

# DISAGREEMENT AS DEPARTMENTALISM OR JUDICIAL SUPREMACY IN STARE DECISIS

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*The role of stare decisis in constitutional law is a ubiquitous one. It shows up almost everywhere, leaving controversy and chaos in its wake. Yet despite the prominence of stare decisis, its jurisprudence remains perpetually unsettled. The Supreme Court identifies several factors that affect the strength of prior precedent. However, these factors are not consistently defined or even wholly agreed upon. How can something as crucial as the law of stare decisis have such scattered precedents? Something more, something deeper, is going on here. A hint of this deeper issue comes out in contentious cases like Payne v. Tennessee, Planned Parenthood v. Casey, and Dobbs v. Jackson Women's Health Organization, where the Justices speak to or acknowledge democratic disagreement and its effect on the Supreme Court's legitimacy. But to understand these cases as the Court simply confronting its own legitimacy, while partly correct, is much too narrow. A closer inspection of these opinions reveals more than just a simple debate about democratic disagreement. It is a debate about what role democratic disagreement should play in stare decisis and, therefore, in the Supreme Court as an institution. Thus, it is no wonder that stare decisis, as a doctrine, is unsettled. Stare decisis has become the battleground for America's oldest contest: departmentalism or judicial supremacy.*

*This Note argues that stare decisis is much better understood when one analyzes the doctrine in connection with the broader discussions surrounding departmentalism and judicial supremacy. In doing so, this Note develops in three Parts. Part I examines the necessary background of stare decisis and its relationship to interbranch conflict. Part II surveys the three cases of Payne, Casey, and Dobbs, paying particular attention to how the Justices in these cases are, in truth, guided by their views of departmentalism or judicial supremacy. Part III further highlights the relationship between disputes over stare decisis and departmentalism versus judicial supremacy and provides the reader with a potential theoretical framework to explicitly incorporate the concept of departmentalism within precedent. Departmentalism and judicial supremacy will forever be negotiated. Ultimately, in stare decisis, a home has been found for this great American debate.*

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## INTRODUCTION

Seven debates, seven locations.<sup>1</sup> Throughout them all, Illinois Senator Stephen A. Douglas would seek to defend his seat in the Senate against a former, one-term Congressman named Abraham Lincoln.<sup>2</sup> A year prior, the Supreme Court had written their infamous *Dred Scott v. Sandford* decision.<sup>3</sup> Responding to *Dred Scott*, Lincoln's acceptance speech for the Republican Party's Senatorial nomination forewarned that "A house divided against itself cannot stand."<sup>4</sup> And what

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<sup>1</sup> *Lincoln-Douglas Debates*, HISTORY.COM (June 14, 2021), <https://www.history.com/topics/19th-century/lincoln-douglas-debates> [https://perma.cc/BVK5-K4JL].

<sup>2</sup> *Id.*

<sup>3</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>4</sup> Abraham Lincoln, "A House Divided" Speech (June 16, 1858), <https://millercenter.org/the-presidency/presidential-speeches/june-16-1858-house-divided-speech> [https://perma.cc/6BKG-DPB9].

a house it was.<sup>5</sup> Franklin Pierce, the outgoing President, had gathered the materials: he had used his departing message to urge the American people to appreciate the “*weight* and *authority*” of the Supreme Court.<sup>6</sup> Incoming President James Buchanan then set the base: he had “urged compliance” with the Supreme Court’s *Dred Scott* decision two days before it was made public.<sup>7</sup> Chief Justice Roger Taney proceeded to build the house: he wrote the opinion.<sup>8</sup> And every good house needs a guard dog to defend its structure: there did Lincoln’s opponent Douglas step in.<sup>9</sup>

For Lincoln, the immediate decision of *Dred Scott* was to be accepted; Dred Scott the man would not be freed.<sup>10</sup> However, the precedent of that decision did not need to be acquiesced to; rather, it could and should be resisted.<sup>11</sup> Douglas, by contrast, embraced the precedent in its entirety, stating during the Lincoln-Douglas debates that he was “amazed” that Lincoln would even hint at the prospect that prior Supreme Court decisions could be undermined or disagreed with.<sup>12</sup> Reacting to such a proposition, someone from the debate audience shouted, “[a] school boy knows better[!]”<sup>13</sup> Playing off the crowd, Douglas responded, “[y]es, a school-boy does know better. Mr. Lincoln’s object is to cast an imputation upon the Supreme Court . . . by supposing that they would violate the Constitution of the United States. I tell him that *such a thing is not possible*.<sup>14</sup>”

Lincoln, too, did not mince words, mocking Douglas’s incessant need to hang onto the Court’s precedent “[l]ike some obstinate animal”

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<sup>5</sup> Credit to historian Doris Kearns Goodwin for her illustrative house analogy. DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 199 (2005).

<sup>6</sup> *Id.*; see also Abraham Lincoln, “A House Divided” Speech (June 16, 1858), <https://millercenter.org/the-presidency/presidential-speeches/june-16-1858-house-divided-speech> [<https://perma.cc/6BKG-DBP9>] (describing Franklin Pierce as having given the “*weight* and *authority*” of an “indorsement” for *Dred Scott*); Franklin Pierce, *Fourth Annual Message*, THE AM. PRESIDENCY PROJECT (Dec. 2, 1856), <https://www.presidency.ucsb.edu/documents/fourth-annual-message-7> [<https://perma.cc/2EGT-PRZ5>].

<sup>7</sup> GOODWIN, *supra* note 5, at 199.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDozo L. REV. 81, 89 (1993) (“The line [Lincoln] drew as a Senate candidate . . . was that Supreme Court decisions are law for the case, but not the law of the land.”).

<sup>11</sup> Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1234 (2008). Only precedents once fully settled for Lincoln could not be resisted. *Id.*

<sup>12</sup> Second Debate: Freeport, Illinois, NAT’L PARK SERV., <https://home.nps.gov/liho/learn/historyculture/debate2.htm> [<https://perma.cc/Z5FN-ULWY>].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (emphasis added).

that once its teeth have been fixed onto an object, proceeds to hang on for dear life, no matter the cost.<sup>15</sup> Lincoln, to be clear, did not argue that mob rule should preempt Supreme Court decisions.<sup>16</sup> Instead, Lincoln's position was much more reserved: the *Dred Scott* decision did not require voters to stop voting for individuals who felt slavery was unconstitutional, and the Congress and the President could continually support measures that did "not actually concur" with the principles of *Dred Scott*.<sup>17</sup> Ultimately, what is key to Lincoln's position is *why* he felt it so crucial to not immediately accept precedent. For Lincoln, should Douglas and his ideological allies succeed, it was only a matter of time until a second *Dred Scott* decision nationalizing slavery arrived.<sup>18</sup>

In Lincoln and Douglas, we see the dueling concepts of departmentalism and judicial supremacy. Departmentalism, at a high-level, stands for the straightforward proposition that each branch of government, being co-equal partners in our government, has an equal claim to interpret the Constitution.<sup>19</sup> Opposite departmentalism stands the perhaps more familiar concept of judicial supremacy favored by Douglas. Judicial supremacy posits that the Supreme Court has the superior claim to interpret the Constitution against the executive and the legislative branches.<sup>20</sup> The conflict between these two inconsistent visions of our government structure is arguably one of the longest running debates in American jurisprudence.<sup>21</sup> Once you know where to look, it is everywhere.

Seemingly unconnected from this struggle—for now—is the judicial concept of stare decisis, what many might refer to as "precedent."<sup>22</sup> For the most part, the Supreme Court in opinion after opinion presents debates over what stare decisis entails in a predominantly inward

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<sup>15</sup> Paulsen, *supra* note 11, at 1253.

<sup>16</sup> Paulsen, *supra* note 10, at 1258 n.135.

<sup>17</sup> *Sixth Debate: Quincy, Illinois*, NAT'L PARK SERV., <https://home.nps.gov/liho/learn/historyculture/debate6.htm> [<https://perma.cc/8YBJ-ZMES>].

<sup>18</sup> Paulsen, *supra* note 11, at 1253.

<sup>19</sup> See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 106 (2004) [hereinafter, KRAMER, THE PEOPLE THEMSELVES] (noting Thomas Jefferson's succinct definition: "[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question"); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017) ("Judicial departmentalism . . . is the idea that the Constitution means in the judicial department what the Supreme Court says it means in deciding a case.").

<sup>20</sup> Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1461 (2017).

<sup>21</sup> See *infra* Section III.A.

<sup>22</sup> Robert A. Sprecher, *1945 Prize – Winning Ross Essay: The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 31 A.B.A. J. 501, 502.

fashion.<sup>23</sup> This is despite the fact that the legislative and executive branches consistently and clearly indicate that they have some intense viewpoints on certain precedents.<sup>24</sup> Still, the Supreme Court, in penning its stare decisis decisions, primarily acts as though it is unaware of the existence of outside debates.<sup>25</sup> Occasionally, though, these external arguments get too loud to ignore, and the nine Justices are forced to admit that they are, in fact, cognizant of what is going on across the street or down Constitution Avenue. However, even then, the Supreme Court only acknowledges these outside views with somewhat vague references to legitimacy.<sup>26</sup> But legitimacy is not a freestanding notion—it must always dovetail with something else. You cannot settle a debate over whether or not an action legitimizes “X” without also arguing over what, exactly, the “X” that you hope to legitimize is.

