil libertarian on the Court would have had to admit that a line had to be drawn somewhere.¹¹⁷ Yet, as Justice Brennan conceded in 1973 after trying to draw such a line for nearly two decades:

Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as “prurient interest,” “patent offensiveness,” “serious literary value” and the like. The meaning of these concepts necessarily varies with the experience, outlook and even idiosyncrasies of the person defining them. [Any standard is subject to] the further complication that the obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination.¹¹⁸

Justice Brennan failed to perceive the limits of his logic, however, and proposed yet another test: “[A]t least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly ‘obscene’ contents.”¹¹⁹ But this test, too, would present intractable line-drawing problems, as governmental officials continued their quest for a sinut-free America and as the purveyors of pornography searched for ever more disgusting material to tempt the jaded palates of their customers. Does putting a “No one under 21 admitted” sign on the door of a book and magazine store solve the problem of distribution to juveniles? What is the meaning of the qualifying word “wholly” in Justice Brennan’s test? Apparently some suppression is appropriate. How much? What about “kiddy porn”? Justice Brennan recently agreed that the states could forbid this in the interests of the child

116. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting) (rejecting view of Black and Douglas that first amendment bars suppression of sexually oriented expression).

117. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Professor Emerson notes:

Proponents of the “absolute” or “literal” interpretation of the first amendment have failed to define the bounds of their position or to account for such apparent exceptions to the absolute test as the law of libel, the application of child labor laws to the distribution of literature, and the regulation of election campaigns.

Id. at 877.

118. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).

119. *Id.* at 113. Professor Tribe offers a version of Justice Brennan’s scheme, allowing regulation of obscenity and other speech, “in the interest of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods.” L. TRIBE, *supra* note 109, § 12-16, at 662.

participants.¹²⁰ Is a fourteen-year-old a "child"? Why not limit other pornography in the interests of the adult participants? Or in recognition of evidence that pornography causes men to abuse women?¹²¹

To say that the tests advanced by the Court and others will not provide certainty and will continue to produce litigation is not to say that they are bad tests. They may succeed in focusing litigation on the proper issues and in producing reasonably just results in most cases. If one assumes that there should be a test for obscenity, then one or more of these tests may well be the best we can do. Yet any attempt to formulate a rule or a test—particularly a new test—will result in virtually endless litigation and, to the extent that the test is strictly applied, some unjust results. Thus it is fair to ask whether any test should be promulgated at all. Although the Court's doctrine in the obscenity cases is certainly "unconvincing," as Professor Tribe observes, it has proved to be stable, because the Court stopped tinkering with the definition in 1973. There is value in such stability even if it is based on defective or ambiguous doctrine. In the 1956-57 Term of the Supreme Court, the year in which *Roth v. United States*¹²² was decided, there were five petitions before the Court presenting issues relating to obscenity.¹²³ In the 1972-73 Term, when *Miller v. California*¹²⁴ was decided, that number had risen to 110.¹²⁵ Since then the number of cases has tapered off, shrinking to sixty-seven in the 1975-76 Term¹²⁶ and thirty-five in the 1981-82 Term.¹²⁷ Although the number of petitions to the Court does not necessarily coincide with the overall amount of litigation, it does serve as a good barometer. These figures support the notion that the *process* of decision, rather than the content, influences the Supreme Court's docket.

The only way to achieve truly stable doctrine, however, is to have no test at all: to engage in case-by-case balancing, declaring that a given regulation of speech is or is not reasonable given the value of the material to be regulated. Such a non-test would render every case fact-specific and thus reduce the temptation for the Court to decide a particular case in order to refine or explain its "test." Although the Court has claimed

120. *New York v. Ferber*, 458 U.S. 747, 776 (1982) (Brennan, J., concurring).

121. *But see* *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324-25, 329 & n.2 (7th Cir. 1985) (invalidating, on first amendment grounds, ordinance that prohibited dissemination of pornography—"graphic sexually explicit subordination of women, whether in pictures or in words"—while accepting legislative judgment that pornography leads to "injury at home, battery and rape").

122. 354 U.S. 576 (1957).

123. *See Final Supreme Court Index, Topical Index, 1956-57 Term*, 25 U.S.L.W. 18 (1957).

124. 413 U.S. 15 (1973).

125. *See Final Supreme Court Index, Topical Index, 1972-73 Term*, 42 U.S.L.W. 44-45 (1973).

126. *See Final Supreme Court Index, Topical Index, 1975-76 Term*, 44 U.S.L.W. 47 (1976).

127. *See Final Supreme Court Index, Topical Index, 1981-82 Term*, 51 U.S.L.W. 61-62 (1982).

to do this in other first amendment cases,¹²⁸ it has insisted on declaring rules or formulas by which the balancing is to be performed and on explaining its decisions in terms of past precedents. This approach yields the same result as any other test applicable to all future cases—confusion. The only workable ad hoc balancing is a kind that the Court has never been willing to undertake: a simple listing of the factors weighed and the result.

If the Court is unwilling to engage in such balancing, the next best course is simply to leave the doctrine alone. A degree of stability will be achieved by the continued application of the same test. Given that any new test is unlikely to be more effective than the old test, this is an appealing course.

C. *The Commercial Speech Cases.*

The commercial speech cases also exemplify the Court's inability to resolve issues in an area that some would argue was better left alone.¹²⁹ In *Virginia State Board of Pharmacy v. Virginia Consumers Council*,¹³⁰ the Court abandoned the long-held view that commercial speech is not entitled to first amendment protection,¹³¹ labeling that position "simplistic."¹³² The Court indicated, however, that it was unwilling to grant commercial speech the same protection as noncommercial speech.¹³³ *Virginia Pharmacy* thus raised questions regarding what speech was now protected, what the degree of protection might be, and whether the same degree of protection would apply to all types of commercial speech. In *Bates v. State Bar of Arizona*,¹³⁴ the Court held that the commercial speech protections of *Virginia Pharmacy* precluded state bar prohibitions on lawyer advertising.¹³⁵ However, in *Ohralik v. Ohio State Bar Associa-*

128. See discussion of *Erznoznik v. City of Jacksonville*, *infra* notes 284-89 and accompanying text.

129. See, e.g., Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 458-59 (1980) (the Court originally excluded commercial speech from the first amendment, but 25 years later scrapped the entire commercial speech doctrine); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1-5 (1979) (arguing that doctrine of commercial speech was sufficiently settled at time Court rejected the entire doctrine).

130. 425 U.S. 748 (1976).

131. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (first amendment does not protect purely commercial speech against government regulation).

132. *Virginia Pharmacy*, 425 U.S. at 759.

133. *Id.* at 771 n.24 ("Even if the differences [between commercial and noncommercial speech] do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to ensure that the flow of truthful and legitimate commercial information is unimpaired.").

134. 433 U.S. 350 (1977).

135. *Id.* at 365, 384.

tion¹³⁶ the Court held that in-person solicitation of clients by lawyers (so-called "ambulance chasing") could be forbidden despite the fact that the solicitation in question was not deceptive or harmful.¹³⁷ Prophylactic rules were deemed appropriate.¹³⁸ The Court continued in this vein in *Friedman v. Rogers*,¹³⁹ where it upheld a Texas law that prohibited the practice of optometry under a trade name.¹⁴⁰ In a footnote to its opinion, the Court observed: "[O]ur decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area."¹⁴¹

In all, the Court has decided nine commercial speech cases since *Virginia Pharmacy*.¹⁴² It has promulgated a three-part test for determining whether speech is commercial,¹⁴³ and a four-part test for determining whether commercial speech may be suppressed.¹⁴⁴ As one commentator has noted:

The difficulty with the Court's analysis [in the commercial speech cases] . . . is that at no point during its legal wanderings has it ever articulated sturdy rationales to support its holdings. Instead, it has seemed to decide each case on its facts, deciding first the desired results and manipulating—or creating—doctrine to fit.¹⁴⁵

Thus the Court exchanged a "simplistic" doctrine that had not, in Professor Emerson's view, been difficult to apply in practice,¹⁴⁶ for an "in-

136. 436 U.S. 447 (1978).

137. *Id.* at 468.

138. *Id.* at 464-68.

139. 440 U.S. 1 (1979).

140. *Id.* at 15.

141. *Id.* at 11 n.9.

142. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 934-43, 986-88 (2d ed. 1983) and cases discussed therein.

143. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (factors relevant to whether speech is "commercial" include: whether the speech is an advertisement, whether it refers to specific product, and whether it has an economic motivation).

144. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Supreme Court applied a four-part test to determine whether a regulation banning or suppressing commercial speech was valid. *Id.* at 566. The Court stated:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

145. Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 720 (1982); see also Cox, *The Supreme Court 1979 Term, Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1 (1980).

146. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 n.46 (1966) ("The principles governing commercial speech, and the relations between this sector and the area of free expression, have never been worked out.").

consistent" doctrine¹⁴⁷ based on ad hoc balancing.¹⁴⁸ "There is a serious question . . . whether the gain, if any, is worth the cost."¹⁴⁹

Of course, to the extent that the doctrinal problems in this area are simply the result of a series of poor decisions, then the commercial speech cases do not support my premise. It would be unreasonable to ask that a Justice vote to deny certiorari because he can foresee that he and his colleagues will not be able to deal competently with a given subject matter. When the Court decided *Virginia Pharmacy*, it undoubtedly recognized that it was going to stir up litigation on the questions left unanswered by that opinion. Presumably, however, the majority anticipated that they would be able to clarify matters eventually. Instead, the Justices wrote nine more opinions in the next nine years, only to end up with a doctrine widely condemned by commentators as inconsistent¹⁵⁰ and as giving little guidance to government on regulation of commercial speech.

Could these cases have been decided in a way that would have brought clarity to this area while pushing the doctrine in the direction desired by the Court? Again, I argue that they could not. Professor Emerson suggests three reasons why these decisions failed: (1) commercial speech has historically been treated on an entirely different basis than all other forms of communication; (2) it is unlikely that commercial speech will fit into the system of freedom of expression at all because it does not promote the same values; and (3) "changing the earlier rule poses certain dangers to the system of freedom of expression."¹⁵¹ Professor Emerson suggests that the Court's effort to blur the distinction between commercial and noncommercial speech was bound to fail and that the Court should have retained the old rule that commercial speech is not protected by the first amendment.

147. Cox, *supra* note 145, at 31 (inconsistency marks the Burger Court's decisions concerning commercial speech).

148. *Id.* at 26 ("The Court paid little attention to building a systematic body of law, but instead engaged in particularistic and pragmatic *balancing*." (emphasis added). But the Court did not engage in the sort of pure ad hoc balancing that this article advocates.

149. Emerson, *supra* note 129, at 460. Professor Emerson concludes that "separate treatment of commercial speech would seem to better serve the system of freedom of expression than the course taken by the Burger Court." *Id.* at 461.

150. In addition to the discussions already cited, see *supra* notes 102-08, 129, the two most recent decisions in this area have also been criticized by commentators. Regarding *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), it was observed that the "Court's decisions raise more questions than the case settles." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 142, at 988. Regarding *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), one commentator noted that "the Court continued the imprecision and confusion surrounding the commercial speech doctrine." Note, *Constitutional Law—First Amendment—Protection of Commercial Speech—Bolger v. Youngs Drug Prods. Corp.*, 32 U. KAN. L. REV. 679, 696 (1984).

151. Emerson, *supra* note 129, at 460.

Although Professor Emerson's analysis of the problems with the *Virginia Pharmacy* rule is correct as far as it goes, it misses the main point—that no alternative resolution would have produced more satisfactory results. The old system—in which speech was branded as either unprotected commercial speech or protected noncommercial speech—was clearly unsatisfactory.¹⁵² It drew a line where there was little justification for drawing it and encouraged states to ban “commercial” advertisements for products that they disliked, such as the advertisement promoting legal, out-of-state abortions in *Bigelow v. Virginia*.¹⁵³

Another thoughtful theory for resolving the flaws in the commercial speech doctrine has been advanced by Professor Daniel Farber.¹⁵⁴ Farber suggests that a given example of commercial speech may be considered as constituting “part of the contractual arrangement between buyer and seller” as well as serving “an informative function to which the first amendment applies.”¹⁵⁵ State rules “relat[ing] to the contractual function . . . should not be subjected to the intensive scrutiny required when a regulation directly implicates the first amendment function of language.”¹⁵⁶ In his analysis, Farber relies on *United States v. O'Brien*,¹⁵⁷ the draft card burning case, in which the Court stated that “government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the

152. See, e.g., Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 21 (1977) (concluding that Supreme Court had to declare either all commercial speech or no commercial speech protected because deciding where to draw the line was impossible, and that the Court could not logically hold that no commercial speech was protected); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 462-64 (1964) (noting that the standard for declaring commercial speech not to be constitutionally protected is lower than that for declaring pornography unprotected, and quoting *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) for the proposition that profit motive should not control whether speech is protected); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 452 (1971) (arguing that the primary purpose doctrine (i.e., determining whether speech is protected on the basis of whether its primary purpose is commercial or noncommercial) violates listeners' first amendment right to acquire information and unduly limits scope of protection accorded to periodicals, books, and newspapers).

153. 421 U.S. 809 (1975). The Court struck down the statute in *Bigelow* on the theory that the commercial speech doctrine did not mean that “all statutes regulating commercial advertising are immune from constitutional challenge.” *Id.* at 820. Because the advertisement in *Bigelow* “conveyed information of potential interest and value to a diverse audience” and “pertained to constitutional interests,” it could not be banned. *Id.* at 822, 824-25.

154. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979).

155. *Id.* at 387.