This query is at the core of debates over stare decisis and its reflecting jurisprudence. Supreme Court Justices and legal commentators share vastly conflicting beliefs over what role—if any at all—external government institutions should play in deciding precedent. Yet, in judicial opinions and legal commentary on precedent, this aspect of the discussion appears to be ignored or glossed over, which results in arguments over precedent that are hard to contextualize, seem inconsistent, or, through a failure to reach the core of an issue, leave the reader unsatisfied.<sup>27</sup> An understanding of stare decisis and the debate over

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<sup>23</sup> See *infra* Section I.B, III.A.

<sup>24</sup> See *infra* Section I.C.

<sup>25</sup> By this I mean to say that in many cases in which the Court discusses the validity or invalidity of precedent, the Court does not consider the interpretations of Congress or the executive. For instance, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Chief Justice Rehnquist for the Court briefly concludes that Congress intended to exercise its powers under the Indian Commerce Clause to waive the sovereign immunity of the States but gives no in depth discussion or consideration to the fact that in doing so Congress expressly interpreted the Indian Commerce Clause to give them this power. *Id.* at 56–57 (finding a clear statement of Congress but ignoring any constitutional interpretative effects such a clear statement would have).

<sup>26</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o overrule under fire in absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”); *Alleyn v. United States*, 570 U.S. 99, 121–22 (2013) (Sotomayor, J., concurring) (responding to Justice Alito’s dissent which contended that the overruling of precedent in the majority decision had no justification and was therefore “illegitimate”); *Dickerson v. United States*, 530 U.S. 428, 461–62 (2000) (Scalia, J., dissenting) (arguing that upholding *Miranda v. Arizona*, 384 U.S. 436 (1966), is an incorrect application of stare decisis and therefore makes the Court’s judgment “illegitimate”).

<sup>27</sup> To give just one example, consider the debate between Professors Daniel A. Farber, Michael J. Gerhardt, and Randy E. Barnett over whether precedent can legitimately be strengthened by outside forces. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent:*

judicial supremacy and departmentalism *cannot* be separated; they are much too intertwined.

This Note proceeds in three Parts. Part I will review the necessary background on constitutional stare decisis. This includes the history of the doctrine, how it is conventionally applied in Supreme Court decisions, and when there are disputes over precedent among the three branches of government. Part II surveys three critical Supreme Court decisions concerning stare decisis: *Payne v. Tennessee*, *Planned Parenthood v. Casey*, and *Dobbs v. Jackson's Women's Health Organization*.<sup>28</sup> These three decisions provide a valuable course of study for several reasons. First, they are decisions with significant conflicting interbranch views on precedent. And second, it is this considerable conflict that forces the Supreme Court to reveal the broader departmentalist and judicial supremacy debates that underly their discussions of stare decisis. Part III ties together the analysis in Parts I and II to demonstrate that a crucial aspect of the debates over democratic disagreement and its relation to constitutional precedent is, in reality, a debate over departmentalism and judicial supremacy. Additionally, Part III briefly provides a framework modeled after Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>29</sup> to incorporate departmentalism into precedent. Finally, the Note concludes to state that stare decisis may be better understood through the departmentalism and judicial supremacy debates.

## I A PRIMER FOR STARE DECISIS

Part I of this Note will survey the necessary background and context of stare decisis to better frame the doctrine in the context of departmentalism and judicial supremacy. In doing so, the Note will first outline the history and substantive law of constitutional precedent before exploring interbranch conflicts over constitutional precedent.

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A Response to Farber and Gerhardt, 90 MINN. L. REV. 1232 (2006). Barnett criticizes Farber and Gerhardt's vision of precedent—that is, precedent becomes super precedent if accepted by American institutions—for conflating what is descriptive with what is normative, and also for leading Justices to abandon their constitutional role. *Id.* at 1240–42. Of course, if you are a departmentalist that *is* a normative argument and taking account of other branch's views on the Constitution *is* a valid role. By not engaging with *this* aspect of the debate, Barnett seems to be mostly talking past Farber and Gerhardt.

<sup>28</sup> 501 U.S. 808 (1991); 505 U.S. 833 (1992); 142 S. Ct. 2228 (2022).

<sup>29</sup> 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

### A. *The History of Stare Decisis*

Precedent has an intuitive, informal appeal to basic concepts of fairness. Or, as Professor Larry Alexander notes, precedent has some natural moral weight to it.<sup>30</sup> You let your daughter eat only cake for the day; your son, then, will inevitably cite that past decision as a basis that he should also be allowed to eat only cake for the day.<sup>31</sup> It would be unfair to treat your daughter differently than your son when presented with presumably identical requests.<sup>32</sup> Due to this logical connection to fairness, it was practically inevitable that the concept of precedent would eventually find its way into several nations' legal systems.<sup>33</sup>

The most immediate source of the American tradition of precedent comes from British common law: it is the result of a series of reforms from William, Duke of Normandy, after his victory over the Anglo-Saxons in the Battle of Hastings in the year 1066.<sup>34</sup> Whereas the old Anglo-Saxon King's Council, known in Old English as the "witan," only advised the King on legal issues of great importance to the state, the new Norman Court took on much more expansive judicial powers.<sup>35</sup> The Royal Court would go to local towns and apply a centralized form of law common to all—i.e., common law—that trumped local customs.<sup>36</sup> These judges would then return to Westminster and record their decisions.<sup>37</sup> Eventually, as time progressed, a principle of stare decisis—Latin for "to stand by things decided"—developed concerning these recorded

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<sup>30</sup> Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 5 (1989).

<sup>31</sup> My cake analysis is borrowed from Alexander, who, instead of using cake, has opted for rock concerts. *Id.* at 5–6.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> Cf., e.g., John Chipman Gray, *Judicial Precedents. — A Short Study in Comparative Jurisprudence*, 9 HARV. L. REV. 27, 31 (1895) (stating that the Romans employed the notion of precedent—all be it limited in scope); Charles Wallace Collins, *Stare Decisis and the Fourteenth Amendment*, 12 COLUM. L. REV. 603, 603 (1912) (noting that Egyptians made use of precedent).

<sup>34</sup> See William I "The Conqueror" (r. 1066–1087), THE ROYAL HOUSEHOLD, <https://www.royal.uk/william-the-conqueror> [https://perma.cc/5PFB-7DCP] (chronicling William's victory at the Battle of Hastings as well as his bureaucratic reforms); Mary Ann Glendon, Andrew D.E. Lewis & Albert Roland Kiralfy, *Common Law*, BRITANNICA, <https://www.britannica.com/topic/common-law> [https://perma.cc/8R8J-6QM4] (last visited Jan. 13, 2022) ("The common law of England was largely created in the period after the Norman Conquest of 1066.").

<sup>35</sup> Glendon et al., *supra* note 34 ("Royal judges went out to provincial towns 'on circuit' and took the law of Westminster everywhere with them, both in civil and in criminal cases. . . . By the 13th century, three central courts—Exchequer, Common Pleas, and King's Bench—applied the common law."); see David A. Thomas, *Origins of the Common Law (A Three-Part Series) Part III: Common Law Under the Early Normans*, 109 BYU L. REV. 109, 120–22 (1986) (discussing King William's bureaucratic reformation of the judicial role).

<sup>36</sup> Glendon et al., *supra* note 34.

<sup>37</sup> See *id.* (noting that Royal judges would ride "circuit" to dispense justice).

decisions.<sup>38</sup> Judges would consult the records held in Westminster and give some form of deference or acknowledgment to the past decisions of their colleagues when they found themselves confronted with similar issues.<sup>39</sup>

Adherence to this British concept of precedent appeared to be an expectation for the United States' fledgling judiciary.<sup>40</sup> Yet, while precedent was a force in the early years of the nation, it was an inconsistent one.<sup>41</sup> Precedent only really gained a solid foothold in the 1850s, coinciding with the increased popularity of court-wide opinions and past decisions becoming immortalized (and much more readily accessible) in case recorders.<sup>42</sup> By 1900, the Supreme Court began to rely heavily on and place great weight upon its past decisions.<sup>43</sup>

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<sup>38</sup> Collins, *supra* note 33, at 603.

<sup>39</sup> See Sprecher, *supra* note 22, at 502 (noting the British practice of looking to the records of past decisions when deciding present ones); see also Glendon et al., *supra* note 34 (noting this centralization). It is important to note that stare decisis in its origin was not as strong or binding in the way we consider it today. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999) (noting that as late as the eighteenth century, judicial decisions may have been seen as “evidence of the law” but not necessarily as “collections of authoritative or binding decisions”).

<sup>40</sup> See Lee, *supra* note 39, at 662 (“The Framers’ expectation that the federal courts would be subject to some notion of binding precedent is evident in Alexander Hamilton’s argument in *Federalist No. 78* in favor of strong job security for federal judges.”); see also THE FEDERALIST No. 78, at 442 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”). This is not to proffer the idea that expectations of the framers were not complex or did not differ, at least somewhat, on precedent. See, e.g., Letter from James Madison to Charles E. Haynes (Feb. 25, 1831) (“That cases may occur which transcend all authority of precedents, must be admitted, but they form exceptions which will speak for themselves and must justify themselves.”).

<sup>41</sup> See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 UNIV. COLO. L. REV. 1011, 1065–66 (2003) (“Even after the 1850s, stare decisis was not as rigid as the version of stare decisis employed today. The rules that give modern stare decisis doctrine much of its rigor are decidedly modern.”); see also Lee, *supra* note 39, at 666–70 (surveying the early history of precedent in the Supreme Court and the “uneasy state of internal conflict” that it inhabited).

<sup>42</sup> Barrett, *supra* note 41, at 1065. There are, of course a great many other reasons for this phenomenon. See generally Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959) (discussing the development of precedent in America).

<sup>43</sup> See Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) (“[S]tudies show that by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision in at least ninety percent of its constitutional decisions.”); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) (“By the twentieth century, the doctrine [of stare decisis] had become a fixture in the federal judicial system.”); see also Lee, *supra* note 39, at 659–60 (stating that treating past precedent as completely binding, rather than support for a proposition, is relatively recent in origin).

### B. The Doctrine of *Stare Decisis*

There are, ultimately, two main types of stare decisis—or forms of precedent—vertical stare decisis and horizontal stare decisis. Vertical stare decisis is the largely undisputed idea that a court must follow the precedent of higher courts.<sup>44</sup> Horizontal stare decisis, the focus of this Note, is the much more controversial idea where the Supreme Court considers itself, at least to some extent, bound by its past decisions.<sup>45</sup> While a colleague’s belief or a law review article may exhibit some *persuasive authority*, the doctrine of stare decisis ascribes to past precedent the much greater force of *deference*.<sup>46</sup> Through this deference to precedent, the Supreme Court establishes a baseline normative preference for continuity.<sup>47</sup>

Because of this enshrined status quo bias, litigants who are attempting to overturn precedent face a sort of double hurdle: First, they must convince a majority of the Justices that the past decision was wrong, and, second, they must then convince a majority of the Justices that another reason, besides the simple incorrectness of that past decision, exists to justify the abandonment of precedent.<sup>48</sup> This second reason—the idea that something exceptional must counsel the disregarding of stare decisis—has found its home in what most Justices refer to as “special justifications” to overrule precedent.<sup>49</sup> Therefore, in theory at least, the doctrine of stare decisis is fairly mechanical. Get five or more Justices to all agree that a precedent was wrongly decided and that a “special justification” exists to overrule it, and you have a winning case.

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<sup>44</sup> See Barrett, *supra* note 43, at 1712 (“Vertical stare decisis is an inflexible rule that admits of no exception.”).

<sup>45</sup> *Id.* at 1712. Within horizontal stare decisis, there are a variety of types. *See id.* at 1713 (delineating different types of precedents—statutory, common law, and constitutional—and their strengths); *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (“[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”).

<sup>46</sup> Randy J. Kozel, *The Scope of Precedent*, 133 MICH. L. REV. 179, 185–87 (2014); *see, e.g.*, Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (“Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function.”).

<sup>47</sup> Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 43, at 1722 (“[W]here differences in constitutional philosophy are in the foreground, the preference for continuity disciplines jurisprudential disagreement. . . . The need to take account of reliance interests forces a justice to think carefully about . . . pay[ing] the cost of upsetting institutional investment in the prior approach.”).

<sup>48</sup> *See id.* (“Justifying a decision to overrule precedent, however, requires both reason giving on the merits and an explanation of why its view is so compelling as to warrant reversal.”).

<sup>49</sup> *See, e.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–56 (2015) (“To reverse course, we require as well what we have termed a ‘special justification’—over and above the belief ‘that the precedent was wrongly decided.’” (internal citations omitted)).

Notably, however, there is a lack of consistency over what precisely these “special justifications” are supposed to be. To be sure, there are exceedingly common special justifications like unworkability,<sup>50</sup> lack of reliance,<sup>51</sup> change in fact,<sup>52</sup> the decision is egregiously wrong,<sup>53</sup> or the decision presents some sort of inconsistency with other decisions,<sup>54</sup> but there is no overarching doctrine that sets forward a precise list of “special justifications.”<sup>55</sup> In reality, what these “special justifications” are ultimately a product of which Justice writes the opinion.<sup>56</sup> Except for a few cases to be discussed later,<sup>57</sup> this jurisprudence and the Court’s analysis of “special justifications” is largely self-contained and inward-looking.<sup>58</sup> However, the Supreme Court does not exist in a vacuum, and therefore, it is vital to understand precedent and the Court in relation to the two other government branches.

### C. Interbranch Conflict over Constitutional Decisions and Precedent

There exists in popular culture an oversimplified version of the Supreme Court concerning constitutional interpretation and its relationship with other branches. The idea is that when it comes to the Constitution, what the Supreme Court says goes; there will be no further debate on the precedent set by the Court’s decision.<sup>59</sup> This is far from the truth. Even John Marshall’s famous statement in *Marbury v.*

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<sup>50</sup> See, e.g., *Kimble*, 576 U.S. at 459 (adhering to precedent in part because the current test was not “unworkable”).

<sup>51</sup> See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (identifying reliance interests as a factor “to decide whether the scales tip in favor of overruling precedent”).

<sup>52</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (considering “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

<sup>53</sup> See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring) (asking “is the prior decision not just wrong, but grievously or egregiously wrong?”).

<sup>54</sup> See, e.g., *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2178 (2019) (overturning precedent in part because it “conflicted with much of our takings jurisprudence”).

<sup>55</sup> See Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010) (“The sheer number of these considerations, combined with the fact that the Court often selects a few items from the catalog without explaining how much work is being done by each, makes it difficult even to find a starting point for thinking critically about *stare decisis* as a judicial doctrine.”).

<sup>56</sup> *Id.*

<sup>57</sup> See *infra* Part II.

<sup>58</sup> See *supra* note 25 and accompanying text for a more in depth discussion.

<sup>59</sup> See, e.g., *About the Court*, S. CT. OF THE U.S., <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/836U-HJ35>] (“As the final arbiter of the law, the Court . . . functions as guardian and interpreter of the Constitution.”); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“No doubt the political branches have a role in interpreting and

*Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is” was, at the time, a pragmatic<sup>60</sup> action by Marshall merely asserting that the judiciary, *too*, interprets the Constitution along with the Congress and the executive.<sup>61</sup> While Marshall certainly pushed the boundaries on judicial power, this was no ambitious assertion of judicial supremacy—that came later, if at all.<sup>62</sup>

Ultimately, there was, and continues to be, a long-running argument over the scope of judicial power. No doubt, the Supreme Court today is an influential and authoritative interpreter of the Constitution, especially when compared to its more primitive form. The change from Nixon’s 1968 law-and-order campaign being directed *against* the Court to the 1980s debates on constitutional issues being directed at *convincing* the Court is authoritative to that fast-paced, late twentieth-century evolution.<sup>63</sup> However, from the beginning of the nation to the present, Congress and the executive have continually interpreted the Constitution on their own.<sup>64</sup> What is more, Congress and the executive do not only often interpret the Constitution for themselves; they often interpret the Constitution *differently* than the Supreme Court does.

Given the fact that these differing interpretations exist, it should be no surprise that what starts with difference can lead to conflict. Ground-breaking and important legal decisions were resisted by the executive

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applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.”).

<sup>60</sup> Cf. Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 487 TEX. L. REV. 487, 503–04 (2018) (outlining the practical power dynamics that encouraged Marshall to forgo certain legal positions).

<sup>61</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 19, at 126 (making this argument); see Larry D. Kramer, *Understanding Marbury v. Madison*, 148 PROC. AM. PHIL. SOC’Y 14, 26 (2004) (“[Marshall’s] opinion simply parroted the arguments made by Republican judges . . . in emphasizing that the Court’s power was concurrent with that of the other branches . . . .”). Marshall himself, sixteen years later, gave great deference to the executive and legislature’s views on the constitutionality of a national bank. See *McCulloch v. Maryland*, 17 U.S. 316, 401–02 (1819) (arguing that, in giving support to a national bank, the legislature and executive provided precedent for the constitutional validity of said bank).

<sup>62</sup> See Michael Stokes Paulsen, *The President and the Myth of Judicial Supremacy*, 14 U. SAINT THOMAS L.J. 602, 605 (2018) (arguing that no branch of government has complete “interpretive supremacy” over the other).

<sup>63</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 19, at 221.