156. *Id.*

157. 391 U.S. 367 (1968).

furtherance of that interest.”¹⁵⁸ Farber does not advance this approach as a panacea for the ills of the commercial speech doctrine, but he does claim that it provides “greater clarity, which is ultimately the most any theory can offer.”¹⁵⁹ Unconstrained by the need to mold an opinion that will attract at least four other votes, Farber probably has achieved “greater clarity” than the Court. Yet his test—like any other theory—cannot be considered “clear.”

The first problem with the “contractual approach” is that, in Farber’s initial statement of it, it depends on the “function of the language”¹⁶⁰ of the advertisement; in contrast, *O’Brien* focuses on the nature of the governmental interest being asserted, not on the nature of the speech. Suppose a city, for aesthetic reasons, wanted to ban all billboards, including those that clearly qualified for first amendment protection.¹⁶¹ The language in *O’Brien*, emphasizing the nature of the governmental interest being asserted, would seem to permit such a ban without subjecting it to strict scrutiny.¹⁶² But this regulation also “directly implicates the first amendment function of language,”¹⁶³ which would suggest that it must be strictly scrutinized under Farber’s test. The problem with Farber’s test is that it is frequently impossible to distinguish between the “contractual” and “informative” functions of a particular form of speech, just as it is impossible to distinguish consistently between protected noncommercial and unprotected commercial speech. Farber himself presents the example of an advertisement by an association of egg producers that misrepresents the scientific evidence on the allegedly harmful effects of cholesterol. Farber quickly concludes that “[t]he misrepresentation can reasonably be seen as affecting the contract of sale, giving consumers a possible cause of action for breach of war-

158. *Id.* at 377.

159. Farber, *supra* note 154, at 408.

160. *Id.* at 387.

161. This was close to the issue presented in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Chief Justice Burger claimed that the plurality “hint[ed]—and not too subtly,” that such an ordinance would be unconstitutional, a result that he termed “insensitive to the needs of the modern urban dweller and devoid of valid constitutional foundations.” *Id.* at 564 (Burger, C.J., dissenting).

162. See *O’Brien*, 391 U.S. at 376-77 (“This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Court deferred to the City’s conclusion that a billboard ban would promote aesthetic interests as well as traffic safety: “There is nothing here to suggest that these judgments are unreasonable.” *Id.* at 509.

163. Farber, *supra* note 154, at 387.

ranty.”¹⁶⁴ This may be true, but this advertisement also seems to be performing or purporting to perform an informative function—albeit one intended to benefit the commercial interests of the advertiser. To call this advertisement “contractual” and therefore “suppressible” does not seem to clarify one of the basic problems with the commercial speech cases: if commercial speech is protected by the first amendment, how and to what extent may false or misleading advertising be regulated?

The commercial speech cases illustrate the perpetual dilemma of the Court. If its opinions are, in fact, intended to resolve future disputes by giving guidance to lower courts, legislatures, and executive bodies, then it must draw reasonably clear lines. The old commercial speech doctrine was such a line. However, such lines inevitably lead to unjust results in individual cases and often do not comport precisely with the constitutional provision they are designed to implement. Consequently, cases arise where the Court, as in *Bigelow*, must tinker with the line, declaring that the line is no longer as straight and clear as had been believed. Once the Court does this, there is no logical justification for having the line at all. In *Virginia Pharmacy* the Court recognized that commercial speech frequently conveys information of potential interest and value to a diverse audience, and hence that it should be constitutionally protected, but not totally free from regulation.¹⁶⁵ The Court soon realized, however, that there are problems with having no lines. People become confused about the meaning of legal rules, and there is a litigation explosion. The Court then hears more cases in the area, but matters only become more confused. Finally, it either adopts a new doctrine with the same fundamental problems that the old one had, continues to decide cases on an ad hoc basis, or perhaps just refuses to decide any more cases in the area, leaving matters where they are. The process is similar to that of law faculties searching for the ideal first-year curriculum. Everyone realizes at one level that such an ideal is unattainable, but every decade or so the curriculum is altered only to produce several years of upheaval and no more satisfactory results. The same process will probably occur in the commercial speech area: having announced three- and four-part tests for determining whether or not speech is commercial and, if so, whether it can be regulated, the Court will soon bow out of this area. Even though everyone agrees that these tests are far from ideal, experience has shown that if the Court lets the matter rest, litigation will gradually subside. As Justice Brandeis observed, “in most matters it is more important that the

164. *Id.* at 390.

165. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764, 770-73 (1976).

applicable rule of law be settled than that it be settled right.”¹⁶⁶ The alternative is to continue the search for the holy grail of doctrinal stability, with each new crusade only putting the goal further out of reach.

II. THEMES OF LIMITATION

To this point, this article has been limited to a series of examples of how repeated efforts by the Court to promulgate a test or rule in constitutional cases have generally provoked litigation and confusion and have not promoted doctrinal clarity. Although doctrinal uncertainty is, in some cases, the product of the changing composition of the Court, the inevitability of uncertainty is institutional. There are at least five reasons for the inevitability of confusion and incomprehensibility: the gray area problem, the “tyranny” of the majority opinion, the “case or controversy” limitation, the principle of stare decisis, and the dichotomy between a clear rule and a flexible response. All of these difficulties are rather obvious, but the full range of the problems that they cause, and the way in which the difficulties interact, may not be.

A. *Gray Areas.*

Lines can be clearly drawn on a surface. Thus the boundary between East and West Berlin can be determined with virtual certainty, so that one who steps over the line will be shot. Even such physical lines can be uncertain when, for example, they are defined in terms of a river whose banks are constantly shifting. When concepts are to be separated by a verbal “line,” then both the concepts to be divided and the line to be used in the division are subject to the inherent vagueness of language. Thus we can say with certainty where East Berlin stops and West Berlin starts, but we cannot be certain in speaking of economic activity, where communism stops and capitalism begins.

Despite its recognition that “[m]any constitutional standards involve ‘undoubted gray areas,’ ”¹⁶⁷ the Supreme Court occasionally loses track of this obvious point and purports to achieve, or at least approach, “clear lines,” “certainty,” or some equally unattainable goal.¹⁶⁸ Even the

166. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

167. *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005, 1012 (1985) (quoting *Fry v. United States*, 421 U.S. 542, 558 (1975) (Rehnquist, J., dissenting)).

168. See, e.g., *Michigan v. Clifford*, 464 U.S. 287 (1984). In *Clifford*, the Court granted certiorari to “clarify doubt that appears to exist as to the application of our decision in [*Michigan v. Tyler*],” in which the Court created a new fourth amendment exception for fire investigations. *Id.* at 289. In dissent, four Justices averred: “[T]oday’s opinion, far from clarifying the doubtful aspects of *Tyler*, sows confusion broadside.” *Id.* at 306 (Rehnquist, J., dissenting). See also *United States v. Ross*, 456 U.S. 798, 799-800 (1982) (extending the automobile exception of *Carroll v. United States*, 267 U.S. 132 (1925), to containers and packages located in the car).

brightest line has gray areas surrounding it. Moreover, bright lines may yield unpalatable results, causing the Court to modify the rules. The Court is often reluctant, however, to admit that the line has been changed. Observers are then left to wonder whether the first case or the second is to be consulted for the true definition of the rule. Both cases will be cited to support contradictory results.

B. *The Tyranny of the Majority Opinion.*

When a Supreme Court Justice joins an opinion, the most he or she can expect is to agree with the result and the broad outlines of that opinion. It may be impolitic or impossible to quibble with every point made by the author, even though the joining Justice almost invariably will not agree with all of them. In a number of dissenting opinions, for example, Justice Rehnquist has expressed the view that a case-by-case "reasonableness" approach would be the best way to deal with fourth amendment cases.¹⁶⁹ Yet, in the recent case of *Oliver v. United States*,¹⁷⁰ he joined an opinion that contained a paragraph vigorously condemning such an approach.¹⁷¹ Presumably he liked the majority decision better than the dissent and was unable, or unwilling, or did not have time, to convince the author to leave out the paragraph in question.

Consequently, though a majority opinion purports to "speak for" five or more Justices, particular statements made in the opinion may not represent the opinion of all of these Justices. When one of the joining Justices has an opportunity to address the issue in another case, that Justice will probably slant it somewhat toward his or her own viewpoint, never conceding that this represents a departure from the previous decision. And, for the same reasons previously discussed, the author of the original opinion is likely to acquiesce in this distortion provided it is not too severe. Obviously, the potential for uncertainty in this process is great.

C. *Cases or Controversies.*

The case-or-controversy limitation is a constitutional one, stemming from article III, which states that "the judicial power shall extend" to a

169. See, e.g., *Florida v. Royer*, 460 U.S. 491, 528-29 (1983) (Rehnquist, J., dissenting) ("The question we must decide is what was *unreasonable* about the steps which *these officers* took with respect to *this* suspect in the Miami Airport on this particular day.").

170. 466 U.S. 170 (1984).

171. *Id.* at 181-82.

variety of "cases" and "controversies."¹⁷² As Professor Lea Brilmayer has observed, "[t]he wording [of article III] has traditionally been understood to include the power to resolve abstract legal issues, including constitutional issues, but only as a necessary byproduct of the resolution of particular disputes between individuals."¹⁷³

This is an extraordinary limitation, given that the stated purpose of the certiorari grant, as discussed earlier, is specifically *not* to resolve disputes between parties but to decide "an important question of federal law which has not been, but should be, settled by . . . [the Supreme] Court."¹⁷⁴ The purpose in granting certiorari is, essentially, to legislate—to declare broad policy that will be applicable nationwide.¹⁷⁵ Thus, the Court, which considers itself principally a "legislative" or rulemaking body, can only make rules as a by-product of a dispute between parties. It must sit and wait and hope that two parties will bring it the issue that it wants to decide.¹⁷⁶ Resolving such a case does not readily foster the establishment of a general principle; the statement of the general principle is limited by the bounds of the individual case. This limitation leads to several possible results. First, there may be fudging of the case-or-controversy doctrine as the Court reaches out to decide issues that are not presented by the case. For example, in the recent cases of *United States v. Leon*¹⁷⁷ and *Massachusetts v. Sheppard*,¹⁷⁸ the Court held that it is inappropriate to exclude evidence obtained from an unconstitutional search when the police error was made in "good faith."¹⁷⁹

172. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

173. Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300 (1979) (footnote omitted). See, e.g., *Chicago & G.T. Ry. v. Wellman*, 143 U.S. 339, 345 (1892) (holding that courts may legitimately call the constitutionality of legislation into question "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals"), *quoted with approval in* *Muskat v. United States*, 219 U.S. 346, 359 (1911).

174. See SUP. CT. R. 17.1(c).

175. "[The Supreme Court] is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy." Dahl, *Decision Making in a Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 106 (L. Levy ed.) (1967).

176. See J. ELY, *DEMOCRACY AND DISTRUST* 22 (1980), for a discussion of how case-or-controversy limitations in the *Slaughter House Cases* pushed the Court into a decision that stripped the privileges and immunities clause of any meaning, which in turn forced the Court to use the less likely due process clause of the fourteenth amendment as the vehicle for extending the Bill of Rights to the states.

177. 468 U.S. 897 (1984).

178. 468 U.S. 981 (1984).

179. *Sheppard*, 468 U.S. at 899-90 (police officer is justified in relying upon a judge concerning validity of a warrant); *Leon*, 468 U.S. at 926 (finding that officer's affidavit, which was used to obtain a warrant, was much more than a "bare bones" affidavit).

Yet Justice Stevens noted that the search, at least in *Leon*,¹⁸⁰ actually was constitutional under the test announced the previous term in *Illinois v. Gates*.¹⁸¹ Thus there was no need to decide whether certain *illegal* searches fell under the "good faith exception," because the search in question was legal. The Court, charged Stevens, was "reach[ing] out to decide what is undoubtedly a profound question concerning the administration of criminal justice [without] assuring itself that this question is actually and of necessity presented by the concrete facts before the Court."¹⁸²

In addition to deciding issues that are not presented, the Court may distort the issue in order to find the case justiciable. *Taylor v. Louisiana*,¹⁸³ for example, involved a challenge by Taylor, a man, to the exclusion of women from the jury venire.¹⁸⁴ In order to find that Taylor had standing, the Court had to define the sixth amendment right to a jury trial as a right to a jury drawn from a "representative cross-section of the community" rather than to an unbiased and impartial jury, a definition that was highly disputable.¹⁸⁵

By deciding issues that are not presented, or by misstating the issue presented in order to avoid the case-or-controversy limitation, the Court sows confusion about what has been decided and increases the probability that a future decision will interpret the issue differently than the first Court intended. In *Leon* and *Sheppard*, for example, it is not

180. *Leon*, 468 U.S. at 961-63 (Stevens, J., dissenting).

181. 462 U.S. 213 (1983). *Gates* held that the "two pronged" test for determining probable cause, see *Spinelli v. United States*, 393 U.S. 410 (1969), was to be abandoned and that the determination should be grounded on the "totality of the circumstances." *Gates*, 462 U.S. at 230-39.

182. *Leon*, 468 U.S. at 963 (Stevens, J., dissenting). The Court enumerated the various limitations on access to courts for constitutional adjudication in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947):

[T]his Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications . . . arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. . . .

The policy, however, has not been limited to jurisdictional determinations. For, in addition, "the Court has developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

Id. at 568-69 (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (footnotes omitted)).

183. 419 U.S. 522 (1975).

184. *Id.* at 524.