<sup>64</sup> See, e.g., Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395, 1396–97 (2001) (evaluating and discussing Congress’s record of constitutional interpretation); Jeffrey Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011) (discussing, among other things, Congressional responses to the Supreme Court when they differ on constitutional interpretation); John Harrison, *Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373 (1988) (arguing that the Constitution does not solely allocate interpretive power to the courts).

and legislative branches practically every step of the way. Almost immediately after *Brown v. Board of Education* was read, Senator Strom Thurmond of South Carolina began writing his initial draft of a manifesto deemed the “Declaration of Constitutional Principles.”<sup>65</sup> This document—the “Southern Manifesto”—was signed by a number of Senate and House members when it was introduced to Congress and promised to resist the Supreme Court’s “unconstitutional” desegregation ruling in any way possible.<sup>66</sup> Many southern politicians rose to speak in support of the Manifesto—no member of Congress rose to speak in opposition.<sup>67</sup> In the face of this interbranch hostility, the Court backed off and gave their infamous “all deliberate speed” standard for desegregation.<sup>68</sup> That looser standard had been given because—in the Court’s own words—the presentations of the United States, Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas “were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination.”<sup>69</sup> Despite *INS v. Chadha*,<sup>70</sup> which outlawed legislative veto mechanisms, Congress still continues to include

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<sup>65</sup> Andrew Glass, *Southern Manifesto Introduced, March 12, 1956*, POLITICO (Mar. 12, 2009, 4:43 AM), <https://www.politico.com/story/2009/03/southern-manifesto-introduced-march-12-1956-019897> [https://perma.cc/VL7N-EPLK].

<sup>66</sup> See, e.g., William S. White, *Manifesto Splits Democrats Again*, N.Y. TIMES, Mar. 13, 1956, at A1 (“[N]ineteen Senators and seventy-seven Representatives pledged themselves to use ‘all lawful means’ to overturn the Supreme Court decision of 1954 outlawing racial segregation in the public schools.”); 102 CONG. REC. 4460, 4515 (1956) (statement of Sen. Walter George) (“We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power.”).

<sup>67</sup> Glass, *supra* note 65. Similarly, President Dwight D. Eisenhower publicly provided only mild support for the *Brown* decision; privately, Eisenhower was much more critical. See Lincoln Caplan, *A President, a Chief Justice and the Politics of Segregation*, N.Y. TIMES (June 12, 2018) (reviewing JAMES F. SIMON, EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES (2018)), <https://www.nytimes.com/2018/06/12/books/review/eisenhower-vs-warren-james-f-simon.html> [https://perma.cc/YDZ7-ZK2H] (noting Eisenhower’s minimal—if any—public support for the *Brown* decision); Michael O’Donnell, *Commander v. Chief*, ATLANTIC (Apr. 17, 2018), <https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045> [https://perma.cc/ZCK3-EUG4] (stating that in private conversation, “Eisenhower took [Chief Justice Earl] Warren by the arm and asked him to consider the perspective of white parents in the Deep South”).

<sup>68</sup> *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294, 301 (1955); see Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1059 (2005) (“With no support from the other branches of government forthcoming, the Court . . . withdrew its earlier commitment to desegregation . . . .”); Gerhardt, *Super Precedent*, *supra* note 27, at 1214–15 (noting that the decision of *Brown* is indicative of the Court’s hesitance to outright overrule certain precedent for fear of political backlash).

<sup>69</sup> *Brown II*, 349 U.S. at 299.

<sup>70</sup> 462 U.S. 919, 958–59 (1983).

legislative veto mechanisms in legislation.<sup>71</sup> And although the Supreme Court deemed the death penalty constitutional in *Gregg v. Georgia*,<sup>72</sup> the executive branch can still express its doubts.<sup>73</sup> The Supreme Court, the President, and Congress frequently argue and disagree over constitutional precedent.<sup>74</sup>

The fault lines of this debate over judicial power can be broadly understood around two competing visions of the Supreme Court as it exists in our government when it comes to constitutional interpretation: Are we a government of departmentalism or judicial supremacy? If our government is one of judicial supremacy, then the prevailing myth holds. In other words, under pure judicial supremacy, what the Supreme Court interprets the Constitution to mean must be accepted by all three branches of government.<sup>75</sup> However, if we are a system of pure departmentalism, then the Supreme Court's interpretation of the Constitution is only binding within the judicial department; the other departments can feel free to agree or disagree.<sup>76</sup>

Note the deliberate use of the word “pure departmentalism” and “pure judicial supremacy.” In understanding these competing ideologies, it is important to consider them more on a spectrum than in a binary sense. Our government has long maintained aspects of both judicial supremacy and departmentalism. The most obvious example of such a mixed situation would be accepting the Court’s immediate decision while still debating the precedent of that decision.<sup>77</sup>

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<sup>71</sup> See Fallon, *supra* note 60, at 501 (“Congress has continued to enact and the President has continued to honor legislative-veto mechanisms of the kind that the Supreme Court held unconstitutional in *INS v. Chadha*.); CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA 5 (2005) (“Congress continues to add legislative vetoes to bills and Presidents continue to sign them into law, although often in their signing statements they object . . . and regard them as unconstitutional . . . ”).

<sup>72</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>73</sup> See, e.g., Katie Benner, *Merrick Garland Pauses Federal Executions a Year After His Predecessor Resumed Them*, N.Y.TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/07/01/us/politics/executions-pause-merrick-garland.html> [<https://perma.cc/8ZFZ-KA98>] (stating that Attorney General Merrick Garland has instituted a federal moratorium on the death penalty due in part to questions on the constitutionality of its use).

<sup>74</sup> See, e.g., Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDozo L. REV. 43, 47 (1993) (discussing several conflicts between the executive and the Supreme Court over precedent); Neal Devins, *Congressional Responses to Judicial Decisions*, 1633 FAC. PUBL’NS 400, 401 (2008) (discussing several conflicts between the Congress and the Supreme Court over precedent).

<sup>75</sup> Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1715 (2017).

<sup>76</sup> *Id.*

<sup>77</sup> See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) (presenting this example and arguing that aspects of judicial supremacy and departmentalism have long coexisted together);

In addition, it is helpful to distinguish between what is *descriptively* true and what is *normatively* desirable when it comes to precedent and departmentalism or judicial supremacy. Descriptively, the premise that resistance to Supreme Court precedent weakens and unsettles that precedent—i.e., departmentalism—is a common theme accepted across legal scholarship.<sup>78</sup> As Professor Michael Gerhardt writes, the ability to overrule controversial precedents depends significantly on how much or how little opposing political forces resist the decision.<sup>79</sup> So, once this political pushback ceases, the precedent entrenches itself, and the decision stays. And, if a precedent becomes ingrained in and accepted into our society, it becomes a super-precedent, which can only be overruled through an unparalleled act of judicial will.<sup>80</sup> The reader will be familiar with some super-precedents like *Marbury v. Madison*, *Brown v. Board of Education*, and *Mapp v. Ohio*.<sup>81</sup> What is it that unifies these cases as super-precedents? The answer is reasonably straightforward—these are all decisions that find themselves *today* accepted by all three branches of government.<sup>82</sup>

Descriptive reality aside, however, there is still a normative debate to be had. *Should* we incorporate much more judicial supremacy-type principles into our governmental structure? For judicial supremacists, the answer is yes. They argue that the Court's decisions should be adhered to by the Congress and the President because the Supreme Court is the better constitutional interpreter due in large part to its

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see, e.g., *supra* notes 10–11 and accompanying text (describing how Lincoln accepted the immediate decision of *Dred Scott* but not its long-term precedential effect).

<sup>78</sup> For example, Professor William Baude, in his recent analysis on constitutional liquidation, picks up on this strand of logic. See generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). The theory holds that constitutional disputes are obscure “until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” *Id.* at 4.

<sup>79</sup> See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 89–90 (1991) (arguing that the permanency of judicial decisions “has rested on the degree to which initially hostile political forces cease to have much influence”); see also Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 554 (2017) (reviewing BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016) (noting that decisions that have been “acquiesced in and relied upon by the public” have more staying power)).

<sup>80</sup> Gerhardt, *Super Precedent*, *supra* note 27, at 1207.

<sup>81</sup> See Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 43, at 1734–35 (collecting super precedents). Given that *Casey* is, in effect, the case on stare decisis, one could understand the narrow portion of *Casey* that deals with “special justifications” as super precedent.

<sup>82</sup> Gerhardt, *supra* note 40, at 1293 (stating that precedent does not become super precedent “unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress”).

epistemic interpretative superiority that results from how the Supreme Court is structured and carries out its authority.<sup>83</sup>

However, for departmentalists, it is not entirely clear that the Supreme Court is truly a *better* constitutional interpreter than the more democratically inclined branches.<sup>84</sup> Take the Eighth Amendment's prohibition on cruel and unusual punishment which purportedly draws its meaning from "the evolving standards of decency that mark the progress of a maturing society."<sup>85</sup> Departmentalist arguments would contend that it is not the Supreme Court, but the legislature, subject to frequent elections of a relatively small constituency, that is better in touch with the evolving standards of the American people.<sup>86</sup> Or, perhaps, another branch just has more institutional experience in the relevant field to strengthen their interpretive abilities. The concept of deferring to a branch with more institutional experience is already recognized by the Supreme Court itself, which routinely defers to the executive in foreign and military affairs for that very reason.<sup>87</sup> With this context in mind, let us now consider how the Court has responded to such conflicts within the realm of constitutional precedent.

## II

### HOW THE COURT HAS RESPONDED TO DISPUTES OVER PRECEDENT

Having in Part I laid the background of stare decisis and the conflicts of precedent that can occur, Part II of this Note will explore three contentious Supreme Court cases that lay bare the departmentalist and judicial supremacy ideologies that come from inter-branch conflicts over precedent. First, *Payne v. Tennessee*, a case that overturns a prior Supreme Court decision not yet two years old. This case is important to explore not only for its raw discussions of stare decisis, but also because in the broader literature of stare decisis, it is rarely, if ever, talked about.

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<sup>83</sup> See Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1462–76 (2017) (presenting this argument).

<sup>84</sup> KRAMER, THE PEOPLE THEMSELVES, *supra* note 19 at 237 (arguing that *even if* judges are insulated, the idea that that makes them better decision makers "lacks foundation or is question-begging"); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707 (2003) (discussing what Paulsen argues is the "irrepressible myth" of judicial review that it is "the ultimate check on the powers of the other branches of government and is one of the unique, crowning features of our constitutional democracy").

<sup>85</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 419–20 (2008).

<sup>86</sup> See, e.g., Adrian Vermeule, *The Limits of Epistemic Legalism: A Reply*, 2 JERUSALEM REV. LEGAL STUDS. 47, 51 (2010) (making this argument).

<sup>87</sup> See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 129 (1993) (noting that on issues regarding foreign affairs and the governance of the military, "[t]he Court defers to the executive because it believes it lacks the capacity to make the necessary judgments.").

Second, *Planned Parenthood v. Casey*, which is arguably the case on stare decisis.<sup>88</sup> Third, *Dobbs v. Jackson Women's Health Organization*, a case, which both serves as an extension of *Casey* and lends a valuable form of study through its recency. In analyzing these three cases, this Note focuses not on the merits of the decision, but rather the Justice's understanding of precedent, which is ripe with debates over departmentalism or judicial supremacy in all but name.

As an initial threshold matter, it is also important to qualify some of the positions articulated in Part II. First, this Note is not attempting to narrow in on the precise views of individual Justices across all their reported decisions. When one deals with contentious issues of constitutional law, especially precedent, politics often step in, which leads to inconsistent views from case to case.<sup>89</sup> Therefore, the goal is to pull general threads of argumentation rooted in theories of judicial supremacy or departmentalism, rather than definitively identify any specific Justice as a principled departmentalist or a principled judicial supremacist. Second, this Note is not arguing that any particular decision is purely or solely departmentalist or judicially supremacist in each of these case studies. The goal, rather, is to identify the strong, unifying theme of departmentalism versus judicial supremacy that exist throughout these decisions.

#### A. Payne and the Overruling of Precedent

Our first case is the 1991 decision of *Payne v. Tennessee*.<sup>90</sup> There, the Supreme Court ultimately found itself relenting to public pressure. *Payne* centered around victim statements for death penalty sentencing. Depending on the state, family members of murdered victims could—and still can—testify to how the murder of a loved one has affected their lives.<sup>91</sup>

The context of the *Payne* decision was against a constitutional precedent on victim impact statements that greatly diverged from the views of the executive and the Congress. In the early 1990s, when *Payne*

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<sup>88</sup> See Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 312 (2020) (“*Casey* has informed much of the Court’s jurisprudence on stare decisis.”).

<sup>89</sup> Compare, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (giving great weight to concerns of stare decisis), *with Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 470 (2015) (Alito, J., dissenting) (subverting concerns of stare decisis in the face of incorrect judicial decisions); see also Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 131 n.76 (2020) (discussing a potential inconsistency in Justice Thomas’s views on precedent).

<sup>90</sup> 501 U.S. 808 (1991).

<sup>91</sup> *Victim Impact Evidence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/victims-families/victim-impact-evidence> [https://perma.cc/U2ZP-NKEH].

was decided, the crime rate in the United States had been on a steep and continuous climb since the 1960s.<sup>92</sup> In response to this development the “victims’ rights movement” was formed in order to fight back against the soft-on-crime decisions of the previous Warren Court.<sup>93</sup> The critical victory of this initiative ultimately culminated in the adoption of victim impact statements for consideration during the sentencing phase of criminal trials.<sup>94</sup> In 1980, Ronald Reagan rode this law-and-order and victims’ rights wave into office, announcing in the first year of his presidency a proclamation for “Victims’ Rights Week.”<sup>95</sup> Congress, too, was feeling the effects of this movement.<sup>96</sup> After the 1980 elections, the Republicans took control of the Senate for the first time since 1955.<sup>97</sup> As a result of the new GOP majority, that infamous Senator from South Carolina, Strom Thurmond<sup>98</sup> assumed the helm of the Senate Judiciary Committee.<sup>99</sup> Note, though, that stronger victims’ rights legislation was not simply a partisan project of the GOP; rather, it was a bipartisan effort. Assisting Thurmond as the ranking member—and later chairman—of that committee was a young upstart from the small state of Delaware: Senator Joe Biden. Together, these two Senators helped pass several bipartisan tough-on-crime bills responsible for, among

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<sup>92</sup> Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, THE ATL. (Apr. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408> [https://perma.cc/4A3D-8RLX].

<sup>93</sup> See Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 948–49 (1985) (discussing the surge in the victims’ rights movements as an effort to fight back against liberal Warren Court decisions involving criminal justice).

<sup>94</sup> *Id.*

<sup>95</sup> See Proclamation No. 4831, 3 C.F.R. 18 (1982) (declaring Victims’ Rights Weeks, 1981).

<sup>96</sup> By the 1980s, and into the 1990s, there was a large uptick in the concern over victim’s rights within the congressional record. See, e.g., 132 CONG. REC. E777-02 (Mar. 13, 1986) (statement of Rep. Thomas F. Hartnett), 1986 WL 769233 (“Hopefully, with the growing awareness of the general social cost of crime and victimization . . . victim’s rights will receive deserved attention.”); 131 CONG. REC. E2653-01 (June 10, 1985) (statement of Rep. Willis D. Gradison, Jr.), 1985 WL 703094 (“Any reform of the corrections system must, in the present environment, contend with . . . victim’s rights and the perception of justice in society.”); 136 CONG. REC. S9600 (July 12, 1990) (statement of Sen. Joseph Lieberman) (“[W]e can set an example for New York . . . and send a message to . . . victims of sexual assault: your rights deserve more attention and protection than the rights of the men who attack you.”).

<sup>97</sup> *Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES: U.S. H.R., <https://history.house.gov/Institution/Election-Statistics> (select “1980 Election Statistics [pdf];” then proceed to page seventy-eight of the pdf) [https://perma.cc/ERK7-7RVF].

<sup>98</sup> See generally Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES (June 27, 2003), <https://www.nytimes.com/2003/06/27/us/strom-thurmond-foe-of-integration-dies-at-100.html> [https://perma.cc/QK5A-F3YZ], for further background on Strom Thurmond.

<sup>99</sup> *Previous Committee Chairmen*, COMM. ON THE JUDICIARY, <https://www.judiciary.senate.gov/about/chairman/previous> [https://perma.cc/VU2V-TKET].

many things, an increased focus toward victims' rights.<sup>100</sup> The democratic branches of government clearly were seeing things differently than the Court.

However, at the highest levels, the Supreme Court was not just going to roll over on death penalty victim impact statements in the face of this pressure—at least not yet. In the 1987 and 1989 cases of *Booth v. Maryland* and *South Carolina v. Gathers*, respectively, the Supreme Court, twice, by razor-tight 5–4 margins, found victim impact statements for use in death penalty sentencing unconstitutional.<sup>101</sup> But, in the same way that precedent comes and goes, so, too, do its creators. By 1991, Justices Lewis Powell and William Brennan—supporters of the *Booth* and *Gathers* precedent—had been replaced by Justices Anthony Kennedy and David Souter—both adherents to the core tenets behind the victims' rights movement.<sup>102</sup> With these new Justices in tow, the Supreme Court took up *Payne's* case in 1991 to reconsider their holdings in *Booth* and *Gathers*. In what was almost a foregone conclusion,<sup>103</sup> victim impact statements in death penalty sentences were upheld six to three; *Booth* and *Gathers* had been overruled.<sup>104</sup> While stare decisis jurisprudence typically is supposed to fit neatly into the “special justification” analysis,<sup>105</sup> the contentious nature of *Payne* brought to

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<sup>100</sup> See Sheryl Gay Stolberg & Astead W. Herndon, ‘Lock the S.O.B.s Up’: Joe Biden and the Era of Mass Incarceration, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html> [https://perma.cc/VHE6-H2FL] (“The truth is,’ Mr. Biden had boasted . . . ‘every major crime bill since 1976 that’s come out of this Congress . . . has had the name of the Democratic senator from the State of Delaware: Joe Biden.’”); 136 CONG. REC. S17595 (Oct. 27, 1990) (statement of Sen. George Mitchell), 1990 WL 168469 (“Mr. President, on behalf of Senators Biden and Thurmond, I ask unanimous consent that the Senate proceed to the immediate consideration of S. 3266 . . . [The bill] contains provisions which greatly expand victims’ rights in our Nation’s court rooms.”).