185. See *id.* at 538-43 (Rehnquist, J., dissenting) (discussing lack of precedent for this view).

clear what constitutes a "good faith" mistake. Is it only a mistake that arguably was not a violation at all (as in these cases), or does the concept include more obvious examples of police misconduct? If a future Court wanted to limit these cases, it would be easy to say that the definition of a good-faith mistake is very narrow, though that does not seem to be the intent of the opinions in *Leon* and *Sheppard*.¹⁸⁶

Finally, the Court may refuse to decide issues that need resolution simply because the issue is not presented by the parties,¹⁸⁷ because the issue is moot, or because the parties lack standing. For example, in *DeFunis v. Odegaard*,¹⁸⁸ the Court declined to decide whether a law school's preferential admissions policy for blacks constituted an equal protection violation of the rights of whites; the Court indicated that the plaintiff's claim was moot because he had been admitted to and was about to graduate from law school.¹⁸⁹ It took four more years for the Court to get a case on this topic that it considered justiciable.¹⁹⁰ In other cases, such as the post-*Miranda* case of *Michigan v. Mosley*,¹⁹¹ the Court is forced by the facts to decide a narrow issue when a decision on a broader one would have been much better. In *Mosley* the police questioned the defendant about a different crime after he asserted his right to silence with regard to the original crime.¹⁹² The Court upheld the use of this evidence at trial.¹⁹³ Much more common, however, is the situation where the police want to question a suspect with regard to the *same* crime after he has invoked his right to silence. Although there are intimations in *Mosley* that this may sometimes be permissible,¹⁹⁴ the case-or-controversy doctrine prevented the Court from deciding this issue, and the question remains unresolved.

The necessity to decide issues that are not presented, as in *Sheppard*

186. Close attention to [the] remedial objectives [of the exclusionary rule] has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule. The Court has, to be sure, not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate . . .'

Leon, 468 U.S. at 908-09.

187. See *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983). The Court in *Gates* grounded its refusal to decide whether there was a "good faith exception" to the exclusionary rule, not on article III, but rather on the Court's statutory authority to review state court decisions, 28 U.S.C. § 1257 (1982), which is limited to "[f]inal judgements or decrees rendered by the highest court of a State." *Gates*, 462 U.S. at 217 (citing 28 U.S.C. § 1257 (1982)).

188. 416 U.S. 312 (1974). Four Justices argued that the case was not moot. *Id.* at 348-50 (Brennan, J., dissenting).

189. *Id.* at 319-20.

190. See *University of California Regents v. Bakke*, 438 U.S. 265, 272-81 (1978).

191. 423 U.S. 96 (1975).

192. *Id.* at 97-98.

193. *Id.* at 99-107.

194. *Id.* at 101-04.

and *Leon*, to sidestep justiciability issues,¹⁹⁵ as in *Taylor*, or to forbear from deciding a case or an issue because of justiciability problems, as in *DeFunis* and *Mosley*, affects the ability of the Court to resolve disputes on important questions of federal law. When combined with the other limitations on the decisionmaking process, this disability becomes very significant.

D. *Stare Decisis*.

When a legislature wishes to declare a new law, or to change an old one, it simply does so. There is no need to account for the new law in terms of similar laws that have been passed, or to explain why this new law is not inconsistent with its predecessors. Not so with the Supreme Court. When it makes law, the doctrine of *stare decisis et non quieta movere*¹⁹⁶ governs the process. *Stare decisis* is seen as a doctrine that lends stability and legitimacy to the judicial process: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."¹⁹⁷

Whatever the necessity or value of *stare decisis*,¹⁹⁸ it unquestionably interferes with the Supreme Court's stated goal of settling important questions of federal law.¹⁹⁹ This is particularly true in constitutional decisions, where the Court must consider the intent of the framers as well as, in some cases, nearly two hundred years of precedent. As the Court adds to the pile of precedents, the problem gets worse. Particularly in the criminal procedure area, where clearly settled law is of the utmost importance, *stare decisis* makes such clear settlement virtually impossible. Justice Stevens noted that as "the body of precedent continues to grow year after year, the likelihood that doctrinal inconsistency may force the Court to reject one precedent in favor of another must likewise

195. See also *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), where, in order to find a case *non* justiciable, the Court took what is arguably an unduly narrow view of what constituted "present objective harm" to the plaintiffs, who were the subjects of dossiers compiled by the Army on potential subversives.

196. See Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied*, 31 A.B.A. J. 501, 501-02 (1945) (*stare decisis* provides that courts should stand by their decisions and should not disturb settled points of law), quoted in Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 & n.1 (1983).

197. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921); see also A. GOLDBERG, *EQUAL JUSTICE* 75 (1971) ("[S]tare decisis foster[s] public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinions.").

198. See *supra* note 13 and accompanying text.

199. See SUP. CT. R. 17.1(c).

increase."²⁰⁰

Yet the problem is more acute than Justice Stevens recognized in this passage. Not only may doctrinal inconsistency force the Court to reject one precedent in favor of another, it may also make it impossible to establish any clear rules. Because it must be phrased in terms of unclear and often conflicting precedents and must be based on the issues of a case presented by the parties, a "new" rule will be imprecise at its inception. These factors exacerbate the already difficult task of drafting a clear rule.

Consider the *Miranda* line of cases discussed earlier.²⁰¹ It is probably fair to say, as the *Miranda* dissenters did, that "[t]he proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion . . . has no significant support in the history of the privilege or in the language of the Fifth Amendment."²⁰² Nevertheless, the majority based its decision on a series of earlier cases. Indeed, it stated that the Court granted certiorari merely "to explore some facets of the problems [raised by *Escobedo v. Illinois*²⁰³] of applying the privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."²⁰⁴ According to the opinion, *Miranda* "is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."²⁰⁵ The Court then rounded up the usual precedents—the English Bill of Rights, *Cohens v. Virginia*,²⁰⁶ and selected passages from more recent cases—to support its position that *Miranda* was a simple, almost inevitable, outgrowth of earlier cases.²⁰⁷ The dissents cited an equally impressive array of cases to show that this case was a radical departure from what had gone before.²⁰⁸

A few years after *Miranda* had been decided, the composition of the Court changed and a majority disagreed with the *Miranda* holding.²⁰⁹

200. Stevens, *supra* note 196, at 4 (citation omitted).

201. See *supra* notes 44-57 and accompanying text.

202. *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting). Similarly, Professor Saltzburg has termed *Miranda* an "abrupt departure" from precedent. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren & Burger Courts*, 69 GEO. L.J. 151, 200 (1980).

203. 378 U.S. 478 (1964).

204. *Miranda*, 384 U.S. at 441-42.

205. *Id.* at 442.

206. 19 U.S. (6 Wheat.) 264, 387 (1821).

207. *Miranda*, 384 U.S. at 442-44.

208. *Id.* at 506-14 (Harlan, J., dissenting); *id.* at 527-31 (White, J., dissenting).

209. See Stone, *supra* note 55, at 99-100, 99 n.2 (concluding that such an assumption is not "unduly rash"); cf. Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1, 12 (1964) (stating, prior to *Miranda*, that "the notion that suppression of evidence in a given case effectively deters

Had they not been precluded by stare decisis, they presumably would have overruled it. This did not occur, for reasons discussed by Professor Geoffrey Stone:

The task of a court confronted with a precedent that a majority of its members believe to be seriously misguided or worse is never an easy one. And the difficulty is exacerbated when that precedent is recent, highly controversial, and deeply embedded in the public consciousness. In such a context, the expedient of direct overruling may seem unattractive, for such action would inescapably raise strong doubts about the integrity and the stability of the judicial process. Faced with this problem, a court may attempt to avoid or to postpone a direct overruling of the disfavored precedent. The very existence of the conflict, however, is likely to exert considerable strain on the court in its efforts to deal forthrightly with issues posed by the precedent. This seems to be the current plight of the Burger Court with respect to *Miranda v. Arizona*.²¹⁰

Thus, instead of overruling *Miranda*, the Court in a series of cases "interpreted" it narrowly. In *Harris v. New York*,²¹¹ it held, despite clear language in *Miranda* to the contrary,²¹² that a statement made without proper warning could be used to impeach the defendant's testimony at trial.²¹³ The *Harris* Court, however, was forced by stare decisis to concede that "*Miranda* barred the prosecution from making its case [in chief] with statements of an accused made while in custody prior to having or effectively waiving counsel."²¹⁴ In *Michigan v. Tucker*,²¹⁵ the Court found, contrary to the express holding of *Miranda*,²¹⁶ that a failure to give the required warnings did not violate the fifth amendment but only the "prophylactic rule developed to protect that right."²¹⁷ The Court's opinion makes it clear that this holding was not based on any

the future action of the particular policeman or of policemen generally was never more than wishful thinking on the part of the courts").

210. Stone, *supra* note 55, at 99 (footnotes omitted).

211. 401 U.S. 222 (1970).

212. "[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings" *Miranda*, 384 U.S. at 477.

213. Comments to the contrary in *Miranda* were written off as dictum. *Harris*, 401 U.S. at 224. See Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1208-18 (1971) (detailed analysis of Court's "misleading" use of precedents).

214. *Harris*, 401 U.S. at 224.

215. 417 U.S. 433 (1974).

216. *Miranda* held that the warnings are required by the fifth amendment, "unless we are shown other procedures which are at least as effective in apprising accused persons of their right[s]." *Miranda*, 384 U.S. at 467. See also *id.* at 476 ("The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege . . ."). For a full discussion of *Harris* and *Tucker*, see Stone, *supra* note 55, at 106-25.

217. *Tucker*, 417 U.S. at 439, 444-46.

misunderstanding of *Miranda*, but rather on the Court's view of the fifth amendment and of the pre-*Miranda* cases.²¹⁸

How did stare decisis cause uncertainty in the post-*Miranda* cases? *Harris* was a short opinion that relied essentially on two earlier cases, *Miranda* and *Walder v. United States*.²¹⁹ To reach its result in *Harris*, the Court found it necessary to dismiss a portion of *Miranda* as dictum. This raises questions as to what other parts of that broad opinion, or of other opinions, are dicta.²²⁰ These questions go to the heart not of the issue presented, but of the scope of stare decisis itself. Thus, stare decisis has raised a series of superfluous and endlessly debatable issues about stare decisis itself.

Perhaps recognizing, as good lawyers, that an argument should be grounded on more than one footing,²²¹ the *Harris* Court also discussed *Walder*. Although a defendant's general denial of culpability could not be impeached by use of illegally seized evidence,²²² an affirmative lie by the defendant could be impeached under *Walder*.²²³ Because *Harris* had not gone beyond a mere denial of guilt in his direct testimony, it would appear that the *Walder* exception was inapplicable. In effect, *Harris* "construed *Walder* as holding that unconstitutionally obtained evidence may always be used to impeach."²²⁴ *Harris* ignored the contrary rule of *Agnello v. United States*,²²⁵ to which *Walder* was a narrow exception.²²⁶

Because *Harris* was limited to the fact situation then before the Court, and because precedential support was needed for a decision that, in fact, was a naked attempt to cut back *Miranda*, the Court raised questions about the scope of stare decisis and about the meaning of *Miranda*,

218. The majority opinion reviewed the earlier cases and commentary and concluded that *Miranda* was the first case to declare "that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded despite their voluntary character under traditional principles." *Id.* at 443.

219. 347 U.S. 62 (1954).

220. "[A] technical reading of *Miranda*, such as that employed in *Harris*, would enable the Court to label many critical aspects of the decision mere dictum . . ." Stone, *supra* note 55, at 107. Stone goes on to note that, curiously, the Court never followed this practice again. *Id.* at 108.

221. Can stare decisis demand less when the pronouncements of an earlier case are to be ignored?

222. See *Agnello v. United States*, 269 U.S. 20, 34-35 (1925).

223. See *Walder*, 347 U.S. at 65.

224. Stone, *supra* note 55, at 109.

225. 269 U.S. 20, 34-35 (1925). The *Walder* Court restated this rule, noting that the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." *Walder*, 347 U.S. at 65.

226. "The actual situation was, however, considerably different from that suggested by the Court. *Walder* did not state the general rule: instead, it stated a rather special exception to the general rule laid down in 1925 by a unanimous Supreme Court in the case of *Agnello v. United States*." Dershowitz & Ely, *supra* note 213, at 1211.

Agnello, and *Walder*. When the additional statements of the *Harris* Court itself are added to the constitutional soup, it is obvious that a future Court will be unable to say precisely what *Harris* means.²²⁷ By purporting to rely on, rather than overrule, *Miranda*, *Agnello*, and *Walder*, the Court rendered a decision in *Harris* that was unclear.

The opinion in *Tucker* was much more complex than the opinion in *Harris* and consequently raised many more questions. I will not attempt to enumerate all of them, but recognition of even a few will make the impact of stare decisis clear. The *Tucker* Court, after discussing the early cases and the intent of the framers, observed that *Miranda* was the first case to find that a defendant's voluntary statement might be excluded at trial.²²⁸ Why is this relevant? Certainly it does not bear on what the holding in *Miranda* may have been. Whether *Miranda* was the first or twelfth case to so hold has nothing to do with whether the *Tucker* Court should follow it. Clearly, this observation in *Tucker* was homage to stare decisis. The Court was saying, in effect, "we may cut back on *Miranda* because it, not this decision, is out of sync with precedent." This attitude was perhaps justified by the claim of the *Miranda* majority that their decision *did* follow from the precedents. After finding, contrary to *Miranda*, that the warnings were not constitutionally compelled,²²⁹ the Court in *Tucker* held that the "fruit of the poisonous tree" doctrine²³⁰ would not bar testimony of a witness who was discovered

227. *Harris* raises a number of new issues. For example, what kind of testimony—direct or cross, outright lies or general denials—may be impeached by what type of evidence—illegally seized evidence, involuntary statements, or silence? The Court attempted to resolve some of these problems in *United States v. Havens*, 446 U.S. 620 (1980) (defendant's statement made in response to proper cross-examination reasonably suggested by defendant's direct examination is subject to proper impeachment by the government, even by evidence that has been illegally obtained and that is otherwise inadmissible on the government's direct case as substantive evidence of guilt), and *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that use of prearrest silence to impeach a defendant's credibility does not deny him fundamental fifth and fourteenth amendment guarantees of fairness). For a critical discussion of those cases, see Bradley, Havens, Jenkins, and Salvucci, *and the Defendant's "Right" to Testify*, 18 AM. CRIM. L. REV. 419, 423-36 (1981).