<sup>101</sup> *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989).

<sup>102</sup> See, e.g., *Nomination of Anthony M. Kennedy to be Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 114 (1987) (“You know Senator, I went to one of the great law schools in the country . . . and I never heard the word “victim” in three years of law school . . . . This is the wrong focus.”) (emphasis added); *Nomination of David H. Souter to be Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 66 (1990) (“The victim also, it seems to me, has a claim to the attention of the court in a criminal case if there is, in fact, a conviction.”).

<sup>103</sup> In fact, two days prior to the ultimate *Payne* decision, Senator Chuck Grassley of Iowa introduced an amendment to the Violent Crime Control Act that dealt with victim impact statements for the death penalty. Grassley noted that the Supreme Court had rejected victim impact statements in 1987 and 1989 but, he believed, “the Supreme Court is going to be reassessing its view and possibly those cases will be modified or overturned.” 137 CONG. REC. S8553-01 (June 25, 1991) (statement of Sen. Charles E. Grassley).

<sup>104</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>105</sup> See *supra* Section I.B.

light a deeper debate about precedent. This Note looks at three *Payne* opinions which have especially strong hints of departmentalism and judicial supremacy: Justice John Paul Stevens' dissent, Justice Thurgood Marshall's dissent, and Justice Antonin Scalia's concurrence.

### 1. Judicial Supremacy

Justice Stevens, dissenting in *Payne*, framed his understanding of stare decisis as one stemming from judicial supremacy. He stressed that death penalty jurisprudence has *always* excluded inadmissible evidence like victim impact statements that seek solely to inflame the jury's emotions.<sup>106</sup> According to Stevens, what is really going on here is that “[t]oday’s majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.”<sup>107</sup> Stevens further acknowledges that due to the “political strength” of the “victims’ rights” movement, the decision in *Payne* will be celebrated by many citizens.<sup>108</sup> However, Stevens continues, the “great tragedy” of *Payne* is that the “‘hydraulic pressure’ of public opinions,” which only “properly” influences democratic legislatures, has influenced the decision reached here.<sup>109</sup> For Stevens, then, there seems to be a vision of the judiciary’s role as one that serves to resist the “hydraulic pressure” of public opinion. Thus, precedent is a steadfast pillar of jurisprudence—guarded by the judiciary—that should not bend or break to the will of the democratically elected branches, which commonly find themselves overwhelmed by the attitudes of their constituents.

Stevens’ words echo early Federalist judicial supremacy advocates who saw something special in the Court’s ability to withstand factionalism.<sup>110</sup> The independent nature of judges was, in fact, a crucial selling point for the Constitution, with Federalist Paper No. 49 arguing that the nature and mode of judicial appointment made federal judges “too far removed from the people to share much in their prepossessions.”<sup>111</sup> Of course, descriptively, such insulation as Stevens describes might be

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<sup>106</sup> *Payne v. Tennessee*, 501 U.S. 808, 856–57, 858 (1991) (Stevens, J., dissenting); *see also* *Chambers v. Florida*, 309 U.S. 227, 236–37 (1940) (stressing the historical importance of a “tribunal free of prejudice, passion, excitement, and tyrannical power.”).

<sup>107</sup> *Payne*, 501 U.S. at 859.

<sup>108</sup> *Id.* at 867.

<sup>109</sup> *Id.*

<sup>110</sup> See James Kent, *Kent’s Introductory Lecture*, 3 COLUM. L. REV. 330, 336 (1903) (“The courts of justice which are organized with peculiar advantages to exempt them from the baneful influence of faction . . . are therefore the most proper power in the government . . . to maintain the authority of the Constitution.”).

<sup>111</sup> THE FEDERALIST No. 49, at 315 (James Madison) (Isaac Kramnick ed., 1987).

impossible;<sup>112</sup> nonetheless, such separation from the public can still be something for the Court to aspire to normatively.

Reflecting on what *Payne* means for stare decisis, Justice Thurgood Marshall, also in dissent, advances an understanding of precedent as a tool the Court wields to protect the powerless from the whims of those individuals in control.<sup>113</sup> This is because “[i]t is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.”<sup>114</sup> Marshall chides the majority, writing that by showing so little respect to its own precedent, the Supreme Court invites open defiance to its past decisions by other government actors who may wish for the prior decision to be reversed.<sup>115</sup> Marshall ends his dissent with an ominous warning: “Inevitably, this campaign to resurrect yesterday’s ‘spirited dissents’ will squander the authority and the legitimacy of this Court as a protector of the powerless.”<sup>116</sup>

Thus, Marshall advances a vision of stare decisis as a tool that, by serving to entrench the legitimacy and stability of the Supreme Court, allows it to effectively serve as a protector of the powerless. This is an understanding of precedent that fits firmly within the realm of the more judicially-supremacist beliefs that see a powerful counter-majoritarian Court as crucial to protect the rights of minority populations.<sup>117</sup> In this view, the Court steps in and sets a precedent that protects a minority group that the majority group, represented by the Congress and the President, does not like. The Congress and the President express their dislike of the precedent, but the Supreme Court stands tall and refuses

<sup>112</sup> See, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 168 (1921) (“The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by.”); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U.L. REV. 751, 768 (1986) (“[J]udges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events. Somewhere ‘out there’—beyond the walls of the courthouse—run currents and tides of public opinion which lap at the courthouse door.”).

<sup>113</sup> *Payne v. Tennessee*, 501 U.S. 808, 852–53 (1991) (Marshall, J., dissenting).

<sup>114</sup> *Id.* at 853 (quoting Fla. Dep’t of Health & Rehab. Servs. v. Fla. Nursing Home Ass’n, 540 U.S. 147, 154 (1981) (Stevens, J., concurring)).

<sup>115</sup> See *id.* at 853–54 (Marshall, J., dissenting) (“If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind.”).

<sup>116</sup> *Id.* at 856.

<sup>117</sup> See, e.g., Ilya Somin, *The Supreme Court Is a Check on Big Government, Protection for Minorities*, N.Y. TIMES (Feb. 15, 2016), <https://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-check-on-big-government-protection-for-minorities> [https://perma.cc/HG25-MCW8] (arguing, among other things, that the Supreme Court is a check on majority rule to protect minority rights); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 86–88 (1980) (arguing for a “representation-reinforcing” theory of judicial review).

to budge. For Marshall, the Supreme Court is the protector of the powerless, and, to serve as such, judicial supremacy is a necessity.

## 2. Departmentalism

Justice Scalia's concurrence in *Payne* presents his vision of stare decisis—and when it is weakened—as at least partly a product of *external* rather than *internal* forces. According to Scalia, a judge should not stubbornly adhere to a decision that conflicts with a public sense of justice and, therefore, undermines respect in the courts and the law.<sup>118</sup> Scalia argued that *Booth* was one such decision, stating that it “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.”<sup>119</sup> This statement, by itself, is striking for its frankness concerning precedent and the relevance of opinions *outside* the Court. But Scalia goes even further, writing that stare decisis, to the extent that it is more than an administrative convenience, is a “general principle that the settled practices and *expectations* of a democratic society should generally not be disturbed by the courts.”<sup>120</sup>

Scalia is, in effect, advocating for some form of caving to—or at least acknowledgment of—the interpretations of the democratically elected branches of government concerning precedent. He is drawing on the rationale of the new victims’ rights movement and is arguing that it is the role of the Supreme Court to take those “expectations” into account. Moreover, victim impact statements were a new phenomenon,<sup>121</sup> leaving Scalia unable to make his typical appeal to originalism to justify his decision.<sup>122</sup> It is hard to deny that Scalia’s understanding of precedent is *not* based on restraint insofar as one sees judicial restraint as entailing, in large part, deference to past decisions. Scalia’s jurisprudence in other areas of constitutional law, which indicates a high willingness to overrule past precedent, supports such a conclusion.<sup>123</sup>

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<sup>118</sup> *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

<sup>119</sup> *Id.* (emphasis added).

<sup>120</sup> *Id.* at 835 (emphasis added).

<sup>121</sup> See Aida Alaka, *Victim Impact, Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in Payne v. Tennessee*, 23 Loy. U. Chi. L.J. 581, 594 (1992) (noting the more modern phenomenon of legislatures enacting victim-centered criminal justice reforms); Joe Frankel, Note, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 CUNY 87, 95 (2008) (“In 1987, victim impact legislation was a new creation.”).

<sup>122</sup> See, e.g., *United States v. Jones*, 565 U.S. 400, 406 (2012) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)) (“[We] must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”).