228. *Tucker*, 417 U.S. at 443.

229. Several commentators have noted the inconsistent approaches in *Miranda* and *Tucker*. See, e.g., Stone, *supra* note 55, at 118-19; cf. *Oregon v. Elstad*, 105 S. Ct. 1285, 1325-26 (1985) (Stevens, J., dissenting) (suggesting that the Court's power to force state courts to exclude probative self-incriminating statements must rest on the premise that use of such evidence violates the Constitution; otherwise, *Miranda* and its progeny constitute "an illegitimate exercise of raw judicial power.").

230. The "fruit of the poisonous tree" doctrine "is drawn from *Wong Sun v. United States*, in which the Court held that evidence and witnesses discovered as a result of a search in violation of the Fourth Amendment must be excluded from evidence." *Oregon v. Elstad*, 105 S. Ct. 1285, 1291 (1985). The doctrine also applies "when the fruit of the Fourth Amendment violation is a confession," unless intervening events break the causal link between the violation and the confession. *Id.*

only as a result of the defendant's inadequately warned statement.²³¹ However, the Court based its holding in part on the fact that the interrogation in *Tucker* had occurred before *Miranda* was decided.²³² Thus *Tucker* did not settle the "poisonous tree" issue for post-*Miranda* cases. Obviously, the police could not have followed the specific requirements of *Miranda* in this pre-*Miranda* interrogation. Discussing the deterrent effect of the exclusionary rule, the Court observed that "[w]here the official action was pursued in complete *good faith* . . . the deterrence rationale loses much of its force."²³³ Nevertheless, the Court noted that the defendant's own statement (as opposed to the witness's testimony) must be excluded because *Miranda* had been declared retroactive in *Johnson v. New Jersey*.²³⁴ Justice Brennan, concurring in the judgment in *Tucker*, argued that the ruling in *Johnson*—that *Miranda* was applicable to trials beginning after *Miranda*—was "unnecessary to our decision" (i.e., dictum) and should not apply to "fruit of the poisonous tree" cases because it would place too great a burden on law enforcement.²³⁵

Why did the conservative Justice Rehnquist, the author of the *Tucker* opinion, accede to a broad reading of *Johnson*, which rendered the *Miranda* holding more potent,²³⁶ whereas the liberal Justice Brennan argued that *Miranda* should be cut back? The reason, of course, was stare decisis—not the backward-looking "accounting for precedent" of most cases, such as *Harris*, but a forward-looking "establishing of precedent." Justice Rehnquist undoubtedly recognized that by 1974, when *Tucker* was decided, a case finding *Miranda* retroactive (but then denying the defendant relief) would be unimportant because it was unlikely that many additional pre-*Miranda* cases would come along. On the other hand, *Tucker* was a perfect opportunity to establish a precedential beachhead for later modification of Warren Court criminal procedure rules. Thus *Tucker* held that *Miranda* was not a constitutional holding

231. "Here we deal . . . with the testimony of a witness whom the police discovered as a result of defendant's statements. This recourse to [defendant's] voluntary statements does no violence to such elements of the adversary system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments." *Tucker*, 417 U.S. at 450.

232. See *Tucker*, 417 U.S. at 447.

233. *Id.* (emphasis added).

234. *Id.* at 451 (citing *Johnson v. New Jersey*, 384 U.S. 719 (1966)). The *Johnson* Court held that "the non-retroactivity of [*Miranda*] will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim." *Johnson*, 384 U.S. at 730.

235. *Tucker*, 417 U.S. at 453-57 (Brennan, J., concurring). Because many lower courts had found "fruits" admissible in pre-*Miranda* cases, and the police had relied on those decisions, Justice Brennan argued that it would be unfair to exclude them. *Id.* at 457.

236. Justice White, who also disagreed with *Miranda*, simply found *Miranda* inapplicable to this kind of case; thus he agreed with Brennan, though Brennan was a *Miranda* supporter. See *id.* at 461.

but merely a set of prophylactic rules. This did not stop the Court from finding that *Miranda* operated to suppress the defendant's improperly warned statements; but in depriving *Miranda* of its constitutional basis, the Court "seems certainly to have laid the groundwork to overrule *Miranda*."²³⁷ At a minimum, *Tucker* laid a foundation for finding that the collateral consequences of a *Miranda* violation would be slight.²³⁸ Perhaps just as important, the statement in *Tucker* that good faith violations by the police should not be the basis for evidentiary exclusion was reiterated and expanded by the Court in *United States v. Peltier*.²³⁹ The *Peltier* decision, in turn, provided a strong precedential basis for the Court's holding, ten years later, in *United States v. Leon*.²⁴⁰ *Leon* held that there is a good faith exception to the exclusionary rule where illegal searches are conducted in "good faith" pursuant to a warrant.²⁴¹ All of this would be possible only if the Court found a *Miranda* violation in the first place—hence the seemingly incongruous positions taken by Justices Rehnquist and Breunan.

Although Justice Rehnquist established in *Tucker* that he could play *stare decisis* like a stringed instrument, he did nothing to clarify the *Miranda* doctrine. Rather, the adherence to *stare decisis*, as well as the expectation of adherence in later cases, caused the Court to distort its purpose: to overturn *Miranda*. It also caused the Court to distort the cases on which it relied, leading to a pyramiding of confusion in the next case.²⁴²

One factor that contributes to the confusion created by *stare decisis* is the "lawyer mentality" of the Justices. The writing Justice sees himself as an advocate who must justify his opinion against that of the dissent. It

237. Stone, *supra* note 55, at 123.

238. *Tucker* has been an important precedent for a number of holdings limiting *Miranda*. See, e.g., *Oregon v. Elstad*, 105 S. Ct. 1285, 1292-93 (1984) ("fruit of the poisonous tree" doctrine does not apply to *Miranda* violations); *New York v. Quarles*, 467 U.S. 649, 654-55 (1984) ("public safety" exception to the *Miranda* requirements); *Minnesota v. Murphy*, 465 U.S. 420, 433-34 (1984) (unwarned admissions to a probation officer do not violate *Miranda*). *Murphy* relied on the statement in *Tucker* that "every schoolboy is familiar with the concept, if not the language of the [fifth amendment]." *Id.* at 437 (quoting *Tucker*, 417 U.S. at 439) (brackets in *Murphy*).

239. 422 U.S. 531, 539, 542 (1975).

240. 468 U.S. 897 (1984).

241. *Id.* at 922.

242. There have been many such "next cases" since *Tucker*. The most recent is *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), in which the Court—relying on *Tucker*'s holding that *Miranda* did not declare a constitutional rule—held that the "fruit of the poisonous tree" doctrine did not operate to suppress the fruits of a statement obtained in violation of *Miranda*, though the statement itself must be suppressed. *Id.* at 1292-93. In dissent, Justice Stevens argued that *Elstad* was "inconsistent with the Court's prior cases" (it was inconsistent with *Miranda* but not with *Tucker*) and that "the attempt to identify its boundaries in future cases will breed confusion and uncertainty in the administration of criminal justice." *Id.* at 1323 (Stevens, J., dissenting).

is hardly surprising that a Justice, with twenty or thirty years of previous experience as an advocate, should tend to view previous holdings in the light most favorable to his position. Thus, a Court opinion, as the dissent and commentators invariably point out, tends to present a slanted view of the applicable precedents, just as a brief does. Because of stare decisis, this view becomes the "law" for future cases. Confusion is inevitable, as cases reaching different outcomes may contain strikingly different interpretations of earlier cases.

E. *Clear Rules/Flexible Responses.*

In addition to resolution of disputes on major issues, another frequently stated or implied goal of the Supreme Court is clarity in the law.²⁴³ If the Court could set down clear rules for everyone to follow, then disputes would be minimized and we would all live in harmony. As previously discussed, it is impossible for the Court to establish clear rules to govern all future cases because of the case-or-controversy and stare decisis limitations, as well as the obvious problem that any "clear rule" will have unclear boundaries. Nevertheless, cases that are clearly governed by a prior holding frequently arise. One might suppose that these cases would pose no problems, but that is not invariably true. Application of the clear rule to an unforeseen fact situation sometimes leads to unjust results.

The Supreme Court discovered this when, years ago, it endeavored to establish a standard "once and for all" regarding "reasonable" conduct of an automobile driver approaching an unmarked railroad crossing—the "stop, look, and listen rule."²⁴⁴ The endeavor failed because the rule led to unjust results when applied to varying fact situations.²⁴⁵ After eight years, the Court abandoned the attempt.²⁴⁶ It emphasized the "need for caution in framing standards of behavior that amount to rules

243. See *United States v. Ross*, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring) ("It is important, however, not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules are clearly established."); see also *Oliver v. United States*, 466 U.S. 170, 173, 175 n.5 (1984) (discussion of the need for clear rules in search and seizure cases).

244. *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927).

245. Prosser describes the upshot of the "stop, look, and listen" rule as follows:

A long series of cases in which gates were left open, or the driver relied upon the absence of a flagman, or it was clear that the conduct specified would have added nothing to the driver's safety made it quite apparent that no such inflexible rule could be applied.

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 188-89 (4th ed. 1971) (footnotes omitted).

246. *Pokora v. Wabash Ry.*, 292 U.S. 98, 106 (1934) (footnote omitted) ("The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.").

of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal."²⁴⁷ William Prosser has elaborated on the problem:

A decision of an appellate court that under certain circumstances a particular type of conduct is clearly negligent, or that it clearly is not negligent, . . . establishes a precedent for other cases where the facts are identical, or substantially the same. To that extent it may define the standard of reasonable conduct which the community requires. Unfortunately the inevitable tendency [is] to crystalize the law into mechanical rules . . . of universal application. Almost invariably the rule has broken down in the face of the obvious necessity of basing the standard upon the particular circumstances, the apparent risk and the actor's opportunity to deal with it.²⁴⁸

Yet the Court frequently forgets this experience as it tries to formulate a "clear rule" that will settle an issue once and for all. The "few specifically established and well-delineated exceptions"²⁴⁹ to the fourth amendment's warrant requirement have expanded to a total of about twenty-three.²⁵⁰ The reason for this is simple: The "clear rule" that warrants are always required could never work; exceptions had to be recognized from the beginning.²⁵¹ Originally, the only exception involved circumstances where it would be impracticable to obtain a warrant.²⁵² This general exception came to be "codified" into a series of more particular exceptions, such as the automobile exception,²⁵³ the search-incident-

247. *Id.* at 105-06.

248. W. PROSSER, *supra* note 245, at 188. The textual discussion of *Goodman* and *Pokora* essentially tracks the discussion in *Bradley*, *supra* note 71, at 1472, where I previously discussed the clear rule/flexible response dichotomy.

249. *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). See *infra* notes 273-76 and accompanying text.

250. These are enumerated in *Bradley*, *supra* note 71, at 1473-74.

251. As Professor Saltzburg has observed:

Because courts cannot determine with certainty what effect judicial decisions regulating the admission of evidence have on the behavior of government officials and because overturning a conviction has high social costs, appellate judges naturally may strain, often subconsciously, to preserve a conviction. . . . [T]his straining . . . tends to produce precedents that uphold police activity at the outer margin of permissibility. Often, the approval takes the form of poorly reasoned opinions. Law enforcement officials rely on the cases that stretch constitutional principles to their limits and in subsequent cases ask that these principles be stretched still further.

Saltzburg, *supra* note 202, at 154-55.

252. See *Trupiano v. United States*, 334 U.S. 699, 708 (1948) ("A search or seizure without a warrant . . . has always been . . . strictly limited . . ."), quoted with approval in *Chimel v. California*, 395 U.S. 752, 758-59 (1969); *Carroll v. United States*, 267 U.S. 132, 156 (1925) (a warrant must be obtained if "reasonably practicable").

253. See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (warrantless search of vehicle not unreasonable because "opportunity to search is fleeting since a car is readily movable"); *Carroll v. United States*, 267 U.S. 132, 152 (1925) (warrantless searches of vehicles with probable cause not unreasonable under fourth amendment because vehicles "can be quickly moved" out of jurisdiction where warrant would be sought).

to-arrest exception,²⁵⁴ and the hot pursuit exception.²⁵⁵ Once the boundaries of these exceptions were set forth, fact situations arose that fell outside of these exceptions, but in which, in the Court's view, it would have been unjust to suppress evidence. Such cases led to the creation of new exceptions, such as the "stop and frisk" exception²⁵⁶ and the enlarged automobile exception.²⁵⁷ Such a factual setting led to the creation of yet another exception last Term. In *New Jersey v. T.L.O.*,²⁵⁸ a high school freshman was caught smoking in a lavatory in violation of school rules. She was taken to the assistant vice-principal's office where her purse was searched for cigarettes. Marijuana was found, along with money, a list, and letters that implicated her in marijuana dealing. This evidence was used in a prosecution of T.L.O. in juvenile court.²⁵⁹

In deciding whether this evidence should have been excluded, the Supreme Court first recognized that the fourth amendment applied to searches by public school officials and that the defendant had an expectation of privacy in her purse.²⁶⁰ On the other hand, the Court found that "requiring a teacher to obtain a warrant before searching a child . . . would unduly interfere with the maintenance of swift and informal disciplinary procedures needed in the schools."²⁶¹ In other words, the warrant requirement would lead to unjust results. The Court rejected not only a warrant requirement for such a search, but also a probable cause requirement.²⁶² The new standard for school searches was to be "reasonable suspicion."²⁶³ The Court upheld the search in *T.L.O.* because there had been a reasonable suspicion that T.L.O. had cigarettes in her purse.²⁶⁴ Thus a new exception to the warrant requirement was born, allowing warrantless searches of persons without probable cause and

254. See *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (warrantless search of arrestee and area into which arrestee may reach reasonable to protect officer's safety and to preserve evidence).

255. See *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

256. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (warrant procedure not practical in street confrontations during police investigations; reasonable belief by officer that suspect is armed supports search of the person without warrant).

257. See *United States v. Ross*, 456 U.S. 798, 824 (1982) (police may search all areas of vehicle—including closed containers—for which they have probable cause that would justify a warrant).

258. 105 S. Ct. 733 (1985).

259. *Id.* at 736-37.

260. *Id.* at 740.

261. *Id.* at 743.

262. *Id.*

263. *Id.* at 746.

264. *Id.* The Court did not discuss the obvious alternative of allowing such searches for school discipline purposes, but not allowing the evidence to be used in a criminal prosecution unless a warrant was used or, at least, probable cause as to a *criminal* violation existed.

with only a reasonable suspicion that a school rule, as opposed to a criminal provision, is being violated.

The problem is not simply one of creating exceptions to broad constitutional rules. It is a continuing and inevitable process. Exceptions are created to avoid applying the rules mechanistically and producing an unjust result, but the exception then becomes a mechanistic rule in its own right. Accordingly, exceptions to the exception must in turn be created, and so on. The automobile cases illustrate this process with respect to one of the exceptions to the fourth amendment warrant requirement.²⁶⁵ After *Chambers v. Maroney*²⁶⁶ validated a warrantless search of a car after the driver had been arrested and the car taken to a police station, the Court, in a series of cases, considered not whether there should be an automobile exception, but the scope of the exception. In an effort to avoid the application of a clear rule—that automobiles may be searched without a warrant—that was an exception to another clear rule—that warrants must always be used—the Court engaged in fine doctrinal distinctions and seemed to lose sight of the basic constitutional requirement of reasonableness.

In *Arkansas v. Sanders*,²⁶⁷ the Court established an exception to the automobile exception: a suitcase found in a car is not covered by the automobile exception—it can only be searched pursuant to a warrant.²⁶⁸ Although *Sanders* is flatly inconsistent with *Chambers*,²⁶⁹ the Court claimed that it was not.²⁷⁰ In *United States v. Ross*,²⁷¹ the Court overruled *Sanders*,²⁷² restoring the automobile exception to its full glory: "[I]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents"²⁷³

265. See *supra* notes 70-107 and accompanying text.

266. 399 U.S. 42, 52 (1970).

267. 442 U.S. 753 (1979).

268. *Id.* at 763.

269. In *Chambers*, the Court held that, where probable cause exists, a car and its contents may be searched without a warrant. *Chambers*, 399 U.S. at 50-52. In *Sanders*, where probable cause existed as to a suitcase that the police observed being placed in a car, the Court held that the car—but not the suitcase—could be searched without a warrant. *Sanders*, 442 U.S. at 763-65. Although the Court's reasons for distinguishing *Chambers* were not necessarily illogical—the search was directed at the suitcase, not the car, and it is easier for police to impound suitcases than cars—the *Sanders* opinion nevertheless changed the contours of the *Chambers* holding.

270. See, e.g., *Sanders*, 442 U.S. at 765 n.14.

271. 456 U.S. 798 (1982).

272. The *Ross* decision was prompted by *Robbins v. California*, 453 U.S. 420, 425 (1981) (plurality opinion), in which the Court extended *Sanders* one logical step further in holding that a package wrapped in green opaque plastic also could not be searched without a warrant.

273. *Ross*, 456 U.S. at 825. The narrow holding of *Sanders* was not overruled by *Ross*: if probable cause only exists as to the contents of the suitcase, rather than the car as a whole, then a warrant must still be obtained. See *Ross*, 456 U.S. at 824. Thus *Ross* places the police in the anomalous position of being better off with nonspecific probable cause than with probable cause that identifies

Thus the perceived need to decide cases justly led the Court first to create and then to abolish an exception to another exception. This sort of wheel-spinning must be expected when the Court succumbs to its natural desire to set forth clear rules.

Not only did *Ross* firmly establish that the police may fully search automobiles on probable cause alone, it also changed the contours of the earlier decisions in *Carroll* and *Sanders*. Stare decisis thus distorts both *Ross* and the cases on which it relies. As Justice Marshall noted in his *Ross* dissent, "[u]nder *Carroll* . . . the mobility of an automobile is what is critical to the legality of a warrantless search";²⁷⁴ the *Ross* Court ignored that factor.

Thus the case-or-controversy requirement limits the Court's choice of issues; the need for flexible responses forces them to discard or modify clear rules; and stare decisis and the line-drawing problem ensure that the new rule will be unclear, as will the precedent on which that new rule is based. Uncertainty is thus inevitable. As in the nineteenth century, when courts purported to "find" the "true meaning" of unclear precedents and constitutional provisions, the Court is actually manipulating precedents to suit its purposes. This mystical process creates just as much cynicism and confusion today as it did in 1938, when the Court, in *Erie Railroad v. Tompkins*,²⁷⁵ purported to have abandoned the claim that law could be "found" and admitted to "making" law.²⁷⁶ Now the Court admits to making law, but claims to do so on the basis of precedents that are just as manipulable as the old concept of law. The upshot is that a person trying in good faith to discover the legally prescribed course of conduct has the *illusion* of being able to do so by consulting, or hiring a lawyer to consult, a Supreme Court case and finding language to support the legality of the course of action that he wishes to take. Everyone would be better off if the Court would simply say: "There are no rules—try to act reasonably. If you do not, you will lose in court."

III. LIVING WITH UNCERTAINTY

It has been shown that the Court is generally incapable of resolving constitutional disputes in a way that will provide guidance for future actors. Clear lines can rarely be drawn and, when they can, the Court does

the specific location of contraband. The Supreme Court recently split 4-4 on a case that would have allowed it to resolve this dilemma. See *Castleberry v. State*, 678 P.2d 720, 724 (Okla. Crim. App. 1984) (probable cause as to contraband in a specific container in a car does not justify warrantless search of the container), *aff'd mem. per curiam by an equally divided court*, 105 S. Ct. 1859 (1985).

274. *Ross*, 456 U.S. at 832 (Marshall, J., dissenting).

275. 304 U.S. 64 (1938).

276. See *supra* note 17 and accompanying text.

not adhere to them when the line produces unjust results. To the extent that clarity is desired, the only options are having "no rules" (pure case-by-case balancing) or avoiding issues altogether by denying certiorari.²⁷⁷ Where the Court is unwilling to adopt either of these options, it must recognize that its decisions will provoke litigation and doctrinal confusion while merely refocusing, rather than ending, debate.

As discussed, the Court has purported to declare clear rules in a variety of different areas while consistently failing to follow those rules. The purported existence of such rules causes much confusion and encourages lower courts to apply such rules mechanically to produce unjust results, or to use the unclear rules and conflicting precedent to justify any desired result.

The Supreme Court agrees, for example, that reasonableness is the "fundamental inquiry in considering Fourth Amendment issues."²⁷⁸ It describes its decisional process as "balancing [the] intrusion [of a particular law enforcement practice] on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."²⁷⁹ That is precisely what is proposed here. However, when the Court discusses "reasonableness" and "balancing," it means deciding whether a particular practice, such as "stop and frisk," is reasonable when performed without a warrant in a particular case and, having concluded that it is, allowing the practice in all future cases.²⁸⁰ The Court has flatly refused to engage in pure case-by-case balancing:

Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of each search would turn on "a highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of sub-

277. Critics of my approach may recognize that I proposed, as one of two possible solutions to the fourth amendment's ills, a *Miranda*-type, bright-line approach in a recent article. See Bradley, *supra* note 71, at 1492 (suggesting that search warrants always be required when it is feasible to obtain them). As noted in that article, such an approach would raise many questions, see *id.* at 1497-98, but I still believe it preferable to the current, totally confused, fourth amendment doctrine. However, the only way to achieve true doctrinal consistency would be to determine the reasonableness of each search case by case—i.e., to admit the inherent inconsistency in the law.

278. *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

279. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); see also *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (upholding warrantless search of boat and emphasizing governmental interest in inspection of vessel documentation).

280. The Court's discussion of the need to provide clear rules to police in *New York v. Belton*, 453 U.S. 454 (1981), is a good example of this process at work. See *id.* at 458-59 (entire interior of an automobile, including any containers in the interior, may be searched incident to a lawful arrest).

tle nuances and hairline distinctions"²⁸¹

Ironically, Justice Rehnquist, joined by the Chief Justice and Justice O'Connor, all of whom concurred in the above statement, had commented the year before in a dissenting opinion that a search such as the one invalidated by the majority opinion "would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence."²⁸² These Justices advocated case-by-case determinations of reasonableness as the solution.²⁸³ Certainly these Justices were correct in that dissenting opinion. It is the Court's repeated effort to draft rules governing police behavior that has inevitably led to these "mysteries."

In some first amendment cases, the Court has unsuccessfully attempted to engage in case-by-case balancing. Thus, in *Erznoznik v. City of Jacksonville*,²⁸⁴ the Court stated that first amendment cases "demand delicate balancing" in which "each case ultimately must depend on its own specific facts."²⁸⁵ The Court, however, then delineated "general principles [that] have emerged,"²⁸⁶ proceeded to discuss precedent, and finally declared rules for future cases.²⁸⁷ *Erznoznik* in turn became precedent for later cases.²⁸⁸ Yet, as the dissent correctly observed, "[a]lthough the Court pays lip service to the proposition that 'each case ultimately must depend on its own specific facts,' . . . it strikes down [the ordinance] by a mechanical application of 'general principles' distilled from cases having little to do with either this case or each other."²⁸⁹ The dissent then proceeded mechanically to apply the case law to reach the opposite result. The Court is never willing to engage in true case-by-case balancing, involving a simple listing of the competing considerations and

281. *Oliver v. United States*, 466 U.S. 170, 181 (1984) (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142)).

282. *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting).

283. *Id.* (Rehnquist, J., dissenting). The dissenting Justices then proceeded to argue that the search was permissible "even in terms of the most meticulous regard for our often conflicting cases." *Id.*

284. 422 U.S. 205 (1975).

285. *Id.* at 208-09; see also *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."); see generally Emerson, *supra* note 129, at 438-40, 447-54 (discussing examples of balancing by the Court in first amendment cases).

286. *Erznoznik*, 422 U.S. at 209.

287. *Id.* at 210-12.

288. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976) (citing *Erznoznik* for the proposition that "what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression").

289. *Erznoznik*, 422 U.S. at 218-19 (Burger, C.J., dissenting).

a statement of the result. The Justices always attempt to justify the result by reference to general principles distilled from past cases.

The only "rule" that will not raise an infinite number of complicated questions is a non-rule. The Court could fulfill its obligations in many cases simply by announcing that states must, on balance, have an adequate interest to suppress speech or that a search must, on balance, be reasonable considering all relevant factors. Under this approach, the greater the needs of the state in a particular case, the greater the infringement on individual liberty that will be tolerated.²⁹⁰ Any attempt to explain why one case was decided differently than another case, or to give hints to guide future conduct, will cause the same problems that currently plague the Court.

This approach is not appropriate for every case. Sometimes the Court may actually be able to produce relative certainty by deciding, for example, between two possible interpretations of a statute. In other cases, such as *Miranda*, the Court may conclude that an ad hoc approach will not produce just results because, in the "swearing contest" concerning whether or not a confession was voluntary, defendants will never be believed. The Court may wish to use a case as a vehicle to shift legal doctrine in a more "liberal" or "conservative" direction. This was the purpose of *Miranda* and *Brown v. Board of Education*. Balancing, a neutral²⁹¹ process that tends to preserve the doctrinal status quo, would not have achieved the Court's goals in these cases.

Before concluding that it is preferable to declare a rule, the Court should recognize the pitfalls. If the rule is not entirely clear, as rules virtually never are,²⁹² there is a risk that the rule will swallow reason; courts and officials will justify their decisions on the basis of the rule and cases interpreting the rule, and will lose sight of the constitutional values that the rule was designed to promote.

For example, in *Oregon v. Mathiason*,²⁹³ the Court considered the

290. Although I recommend this balancing process for all courts, it must begin with the Supreme Court. As long as the Supreme Court has a warrant "requirement," for example, a lower court must endeavor to apply it, however much uncertainty that attempt will create. Of course, once the Supreme Court has begun balancing in an area, then lower courts may do so as well.

291. Balancing is "neutral" in the sense that an empty scale is neutral. The fact that one plans to decide a case by balancing does not, or should not, suggest what the result will be. Of course, depending on the individual judge's conception of what constitutes a just result, the actual outcome of a decided case will not necessarily be viewed as "neutral."

292. One exception is the concurring view of Justices Douglas and Brennan, in *Furman v. Georgia*, 408 U.S. 238, 240, 257 (1972) (per curiam), that the death penalty is flatly unconstitutional. Were this the rule, it would have no unclear boundaries and would not be excepted in the hard case. Similarly, the rights to counsel and against self-incrimination at trial, although not clear in every respect, have created few problems. See *supra* notes 27-29 and accompanying text.