<sup>123</sup> Scalia goes down in history as being one of the Supreme Court Justices to *most* often call for the overruling of prior precedent. See Michael J. Gerhardt, *A Tale of Two*

Instead, his philosophy is one that claims to be sensitive to the problems of a counter-majoritarian Court.<sup>124</sup> Thus, Scalia was much more willing than his colleagues in dissent to explicitly incorporate society's "democratic expectations" into judicial decisions concerning precedent and believes that the judiciary is *strengthened* and not *weakened* when it uses said expectations to overrule prior decisions. In this way, decisions over precedent result from what are essentially "conversations" between the Supreme Court and the people through the democratically elected branches.<sup>125</sup> Such a theory incorporates departmentalism in that the other branches get to have a legitimate and authoritative say on what the Constitution means—regardless of what the Supreme Court has said in the past.<sup>126</sup>

### B. Casey and the Continuation of Precedent

Then, one year after *Payne*, the Supreme Court would again find itself in the searing heat of the spotlight in the 1992 case of *Planned Parenthood v. Casey*.<sup>127</sup> In 1973, the Supreme Court, in a landmark seven-to-two decision, constitutionalized the right to abortion in *Roe v. Wade*.<sup>128</sup> From this decision came immediate backlash from a politically powerful "right-to-life" movement that helped bring Ronald Reagan into office and continues to have a powerful effect on politics to this day.<sup>129</sup>

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*Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U.L.REV. 25, 34 (1994) (writing that Scalia, despite being a junior Justice, "has already called for the Court to overrule as erroneously reasoned precedents involving such varied subject matters as the Establishment Clause, separation of powers, the dormant Commerce Clause, nude dancing, obscenity, criminal procedure, substantive due process, the Takings Clause, and affirmative action.").

<sup>124</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 717 (2015) (Scalia, J., dissenting) ("A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.").

<sup>125</sup> Cf. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91–92 (1978) (stating that Supreme Court decisions stem from conversation among the people and their representatives and, thus, "[t]he effectiveness of the judgment universalized depends on consent").

<sup>126</sup> Of all the Justices, Scalia is probably the most consistently departmentalist. His departmentalism helps explain some of the instances where he departs from his conservative colleagues, such as *Chevron* deference. See Steven G. Calabresi, *Afterword to the New Edition of ANTONIN SCALIA, A MATTER OF INTERPRETATION*, at 162 (2018) ("Justice Scalia was a Departmentalist . . . This is why he believed so ardently in *Chevron*-deference in administrative law."). This kind of departmentalism, to which Calabresi speaks, would be a fairly aggressive version insofar as *Chevron* deference is about statutes not the Constitution. Thus, this is even farther than just constitutional departmentalism.

<sup>127</sup> 505 U.S. 833, 866 (1992).

<sup>128</sup> 410 U.S. 113, 166–67 (1973).

<sup>129</sup> See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR, at xx (2012) ("Roe v. Wade (1973) generated a politically potent right-to-life movement that helped elect Ronald Reagan president in 1980 and has significantly influenced national politics ever since.").

Reagan made it his mission to oppose *Roe*.<sup>130</sup> Reagan's replacement, George H.W. Bush, was initially more moderate on the topic of abortion, but by the time he ran for President, he too was firmly anti-*Roe*.<sup>131</sup>

Between these two Presidents, five Justices had been appointed to the Supreme Court when *Casey* came to the docket. Three Justices by Reagan: Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy. Two Justices by Bush: David Souter and Clarence Thomas. The four other Justices on the Court were Harry Blackmun, John Paul Stevens, Byron White, and William Rehnquist. Justices White and Rehnquist, notably, were the sole two dissents in the 1973 *Roe* decision.<sup>132</sup> As a result, there was a genuine concern that *Roe* was in danger of being overturned.<sup>133</sup> Yet, when the Supreme Court had the chance to overturn *Roe* in *Casey*, they opted instead to affirm *Roe*'s core holding in a tight five-to-four decision—abortion remained a constitutional right.<sup>134</sup> In discussing *Casey*, this Note will look at three different opinions: the joint plurality opinion by Justices O'Connor, Kennedy, and Souter (hereinafter “the plurality”), Chief Justice Rehnquist’s dissent, and Justice Scalia’s dissent.

### 1. Judicial Supremacy

The plurality in *Casey* presents an explanation for why stare decisis demands that *Roe* be upheld, regardless of their potential personal views on the decision. First, the three Justices begin with a discussion of four special justifications that they have selected from the stare decisis doctrinal framework (workability, reliability, doctrinal, factual).<sup>135</sup> If this was a normal case, the plurality admits, they would stop there; however, this is no normal case.<sup>136</sup> So, the plurality presents what is perhaps a

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<sup>130</sup> Julie Johnson, *Reagan Vows to Continue Battle on Abortion*, N.Y. TIMES, Jan. 14, 1989, at A8.

<sup>131</sup> See Mike Glover, *Kemp Backer Attacks Bush on Abortion*, AP News (Oct. 12, 1987), <https://apnews.com/article/bcccd9e7d1445c1d80159a39a67f2b488> [https://perma.cc/ZDS9-PFJJ] (reporting that in response to attacks by opponents, presidential candidate Vice President Bush has reaffirmed his opposition to *Roe*).

<sup>132</sup> *Roe v. Wade*, 410 U.S. 113, 171–78 (1973) (Rehnquist, J., dissenting); *id.* at 221–23 (White, J., dissenting).

<sup>133</sup> See, e.g., *Louisiana Abortion Law Is Halted in U.S. Court*, N.Y. TIMES, Aug. 8, 1991, at A16 (statement of Shirley Pedler, Executive Director, Am. C.L. Union of La.) (“The right to choose is in grave jeopardy.”).

<sup>134</sup> See Linda J. Wharton, Susan Frietsche & Kathryn Kolbert, *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 319 (2006) (“While the Supreme Court discarded the highly protective strict scrutiny standard of *Roe*, the *Casey* joint opinion nevertheless preserved the core of *Roe* by adopting the undue burden test to measure the constitutionality of restrictions on abortion.”).

<sup>135</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–61 (1992).

<sup>136</sup> See *id.* at 861 (writing that only two other cases—*Lochner* and *Brown*—are at the same level of significance as *Casey*).

fifth or overarching special justification: the legitimacy of the Supreme Court.<sup>137</sup>

What is so interesting, though, is that this argument for legitimacy is ultimately framed in the legitimacy of the Supreme Court as the *supreme* expositor of the Constitution. The plurality is not arguing that the Supreme Court is simply a legitimate participant in constitutional interpretation. Instead, they are contending that the Supreme Court is the legitimate *final* interpreter of the Constitution.<sup>138</sup> In other words, their argument is that *Roe* must be upheld to preserve—depending on your perspective—the truth or illusion of the justifications behind the concept of judicial supremacy.<sup>139</sup> The plurality writes that nothing has changed since *Roe*<sup>140</sup> had been decided, so to overturn that decision, now, would hurt the ability of the nation to authoritatively accept the Court’s future decisions.<sup>141</sup>

Yet change as the plurality frames it is a matter of perspective. If only the judiciary’s constitutional views matter, then the only change is the makeup of the Supreme Court.<sup>142</sup> And, for the plurality, new members do not—or at least should not—bring new laws; to think otherwise would simply be a “popular misconception.”<sup>143</sup> However, *externally*, there has been a significant number of changes between the interim of *Roe* and *Casey*, like change in the form of new political backlash.<sup>144</sup> But those changes, for the plurality, are changes that appropriately affect the executive and legislative branches of Government, not the Supreme

<sup>137</sup> *Id.* at 864–66; see also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1839–41 (2005) (discussing *Casey* and the concept of sociological legitimacy where the Court bases its opinions to cultivate public respect); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL’Y 353, 373 (2020) (discussing similar strategic considerations evinced by the Court in *Casey*).

<sup>138</sup> See *Casey*, 505 U.S. at 865 (“The Court must take care to speak and act in ways that allow people to accept its decisions on the terms *the Court claims for them . . .*”) (emphasis added).

<sup>139</sup> These justifications being concepts like the Supreme Court as being a nonbiased, nonpolitical protector of the Constitution. See, e.g., Chemerinsky, *supra* note 83, at 1466 (advocating for judicial supremacy because the judiciary “is the branch of government that can best enforce the Constitution’s limits against the desires of political majorities . . . [because] [i]t is the institution most insulated from political pressures.”).

<sup>140</sup> *Casey*, 505 U.S. at 864.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).

<sup>144</sup> See Nina Martin, *The Supreme Court Decision that Made a Mess of Abortion Rights*, MOTHER JONES (Feb. 29, 2016), <https://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights> [<https://perma.cc/HL2X-REMB>] (“In the period immediately following *Roe*, abortion opponents mobilized . . .”); Ken I. Kersch, *Justice Breyer’s Mandarin Liberty*, 73 U. CHI. L. REV. 759, 797 (2006) (noting the effect *Roe v. Wade* had on the organizing principles around party dynamics and political polarization).

Court. This is because the Supreme Court makes decisions based on principle, *not* through compromises in the face of social pressure.<sup>145</sup> Ultimately, it is this very distinction between politics and principle from which the Supreme Court draws its legitimacy.<sup>146</sup> Thus, the plurality's legitimacy argument is quintessentially grounded in notions of judicial supremacy. The Court is special and unique because of its political insulation.<sup>147</sup> So, the Supreme Court must resist public pressure on precedent and, instead, double down in response to such external forces.