293. 429 U.S. 492 (1977) (per curiam).

case of a parolee who agreed to meet a police officer at a state patrol office. When the defendant arrived, he was told that he was not under arrest and was interviewed across a desk in a regular office. The officer falsely told him that his fingerprints had been found at the scene of a burglary. The defendant then admitted to the burglary, was advised of his *Miranda* rights, and gave a taped confession. He was then allowed to leave but was later arrested and convicted.²⁹⁴ The Court decided that the *Miranda* warning was not necessary in this case because the defendant was not "in custody."²⁹⁵ Had the policeman given the *Miranda* warning, presumably the Court would have had no interest in the case at all. Whether or not the warning was given seems to be beside the main point of the case—whether the police may use deceit to elicit confessions.²⁹⁶ Had the Court weighed all relevant factors here, it might have concluded that this confession could not be used. Instead it was distracted by the "custody" question and never considered the more troubling issue in the case. The point is that, even though the *Miranda* rule generally pushed fifth amendment doctrine in a "liberal" direction, courts sometimes are so engrossed in the fine points of the rule that they will allow police behavior that would not have been permissible had there been no rule. The same is clearly true in the search and seizure area. This is "mechanical jurisprudence" of the same sort that Pound denounced in 1908.²⁹⁷

By contrast, ad hoc balancing, including the threat of ad hoc review by the courts, forces courts and officials to focus on the Constitution instead of on artificial constructs that have been developed in a futile effort to render the Constitution more certain. To be sure, such an approach gives no guidance to officials or courts. The point of this article is that *such guidance is usually impossible to give*. Consequently, it is a mistake to claim to give it.

A Court that produces fourth amendment doctrines described by its members as full of "mysteries" and "intolerably confusing,"²⁹⁸ and first amendment cases termed "bizarre"²⁹⁹ and said to constitute a "Tower of

294. *Id.* at 493-94.

295. *Id.* at 495.

296. In Germany, admissions obtained through deceit may not be used at trial. See Bradley, *supra* note 13, at 1034.

297. See *supra* note 16 and accompanying text.

298. See *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., joined by Burger, C.J., and O'Connor, J., dissenting) (conduct of officers in case would "pass muster" with persons "not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence"); *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring) ("[T]he law of search and seizure with respect to automobiles is intolerably confusing.").

299. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 555 (1981) (Burger, C.J., dissenting) ("Today the Court takes an extraordinary—even a bizarre—step by severely limiting the power of a city to act on risks it perceives to traffic safety and the environment posed by large, permanent billboards.").

Babel, from which no definitive principles can be clearly drawn,"³⁰⁰ can hardly complain that another approach does not provide clear guidelines.³⁰¹ The current system breeds not only confusion but contempt. A set of guidelines is followed in one case to produce one result, "followed" in another case to produce an opposite result, and ignored altogether in a third case.³⁰² How a judge decides a particular search and seizure, or freedom of religion, or freedom of speech case has less to do with these infinitely manipulable guidelines than with his general political outlook or, sometimes it seems, what he or she had for breakfast. Yet, if that judge has approved a blatantly discriminatory religious practice or obviously unreasonable search, he or she can always point to some Supreme Court precedent to support such a holding. Under the regime of "clear guidelines," determining whether an automobile rather than a house was searched, for example, becomes far more important than whether the search was actually reasonable.³⁰³ It is preferable to have judges rule based upon their best efforts at deciding what is just and reasonable, and to have them defend their actions in those terms, rather than to allow them to hide behind vague doctrines in order to justify patently unrea-

300. *Id.* at 569 (Rehnquist, J., dissenting). See also *Oregon v. Elstad*, 105 S. Ct. 1285, 1293, 1297 (1985) (referring to the *Miranda* rules as "slippery," "difficult," and "murky"); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (in establishment clause cases, the Court has "sacrifice[d] clarity and predictability for flexibility"); *id.* at 671 (Stevens, J., dissenting) (referring to "the sisyphian task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman* [403 U.S. 602, 614 (1971)]"). Concurring in *Schneckoeth v. Bustamonte*, 412 U.S. 218 (1973), Justice Powell discussed the Court's fourth amendment doctrine as follows:

Searches and seizures are an opaque area of the law [T]here is a vast twilight zone with respect to which one Justice has stated that our own "decisions . . . are hardly notable for their predictability," and another has observed that the Court was "bifurcating elements too infinitesimal to be split."

Id. at 269 (footnote omitted).

301. As Professor Emerson has observed, "[w]hatever the attitude, there is little question that most commentators would decide the majority of first amendment cases by balancing." Emerson, *supra* note 129, at 438.

302. The test in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), for example, governs whether a given practice causes excessive entanglement between church and state; consider "applications" of the *Lemon* test in, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479, 2490-93 (1985) (invalidating legislation authorizing a moment of silence for "meditation or voluntary prayer" in Alabama public schools); *Lynch v. Donnelly*, 465 U.S. 668, 681-85 (1984) (upholding municipal sponsorship of crèche); *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (upholding Nebraska's practice of opening legislative sessions with prayer led by chaplain).

303. See Justice Brennan's dissent in *Maryland v. Macon*, 105 S. Ct. 2778 (1985), which accuses the majority of "mechanical application of . . . precedents" because it held that an illegal arrest could not be challenged, even in a case involving first amendment interests, when the arrest did not lead to the seizure of evidence. *Id.* at 2785-86. Of course, such mechanical application is the *raison d'être* of a clear rule.

sonable acts and decisions.³⁰⁴

Justice Holmes explained the "clear guidelines" fallacy nearly a century ago:

[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth . . . of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.³⁰⁵

This is the key to my approach. When it attempts to decide a case that requires the striking of a balance, as opposed to a declaration of absolute constitutional rights, the Court should be conscious of the "judgment as to relative worth" and should articulate that and that alone, rather than muddy the waters with fatuous references to the "will of the founding fathers" and precedent. We would then achieve not clarity, but a clear understanding of the function of uncertainty in the judicial process.

This approach is not simply one of applying the individual values of the judge to achieve a result—a so-called Chancellor's Foot approach—for two reasons. First, by stating the competing points to be weighed, the Justices have shown that the decision is not the product of mere whimsy or arbitrariness but of a careful reasoning process. In my view, this is the most that can be expected of them, because the attempt to derive decisions directly from precedents, neutral principles, the intent of the framers, and the like is not only vain but misleading. I believe that the public would not only tolerate but applaud this forthrightness. Although a judge's personal preferences will be no more or less influential than at present, it will be easier to discern those preferences in a decision that does not hide them behind the cloak of precedent.

Second, even if a Supreme Court Justice tried to decide cases on the basis of his or her individual values, some compromise would still be necessary in order to attract a majority of votes. Thus a Justice's initial

304. An argument frequently made against the ad hoc reasonableness approach in the fourth amendment area is that it favors law enforcement. *See, e.g.,* *United States v. Sharpe*, 105 S. Ct. 1568, 1578 (1985) (Marshall, J., concurring) ("To those who rank zealous law enforcement above all other values, it may be tempting to divorce *Terry* from its rationales and merge the two prongs of *Terry* into the single requirement that police act reasonably under all the circumstances."). This argument assumes that if the Court issues "guidelines," then conservative judges will follow them rather than use them as a shield for doing what they want to do anyway—an assumption that I dispute. Moreover, as I have argued, mechanical rules (such as the automobile exception) can be and are applied against defendants as often as for them. Finally, I agree with Justice Powell, concurring in *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972): "[T]his Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue."

305. Holmes, *supra* note 25, at 466.

approach to a problem in conference, as well as the subsequent written opinion, would have to be more thoughtful and reasoned than an approach based on mere personal preference. Not only would the public refuse to accept a decision "because I say so," neither would a majority of the Justice's colleagues. Consequently, such an arbitrary argument would never even be advanced, much less succeed. A Supreme Court decision, in its broad outlines, is just as much a product of compromise as a legislative decision, even though the publicly disseminated outcome of that decision may be a simple "affirmed." Similarly, a trial court judge would need to compromise because his or her decision is subject to review on appeal. Critics of the "individual values" approach seem to overlook these facts. The approach suggested here would more accurately reflect the realities of the decisionmaking process.

Another problem raised by balancing is identifying the central concept on which the balance is to be struck—the fulcrum. It is this fulcrum that provides the fundamental "neutral principle" on which the decision is based.³⁰⁶ What the fulcrum is depends on one's view of the current state of a given constitutional doctrine. In discussing how balancing could have been applied in the recent post-*Miranda* case of *Oregon v. Elstad*,³⁰⁷ this article suggests that a balancing process would probably assume that the *Miranda* warnings would continue to be required—an assumption that most members of the Court seem willing to make. Thus, such cases would turn on the question whether a given statement was voluntary and the suspect was informed of his *Miranda* rights rather than merely whether the statement was voluntary, as in pre-*Miranda* days. If a Justice were ardently opposed to the *Miranda* requirement that the suspect be informed, then he would not be willing to begin the balancing process until that requirement had been abandoned or else he would balance without regard to the requirement. Although the Court could certainly shift doctrine in the *Miranda* area by simply ignoring the warnings requirement in the balancing process—thus sending a message to future litigants that the warnings were not required—this would not be a desirable approach. Because such a decision would have declared a new rule, there would be a great effort to discern that rule from the contents of the Court's brief decision. This would lead to more confusion than at present. It would be far better to render a full opinion explaining

306. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Neutral principles should not be abandoned altogether. For example, the fundamental fourth amendment requirement of "reasonableness" should be employed in determining the legality of searches. These principles, however, cannot both provide specific guidance for deciding particular cases and avoid the trap of mechanical jurisprudence.

307. 105 S. Ct. 1285 (1985). See *infra* notes 333-63 and accompanying text.

that the *Miranda* warnings were no longer required and that future cases would be decided under a balancing approach.³⁰⁸ The Court could adopt voluntariness as the fulcrum and list examples of factors that would be taken into account. Or the Court might wish to go further and establish "reasonableness" as the standard, thus allowing even involuntary statements under extreme circumstances.³⁰⁹ Whatever the choice, it would be better than the current practice of distinguishing away pieces of *Miranda*—always claiming to "clarify" it and "resolve doubt"—until there is nothing left but confusion.

Similarly, in fourth amendment cases, the obvious standard is the reasonableness of a search or seizure. Alternatively, the Court could use the reasonableness of *not* obtaining a warrant as the fulcrum, requiring a warrant unless it was reasonable not to obtain one. In church/state cases, an appropriate fulcrum would be whether a given arrangement is an "excessive" entanglement between church and state. In each area, resort to balancing should be preceded by a full opinion determining what the standard is to be, so that lower courts could then balance appropriately.

When decisions are stripped of the cloak of obedience to precedent, the "will of the framers," and so forth, the reasoning process will be visible for all to see. True consistency with prior decisions will be enhanced, not decreased. Manipulation of precedent to justify results will become less important as a judicial skill, and decisions will be more likely to form a consistent, or at least explicably inconsistent, body of law.

This article suggests that *stare decisis*, when used to describe the Supreme Court's practice of basing holdings on prior decisions, could be profitably abandoned in many cases. *Stare decisis*, however, plays another role in our judicial system that cannot be so readily dismissed. It provides that *lower* courts are bound by Supreme Court decisions on the *same* issue. An example will demonstrate why this aspect of *stare decisis* must be maintained. In *Miranda v. Arizona*, the Court required the administration of warnings whenever a suspect was subjected to "custodial interrogation."³¹⁰ In *Oregon v. Mathiason*,³¹¹ the Court resolved one of the many questions raised by the *Miranda* holding—whether a suspect is in "custody" when he comes to a police station voluntarily to be questioned about a crime—by holding that the suspect is not in custody for

308. This outcome would be preferable assuming one approves of the rejection of *Miranda*.

309. One could achieve this in a manner consistent with the fifth amendment only by reverting to the pre-*Escobedo* view that the amendment only protects the defendant at trial.

310. 384 U.S. 436, 444 (1966).

311. 429 U.S. 492 (1977).

purposes of *Miranda*.³¹² Because this question undoubtedly came up fairly often after *Miranda*, it was useful for the Court to resolve it and, to the extent that the same issue is presented in other cases, the smooth functioning of the legal system is promoted by the fact that lower courts are bound by this result. Moreover the principal problem with stare decisis is avoided, because a lower court's discussion of *Mathiason* cannot authoritatively distort that holding. Because lower courts will frequently be presented with the *Mathiason* issue, the principal benefit of stare decisis—finality of decision—is maintained.³¹³

To summarize the approach that should be taken: In general, many fewer cases should be decided in the traditional manner.³¹⁴ The Court should limit itself to deciding few "fully-reasoned" cases based on the traditional sources, such as constitutional doctrine and prior cases. The rare fully-reasoned decision should establish the fulcrum or neutral principle with sufficient generality that it can be consistently applied in the future. Subsequent decisions applying this main case should be brief. The Court should not attempt to make these decisions conform to precedent, to give reasons for the decision (beyond stating the factors balanced and the fulcrum used), or to provide guidelines for later cases. In cases

312. *Id.* at 495.

313. To the extent that subsequent cases differ somewhat from *Mathiason*, lower courts can attempt to discern from *Mathiason* how such cases should be resolved. For example, suppose the police stopped a suspect on the street and "asked" him to accompany them in a police car to the police station for questioning. (In *Mathiason* the officer merely left a note asking the suspect to call—they met at the police station as a matter of mutual convenience. *Mathiason*, 429 U.S. at 493.) Lower courts should decide the new case with reference to *Mathiason*, and, if a conflict develops, the Supreme Court should resolve it, as the Court did in *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (holding that custodial questioning with less than probable cause violates the fourth amendment despite the use of *Miranda* warnings prior to the questioning).

Nonetheless, lower court decisions in post-*Mathiason* cases were not aided by *Mathiason*'s general discussion of *Miranda* or by other justifications offered by the *Mathiason* Court. All that the Court needed to do in *Mathiason* was to resolve the issue by balancing the facts. See *Mathiason*, 429 U.S. at 495 ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system But police officers are not required to administer *Miranda* warnings to everyone whom they question."). The Court's discussion of precedent, picking out those portions of *Miranda* that supported the result and ignoring those portions that did not, distorted *Miranda*. *Mathiason*, 429 U.S. at 498-99 (Marshall, J., dissenting) (stressing that *Miranda* was meant to be a broad protection and that the interrogation in *Mathiason*, though not "custodial," was just as coercive as a custodial interrogation). Other discussion in *Mathiason* may be picked out selectively in future Court decisions, thus distorting *Mathiason* itself. To the extent that stare decisis requires Supreme Court discussion of, and the fiction of obedience to, precedent, it should be abandoned. To the extent that stare decisis requires lower court deference to Supreme Court holdings on both the same and related points, it must be retained.

314. The ongoing expansion of the federal judiciary, and the proposed creation of a national court of appeals, only exacerbate the problem. It would be better to have fewer judges who, pressed by time, would write fewer and shorter opinions. For an insightful discussion of the mischief caused by judicial prolixity, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 109 (1985).

where an ideological shift is desired, it is preferable to determine what the new standard will be before beginning the balancing process. Although case-by-case balancing does not create certainty, it puts the Court's prejudices up front rather than allowing it to justify decisions by reference to inappropriate precedent and unconvincing doctrine. It exposes the "root and nerve" of every decision for the legal community and public to see.³¹⁵ Moreover, it does not provide the illusion of guidelines and precedents behind which future actors can hide. Cars could then be searched, for example, only when such searches were reasonable, not simply when they fell mechanically within the terms of the "automobile exception."

IV. TWO CASE STUDIES IN UNCERTAINTY

Up to this point, I have described the uncertainty principle, given examples of the principle at work, and explained why it works as it does. An additional test of the validity of a proposition is whether it can predict future results. Because the thrust of this article is that Supreme Court Justices should take the uncertainty principle into account before voting to grant certiorari, it is particularly important that one can accurately foresee how it will work in a given case. Accordingly, I consider two recent cases: one case is *Lynch v. Donnelly*,³¹⁶ which involves the first amendment, and the other is *Oregon v. Elstad*,³¹⁷ a post-*Miranda* case. My prediction is that it will soon be recognized that these cases have served no useful societal purpose and will lead to great doctrinal confusion—confusion so great that more than one Justice will be forced to admit that "our doctrine in this area is an enigma wrapped in a mystery,"³¹⁸ or words to that effect, just as they have done in the obscenity and automobile cases discussed earlier.³¹⁹

315. Jerome Frank discusses the example of *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the two cases in which the Court, contrary to its earlier decisions, adopted the "rule of reason" in interpreting the Sherman Act and claimed that the Court had always interpreted the Act in that manner. Why didn't the Court acknowledge the prior cases and simply overrule the precedents? "Because to have made such a bald statement would have been to make too painfully clear the fact of retroactive law-making by the [C]ourt." J. FRANK, *LAW AND THE MODERN MIND* 22-26 (1930).

316. 465 U.S. 668 (1984).

317. 105 S. Ct. 1285 (1985).

318. This process has already begun: Justice Rehnquist recently observed, dissenting in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2516 (1985), that "[o]ur recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor, conceded that the 'wall of separation' [between church and state] is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" (citations omitted).

319. See *supra* notes 70-128 and accompanying text.

A. *Lynch v. Donnelly*.

In *Lynch*, the Supreme Court held that a city-sponsored Christmas display, including a crèche, did not violate the first amendment.³²⁰ It is not my purpose to offer detailed criticism of the particular holding in *Lynch*, which has already been ably critiqued.³²¹ Rather, my purpose is to consider the case from the perspective of a Justice trying to decide whether certiorari should be granted: if the case were to be decided in favor of permitting the Christmas display by the city, the Court would need to distinguish between this religious exercise and others that have been disallowed. Yet this case, as Professor William Van Alstyne has subsequently indicated, seems to present a clear example of a law respecting an establishment of religion.³²² Imagine a Justice confronted with the decision whether to grant certiorari on a case presenting these facts:

1. The overt alignment of government with the particular theology of one, politically dominant, religious sect;
2. The collaboration of government with commercial interests to stimulate consumer purchases by the government's own promotional use of a particular religion's artifacts and mysteries;
3. The propagation under government sponsorship of distinctly religious symbols uniquely associated with one sect's most holy event—the miracle of divine birth of its particular prophet and messiah;
4. The purchase and maintenance through tax levies, and promotional display in outdoor public location each year, of sectarian objects, during the season designated for the Mass or eucharist of one religion's principal sacrament.³²³

It does seem that any attempt to approve this display would require us to blur the second and third prongs of the *Lemon v. Kurtzman*³²⁴ test. That is, this display does seem to have the primary effect of promoting Christ's mass and, because it is sponsored by the government, it does seem to involve an excessive governmental entanglement. Although we could undoubtedly get around the *Lemon* test, it will be at some cost to the clarity of that doctrine.

320. 465 U.S. 668 (1984).

321. See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 787 (*Lynch* holding represents a trend toward national religious ethnocentrism); see also Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 610-11 (1985) (*Lynch* holding illustrates "the Court's technocratic disregard for the constitutive dimension of its judicial role").

322. Van Alstyne, *supra* note 321, at 781.

323. *Id.*

324. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), established a three-part test for determining whether a statute violates the establishment clause: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster "an excessive governmental entanglement with religion."

Consider the other possibilities: we could take this opportunity to prohibit all municipal involvement in Christmas and, while we're at it, federal recognition of Christmas as a national holiday. This means, for example, no crèches, no street decorating or city cleanup of private decorating, and no municipal sponsorship of Christmas caroling. But even this result would not produce consistent doctrine. Some governmental recognition of religious activities, such as accreditation of parochial schools and traffic control for church functions, is simply unavoidable if the government is not to go to the opposite extreme of stifling religious observance.³²⁵ Moreover, an extreme anti-Christmas stand in this case would not last. New Justices would quickly be appointed who would overrule or distinguish this case.

Alternatively, we could claim that this display is somehow different, i.e., more religious than other acceptable municipal participation in Christmas celebrations, such as street decoration and caroling. Perhaps "[the government's] seasonal celebration must at least be non-denominational and not serve to promote religion."³²⁶ But it is hard to see how any sponsorship of Christmas celebrations by the city could be considered "non-denominational" by Jews, Moslems, and Hindus.³²⁷ The problem is that separating the "distinctly religious"³²⁸ aspects of this religious holiday from the secular aspects is impossible. Is Christmas music, for example, religious or secular? It is difficult to argue that "Silent Night" or "Oh Come All Ye Faithful" are anything but religious; yet to bar the city from playing them, or from hanging speakers from municipal streetlights, would be to adopt a Scrooge-like attitude toward Christmas cheer that no Justice would seem willing to entertain.

The most important goal, as Justice O'Connor notes, is to avoid "[g]overnmental endorsement or disapproval of religion."³²⁹ Any decision in this case will necessarily involve such endorsement or disapproval, and any rule adopted to justify that decision will encourage greater endorsement or disapproval in the next case. To permit the municipal crèche involves a strong endorsement of the Christian religion and its principal holiday and encourages governments to go further in the endeavor to "put Christ back in Christmas." To hold against the city results in untenable distinctions of other, approved, governmental partic-

325. No member of the Court in *Lynch* advocated such an extreme position.

326. *Lynch*, 465 U.S. at 700 (Brennan, J., dissenting).

327. As Professor Tribe has pointed out: "The Court's position [in *Lynch*] was that the government-sponsored nativity scene was no big deal; if any non-Christians felt alienated by it, that was *their* problem." Tribe, *supra* note 321, at 611.

328. *Lynch*, 465 U.S. at 710 (Brennan, J., dissenting).

329. *Id.* at 688 (O'Connor, J., concurring).

ipation in religious practices and will subject the Court to public obloquy for a decision that is not worth that cost.

In the actual *Lynch* decision, the Court did more to tread on the religious sensitivities of minorities than the city of Pawtucket could ever have done. As Justice Jackson pointed out, dissenting in *Korematsu v. United States*,³³⁰ "a military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, the passing incident becomes the doctrine of the Constitution. There it has a generative power of its own."³³¹ Far better to deny certiorari in this difficult case than to distort the tests announced in previous cases to justify a result either way. The denial of certiorari will leave this particular issue unsettled, but it will not create the host of new issues arising from any attempt to resolve this case.³³²

If, despite the above arguments, four members of the Court concluded that *Lynch* must be argued and decided, then, if we assume that *Lemon* declared the proper fulcrum, it should simply have listed the factors considered on both sides, and stated the result. After a statement of the facts and decisions below, the opinion might read as follows:

We considered the following factors, which favor petitioner (the city) in the balance:

1. Similar religious practices, such as prayers in Congress, have traditionally been allowed and were accepted practice at the time the first amendment was ratified.
2. The government has long recognized—indeed it has subsidized—holidays with religious significance and other graphic manifestations of our religious heritage.
3. This display was motivated by secular as well as religious considerations and does not substantially aid religion.

330. 323 U.S. 224 (1944).

331. *Id.* at 246.

332. See, e.g., *McCreary v. Stone*, 739 F.2d 716, 730 (2d Cir. 1984), *aff'd*, *Board of Trustees v. McCreary*, 105 S. Ct. 1859 (1985) (per curiam). *McCreary* presented the issue whether a private group could force the city to display a crèche on public land. *Id.* at 716. An equally divided Supreme Court affirmed the decision below in favor of the private group. *Board of Trustees v. McCreary*, 105 S. Ct. 1859 (1985) (per curiam).

One might have argued that *Lynch* was simply the opening salvo, along with *Marsh v. Chambers*, 463 U.S. 783 (1983), of an effort by the Court to reinsert religious values into our secular society. If this were true, the confusion and consequent litigation created by *Lynch* would be just what the Court wanted, providing more opportunities for advancing this view. It is probably a mistake to attribute any such group motive to the collective activity of nine very independent operators on the Supreme Court. In any event, any such claim about *Lynch* and *Marsh* has surely been dispelled by the recent decisions in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2490-93 (1985) (Alabama law authorizing daily period of silence in public schools for meditation or voluntary prayer was an enforcement of religion lacking any clear secular purpose and thus violated the first amendment), and *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3230 (1985) (school district program providing classes to nonpublic school students at public expense had effect of promoting religion and thus violated the first amendment).

4. There is no significant administrative entanglement between religion and state resulting from the city's ownership and use of the crèche.
5. This is a passive display requiring nothing of a nonreligious observer.

We considered the following factors, which favor the respondent's (citizens' group) position in the balance:

1. Despite the secular reasons for this display, religious reasons seem to be predominant.
2. The secular objectives can be accomplished by other means.
3. Such a display indicates to nonbelievers and non-Christians that their views are not worthy of public recognition or support.
4. Such a display poses a significant risk of excessive entanglement between church and state. It may cause advocates of other religions to demand "equal time."

On balance, we conclude that this display does not constitute an excessive entanglement between church and state.

B. Oregon v. Elstad.

The recent decision in *Oregon v. Elstad*³³³ further illustrates the uncertainty principle at work. In that case, an eighteen-year-old defendant was arrested at his home for burglary. While one policeman explained to Elstad's mother what was happening, the other spoke to Elstad in the living room. After what the Court conceded was a brief "custodial interrogation concerning the burglary,"³³⁴ Elstad stated, "I was there."³³⁵ Elstad was then transported to the sheriff's headquarters. One hour later he was advised of his rights, waived them, and gave a full confession. The Supreme Court agreed with the Oregon Court of Appeals and the trial court that the first statement ("I was there") must be suppressed under the rule of *Miranda v. Arizona*,³³⁶ but reversed the lower court's conclusion that the second statement was a suppressible "fruit" of the first statement.³³⁷

As a matter of common sense, there is much to recommend the Court's holding but little to recommend its rationale. The defendant was not subjected to tactics designed to overbear his will, which is what *Miranda* was intended to preclude.³³⁸ Although Elstad's questioning may have fallen within the technical definition of "custodial interrogation," it

333. 105 S. Ct. 1285 (1985).

334. *Id.* at 1297.

335. *Id.* at 1289.

336. 384 U.S. 436 (1966).

337. *Elstad*, 105 S. Ct. at 1298.

338. See the extended discussion of interrogation techniques in *Miranda*, 384 U.S. at 449-57. "In the cases before us today . . . we concern ourselves primarily with this interrogation [i.e., incommunicado and police-dominated] atmosphere and the evils it can bring." *Id.* at 456.

had none of the physical attributes of custody nor the psychological attributes of interrogation that particularly concerned the *Miranda* Court. Elstad was not held incommunicado for a long period of time at the police station and was not subjected to psychological ploys to elicit a confession.

The Court admitted, however, that *Elstad* involved a custodial interrogation; the Court apparently felt compelled to do so by post-*Miranda* precedent and by the posture of the case.³³⁹ Once this point is conceded, any reasonable reading of *Miranda* and the cases recognizing the psychological impact of "letting the cat out of the bag"³⁴⁰ would seem to demand that the second statement be suppressed as a fruit of the poisonous tree. The bulk of the Court's opinion was an effort to fudge on the rather obvious application of those cases to this one.³⁴¹

In other words, the Court, as usual, fell victim to the uncertainty principle. In order to find that the second statement is not excludable as a fruit of the poisonous tree, the Court concluded that there was no constitutional violation (i.e., no constitutionally poisonous tree) because *Miranda* merely announced prophylactic rules to protect constitutional rights—there is no constitutional right to the warnings themselves.³⁴² If this is so, one wonders, along with Justice Stevens in dissent, how the Court was able to strike down *Miranda*'s own state court conviction; the violation of inere prophylactic rules is not an adequate ground for overturning state convictions.³⁴³

339. The Court noted that "[t]he state has conceded the issue of custody." *Elstad*, 105 S. Ct. at 1297. Because the questions in *Elstad* were designed to elicit a response from the defendant, they constituted "interrogation" under the rule of *Rhode Island v. Innis*, 446 U.S. 291, 298-99 (1980).

340. See *Brown v. Illinois*, 422 U.S. 590, 605 n.12 (1975) ("The fact that Brown had made one statement, believed by him to be admissible, . . . bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination."); *Harrison v. United States*, 392 U.S. 219, 223 (1968) ("If [the accused testified] in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."); *Beecher v. Alabama*, 389 U.S. 35, 36 n.2 (1967) (per curiam) (noting that existence of earlier illegal confession is "vitally relevant to the voluntariness of petitioner's later statements").

341. Justice Brennan accurately characterized the majority's effort in his dissent:

In imposing its new rule . . . the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally the Court reaches out once again to address issues not before us.

Elstad, 105 S. Ct. at 1299 (Brennan, J., dissenting). As an example of the last point, Justice Brennan points out that "although the State of Oregon has conceded that the arresting officers broke the law in this case, the Court goes out of its way to suggest that they may have been objectively justified in doing so." *Id.*

342. *Id.* at 1292.

343. See *Elstad*, 105 S. Ct. at 1324 n.9 (Stevens, J., dissenting).

The Court's explanation for this anomaly is convoluted: failure to give the *Miranda* warnings constitutes an irrebuttable presumption of coercion (i.e., of a constitutional violation), but is not itself a constitutional violation.³⁴⁴ This is a flat contradiction of *Miranda*, which held that "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege."³⁴⁵ When secondary use of such an unwarned statement is considered—such as use of the statement for impeachment purposes and use of such a statement to obtain other evidence³⁴⁶—this presumption unaccountably fades away. In its place, an ad hoc consideration of voluntariness—the very inquiry that *Miranda* specifically eschewed³⁴⁷—miraculously becomes appropriate.³⁴⁸

Having thus distorted *Miranda* to find that there was no constitutionally poisonous tree in *Elstad*, the Court could have stopped. Instead it went on to distort other cases in an attempt to demonstrate that *Elstad*'s second statement was also not a fruit of the first one. It is true, as the Court pointed out, that *United States v. Bayer*³⁴⁹ held that "this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after these conditions have been removed."³⁵⁰ But the Court failed to grapple with the main thrust of these cases—that there must be a "sufficient break in the stream of events . . . to insulate" the subsequent confession from the damning impact of the first."³⁵¹ Instead, the Court again referred to the "voluntariness" of the original statement.³⁵² The Court seems to assume that the lack of coercion during the first statement somehow makes it more "speculative"³⁵³ that the second statement followed from the first than if the first statement were obtained by more reprehensible tactics. Neither the precedents nor the

344. *Id.* at 1292-93.

345. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); see also *Orozco v. Texas*, 394 U.S. 324, 326 (1969) ("[T]he use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment . . .").

346. *Elstad*, 105 S. Ct. at 1293 (fruit of a noncoercive *Miranda* violation not subject to exclusion).

347. *Miranda*, 384 U.S. at 458.

348. Justice Brennan made the following observation about the Court's analysis:

[T]he public will have understandable difficulty in comprehending how a confession obtained in violation of *Miranda* can at once be (1) "irrebuttably" presumed to be the product of official compulsion, and therefore suppressible as a matter of federal constitutional law . . . and (2) "non-coerc[ed]" and "wholly voluntary."

Elstad, 105 S. Ct. at 1316 (Brennan, J., dissenting) (citations omitted).

349. 331 U.S. 532 (1947).

350. *Elstad*, 105 S. Ct. at 1294-95 (quoting *United States v. Bayer*, 331 U.S. 532, 540-41 (1947)).

351. *Elstad*, 105 S. Ct. at 1300 (Brennan, J., dissenting) (quoting *State v. Elstad*, 61 Or. App. 673, 676, 658 P.2d 552, 554 (1983)).

352. *Elstad*, 105 S. Ct. at 1301.

353. *Id.*

interrogation manuals cited by Justice Brennan support this particular view of human psychology.³⁵⁴ It is the circumstances of the *second* statement—its distance in time and manner of attainment from the first—that has always been considered significant.

The *Elstad* Court found itself in a box when it conceded that case-or-controversy limitations required it to accept the state's concession that *Elstad* was in "custody" for the purposes of *Miranda* and that its own precedents suggested that the initial questioning constituted "interrogation."³⁵⁵ The Court's attempt to avoid the clear rule of *Miranda*—that such custodial interrogation is, absent prior warnings, *always* a constitutional violation—makes the Justices look like shyster lawyers when they are in fact engaged in a good faith effort to reach a just result. Nevertheless, as Justice Stevens observed, the attempt to identify the boundaries of *Elstad* in future cases "will breed confusion and uncertainty in the administration of criminal justice."³⁵⁶ For example, what if the police intentionally try to get the defendant to "let the cat out of the bag" before giving him warnings? The Court characterized the failure to warn in *Elstad* as essentially a good faith mistake resulting from "confusion" about the "inurky" concept of custody.³⁵⁷ In other portions of the opinion, the lack of actual coercion during the first statement seemed to be determinative, regardless of the motives of the police.³⁵⁸

Suppose that *Elstad* had been interrogated in a locked room at the police station but there is no evidence that his unwarned first statement was not "voluntary." Does the Court's new definition of a "coerced" or "involuntary" statement refer to the circumstances under which it was taken or to the actual use of threats, violence, or psychological ploys by the police? The Court's emphasis on the noncoercive atmosphere in which *Elstad* was questioned³⁵⁹ suggests that statements obtained at the station would be considered a "poisonous tree." The Court's discussion of the fact that the statement was "voluntary" and "not coerced" suggests the opposite result.³⁶⁰

Does it matter what transpired between the first and second statements? The Court ignores two important facts in *Elstad*: the second

354. *Id.* at 1303-06 (citing A. AUBRY & R. CAPUTO, CRIMINAL INTERROGATION 290 (3d ed. 1980); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 82 (2d ed. 1967); R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE 143 (1976)).

355. *Id.* at 1290.

356. *Id.* at 1323 (Stevens, J., dissenting).

357. *Id.* at 1297.

358. *Id.* at 1293, 1295-96.

359. *Id.* at 1296-97.

360. *Id.* at 1291-92.

statement was near in time to the first, and it was elicited by the same officers. Earlier cases suggest that a "break in the stream of events" is the critical factor.³⁶¹

Much of the opinion seems to be based on the noncustodial nature of the first interrogation. A decision based on that fact would have been much stronger and led to much less confusion, but there was no controversy on that point because the state had conceded the custody issue. The Court was confined by the case-or-controversy doctrine, stare decisis, and its attempt to respond flexibly to the clear rule of *Miranda*. Consequently, it rendered a decision that distorted precedents and left unanswered far more questions than it resolved.

A much simpler approach would have been preferable. The Court should abandon the "murky" doctrine that now surrounds *Miranda* and use the general rule of that case as the fulcrum on which to balance the facts of future cases—that is, statements obtained from criminal suspects must be reasonably voluntary and suspects must be informed of their constitutional rights. In *Elstad*, the first statement was made while the suspect was in custody, there was an interrogation, and there was no reason not to inform him of his rights. The Court would therefore simply hold that the first statement must be suppressed. In addressing the admissibility of the second statement, the Court could continue as follows:

When the application of *Miranda* is in doubt, as with the second statement, we engage in balancing. On the one hand, the first statement was not coerced, was taken in the suspect's home rather than in the police station, and did not involve any period of detention prior to questioning or use of psychological ploys to weaken the defendant's will—factors that were considered significant in *Miranda*. Moreover, it appears that, in this case, the failure to warn may have been the result of confusion about whether or not the defendant was in custody—at least there is no indication that it was intentional. Finally, the suspect was warned before he made the second statement. On the other hand, the clear rule of *Miranda* was violated as to the first statement, which "let the cat out of the bag." This may have influenced the defendant's willingness to repeat his confession after receipt of the warnings. On balance, we conclude that the second statement was reasonably voluntary and informed, and its use at trial did not violate the Fifth Amendment. Accordingly, we reverse.

Such a decision would not provide guidance for future cases. But at least it is forthright in that respect. *Elstad* also provides no meaningful guidance, but only a wealth of justification for the police to evade *Miranda* in a way that the Court probably never intended. Although *Elstad*

361. *Id.* at 1310 n.21 (Brennan, J., dissenting) (citing cases applying the "break in the stream of events" test).

is a glaring example, it is rather typical of Supreme Court decisions that give only the illusion, but not the actuality, of guidance to future actors. It is an illusion that allows those actors to follow the "rules" as they interpret them and causes courts to review their acts in terms of artificial constructs, without considering whether the actions comported with the spirit of the Constitution.

To say that the current system provided clearer guidelines to the police concerning the final result in *Elstad* is, in my view, flatly wrong. A careful analysis of the precedents would indicate that the second statement could not be used. Yet six Justices agreed that the police behavior in this case was reasonable and that the second statement was admissible.³⁶² As Justice Holmes observed, the balancing approach is the best way to anticipate such a decision.³⁶³ Foreknowledge that the Court was going to use a balancing approach in *Elstad* would have produced a more accurate prediction of results than any attempt to predict what it would decide based on precedent.

V. CONCLUSION

How is a Justice to decide whether a case is appropriate for pure ad hoc balancing? There can, of course, be no hard and fast rules, as the uncertainty principle would infect those rules just as it does any other. It will depend on the Justice's goals in a particular case. A Justice who simply wishes to "answer" questions raised by a main case, rather than to advance particular ideological goals, should be amenable to ad hoc balancing. This article has illustrated that, clarity being nearly impossible to attain regarding constitutional issues of any complexity, a new rule is unlikely to be any clearer than the old one and attempts to clarify old rules will only obfuscate them. In particular, certain conventions may have developed in connection with an old rule. Despite its lack of clarity at its inception, the old rule is probably causing less trouble than a new one will. The automobile, commercial speech, and obscenity cases all illustrate this point.

If a Justice has an ideological ax to grind, his assessment of ad hoc balancing will depend on whether he believes that it will produce results closer to his own viewpoint than the results of a particular "rule." One purpose of this article has been to show that balancing is not only a neutral approach but an *admittedly* neutral approach. For example, if in a fourth amendment case a judge strikes the balance strongly in favor of

362. *Id.* at 1294-98.

363. That is, a "judgment as to relative worth"—not obedience to precedent—is the "root and nerve" of the *Elstad* decision. See *supra* note 305 and accompanying text.

law enforcement, it will be obvious that he is doing so and he will be criticized for not striking the balance correctly. Under the current system it is possible to mask these prejudices by claiming that a given result is mandated by precedent. Although the balancing process is neutral, the results may not be; but that lack of neutrality will be much more obvious than it is now.

Ad hoc balancing, with no discussion of precedent and no guidelines for the future, will tend to provide a stable doctrine. The old rules will specify the question that the balancing process will resolve. Judges wishing to change the basic doctrine will not accept such balancing, but will attempt to adopt new rules from which the balancing process may proceed. In my view, justice will be better served in most cases by balancing rather than by trying to declare, apply, or clarify rules. The Court and the public should recognize that the attainment of ideological goals, rather than the achievement of clarity or neutral guidelines, can be the only product of an extended discussion of constitutional doctrine or the promulgation of new rules.

In 1930, Jerome Frank warned against the childish assumption that law was an absolute that could be "found" by judges—a fiction that catered to an immature desire for certainty where none could truly exist:

Myth-making and fatherly lies must be abandoned [such as this] Santa Claus story of complete legal certainty We must stop telling stork-fibs about how the law is born and cease even hinting that perhaps there is still some truth in the Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes.³⁶⁴

Our conception of law has now reached adolescence. We recognize that law is not an absolute that is discovered by judges—it comes from the judges themselves. But if we have stopped believing in the Santa Claus of God-given law, we still cling to the Wizard of Oz of legal certainty. We expect, and the Supreme Court indulges our expectation, that legal doctrine can be resolved and clear rules for future cases can be promulgated. We demand that the Court provide "guidelines" for executive officials and lower courts, obstinately refusing to recognize that such guidelines cannot be given. It is time to accept the burdens of maturity, both of the legal profession and of society. The Court should no longer assume that it can fool the public into believing that judicial decisions are really based on precedent, any more than they were based on the "fixed and immutable law" in centuries past; or if it *can* fool them, it should no longer assume that this is a good thing. The Supreme Court has taken the place of God in this secular age—a deity to whom we look

364. J. FRANK, *supra* note 315, at 244.

for certainty and security.³⁶⁵ That deity must step down from its pedestal and admit that behind the facade of power and authority are nine people trying to do right.

365. "[T]he United States Supreme Court . . . is, so to speak, the institutional church that incarnates that sacred document. . . . 'In our tripartite constitutional system, it is the Holy of Holies.' " Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 123-24 (quoting Mason, *The Supreme Court: Temple and Forum*, 48 YALE REV. 524, 526 (1959)); see also Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 22-23 (1984).