Next, we move to Rehnquist's dissent in *Casey*, which has more in common with the plurality's opinion than may meet the eye. As it relates to judicial supremacy, Rehnquist arguably *agrees* with O'Connor, Kennedy, and Souter: They all wholeheartedly embrace a vision of the Supreme Court that is grounded in notions of judicial supremacy. What ultimately distinguishes Rehnquist from the *Casey* plurality, though, is his position that the Supreme Court can most effectively operate as a judicially supremacist institution.

Whereas the *Casey* plurality seeks to carefully cultivate the public perception and legitimacy of a judicially supreme Court, Rehnquist tosses such concerns aside, taking an even more insular view of the Court's role, similar to his view in *Payne*. Who cares what the public thinks about a precedent? According to Rehnquist, that is the *Court's* job, not theirs.<sup>148</sup> Rehnquist would, therefore, make the same decision he makes now, backlash or no backlash. Regardless of the outcome in *Roe*, Rehnquist notes, someone will be upset; therefore, the plurality's quest for legitimacy is a sort of fool's errand.<sup>149</sup>

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<sup>145</sup> *Casey*, 505 U.S. at 864–65.

<sup>146</sup> See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority . . . ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”).

<sup>147</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting) (arguing that the Court must resist public opinion which can only properly influence the democratically elected branches); Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802–1805; Political Forces and Press Reaction*, 14 AM. J.L. HIST. 55, 58 (1970) (statement by Alexander Hamilton) (“Between a government of laws administered by an independent judiciary, or a despotism supported by an army, there is no medium. If we relinquish one, we must submit to the other.”); KRAMER, *supra* note 19, at 140 (describing the early Federalist judicial-supremacy arguments).

<sup>148</sup> See *Casey*, 505 U.S. at 963 (Rehnquist, C.J., dissenting) (writing that the judiciary does not “derive[] its legitimacy . . . from following public opinion, but from deciding by its best lights whether the legislative enactments of the popular branches of Government comport with the Constitution” and that “[t]he doctrine of *stare decisis* is an adjunct of th[at] duty”).

<sup>149</sup> *Id.*

Rehnquist further suggests that the plurality's opinion displays a needless "fetish for legitimacy."<sup>150</sup> There is an implication, salient throughout Rehnquist's dissent, that in a system of judicial supremacy, it is "improper" for the Court to be so outwardly concerned with legitimacy in the way that Justices O'Connor, Kennedy, and Souter seem to be.

What makes the debate between Rehnquist and the *Casey* plurality so interesting, though, is that they agree on two fundamental premises. All are judicial supremacists, and all—or at least all, possibly excluding Souter—disagree with the original *Roe* decision.<sup>151</sup> However, the four Justices come out on different sides of the debate as it relates to precedent because of their differing views on how to best realize judicial supremacy. The plurality sees judicial supremacy as being more fragile and, therefore, as something that needs to be carefully maintained. On the other hand, Rehnquist sees judicial supremacy as something that needs to be acted on.

## 2. Departmentalism

Scalia's dissent, unlike Rehnquist's, takes a far more departmentalist view of precedent. Scalia's dissent highlights more similarities between Rehnquist's opinion and the plurality opinion than may initially meet the eye. This has the effect of producing what feels like a tripartite split in *Casey*. Whereas Rehnquist scoffed at the plurality's legitimacy concerns, Scalia takes the three Justices fears on that issue much more seriously. This Note contends that Scalia is *deeply* concerned with legitimacy. What differentiates him from the plurality, though, is that, in his view, few things are more *illegitimate* than standing by past precedent that was wrongly decided.<sup>152</sup> Scalia praises decisions like *West Coast Hotel Co. v. Parrish*,<sup>153</sup> which resulted from the caving

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<sup>150</sup> *Id.* at 964.

<sup>151</sup> See *Roe v. Wade*, 410 U.S. 113, 171–78 (1973) (Rehnquist, J., dissenting); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) ("The *Roe* framework . . . is clearly on a collision course with itself."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518–22 (1989) (Justice Kennedy joining an opinion by Chief Justice Rehnquist that is hostile to *Roe*). While Souter, the third member of the plurality, was a Bush nominee, as a "Stealth Justice" his views on abortion were opaque. See generally Jeffrey Rosen, Opinion, *The Stealth Justice*, N.Y. TIMES (May 1, 2009), <https://www.nytimes.com/2009/05/02/opinion/02rosen.html> [https://perma.cc/M8VT-VFET] (providing background on Justice Souter as the "stealth Justice").

<sup>152</sup> See *Casey*, 505 U.S. at 998 (Scalia, J., dissenting).

<sup>153</sup> 300 U.S. 379 (1937).

of political pressure.<sup>154</sup> He argues that, in truth, *West Coast Hotel* gave the Supreme Court more legitimacy than abiding by the erroneous and much maligned<sup>155</sup> *Lochner* precedent ever could.<sup>156</sup>

But what ultimately separates Scalia from the plurality is that Scalia's vision of precedent and its legitimacy concerns is grounded in departmentalist ideals. Scalia decries what he calls “[t]he Imperial Judiciary . . . whose very ‘belief in themselves’ is mystically bound up in their ‘understanding’ of a Court that ‘speak[s] before all others for their constitutional ideals.’”<sup>157</sup> Scalia goes on to quote Abraham Lincoln's First Inaugural Address, where Lincoln stated that if the Government relies upon the Supreme Court for vital questions, then “the people will have ceased to be their own rulers.”<sup>158</sup> The people, Scalia writes, know that their “value judgments” are just as good as the Supreme Court’s—maybe even better; so, it is perfectly acceptable to take into account the people’s visions of the Constitution in forming Supreme Court decisions.<sup>159</sup> This, of course, is the exact opposite of Rehnquist’s dissent, in which he writes that the Supreme Court should be unconcerned with what the people may think the Constitution says.<sup>160</sup> Scalia then proceeds to hammer his point home throughout the final pages of his opinion. He criticizes Lincoln’s predecessor, President James Buchanan, for even suggesting in his inaugural address that the Supreme Court can authoritatively and decisively settle an issue as salient as slavery through the issuing of mere opinions.<sup>161</sup> Topics of such importance, Scalia writes, deserve an “honest fight” through the “political forum”—the Supreme Court *does not* and *cannot* demand supremacy.<sup>162</sup> Ultimately, like in *Payne*, Scalia sees it as much more legitimate and normatively desirable for debates over precedent—especially important ones—to be interpreted and affected by the people and their democratically elected branches of government.

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<sup>154</sup> See BARRY FRIEDMAN, THE WILL OF THE PEOPLE 225–26 (2009) (noting that in the face of political pressure, the Court switched directions in *West Coast Hotel*); see *Casey*, 503 U.S. at 998 (Scalia, J., dissenting) (stating that the Court was “deprived of legitimacy by [Dred Scott], an erroneous (and widely opposed) opinion that it did not abandon, rather than by [West Coast Hotel], which produced the famous ‘switch in time’ from the Court’s erroneous (and widely opposed) opposition to . . . the New Deal”).

<sup>155</sup> See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (“*Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years.”).

<sup>156</sup> *Casey*, 505 U.S. at 998 (Scalia, J., dissenting).

<sup>157</sup> *Id.* at 996.

<sup>158</sup> *Id.* at 997.

<sup>159</sup> *Id.* at 1001.

<sup>160</sup> See *supra* Section II.B.1.

<sup>161</sup> *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting).

<sup>162</sup> *Id.*

### C. An Examination of Dobbs

Despite the best efforts of stare decisis, change seems to remain the only constant in constitutional law. Thus in 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, overruling the previous decision of *Casey* and the constitutional right to abortion. In *Dobbs*, we again see the same departmentalist and judicial supremacist arguments parroted.

One could view *Dobbs* as a victory for departmentalism. After *Roe*, the right sought to destabilize precedent while the left retreated to its fortress to protect abortion.<sup>163</sup> Take, for instance, the December 2021 oral arguments in *Dobbs*.<sup>164</sup> There, Chief Justice John Roberts expressed a view that the strength of precedent should be somewhat responsive to outside opinions.<sup>165</sup> Later, responding to Roberts' concerns, Justice Stephen Breyer stated his belief that stare decisis should not be a product of politics and outside opinions but of reason resulting from the unique role given to the Supreme Court.<sup>166</sup> This is the departmentalism and judicial supremacy debate. And yet, upon closer inspection of the opinions we see the majority by Justice Samuel Alito adopt the arguments of judicial supremacy and the joint dissent by Justices Elena Kagan, Sonia Sotomayor, and Stephen Breyer echo the arguments of departmentalists—an interesting switch and return to the old era of progressive departmentalists.

#### 1. Judicial Supremacy

Alito's majority opinion exhibits substantial similarity to Rehnquist's decision in *Casey*<sup>167</sup> for presenting a vision of judicial supremacy that is insular and unconcerned with the public's views. Writing for the Court, Alito flat out states that "we cannot allow our decisions to be affected by *any* extraneous influences."<sup>168</sup> Recall, again,

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<sup>163</sup> Compare Brief for Respondents at 4, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (an amicus brief by 188 House and 48 Senate Democrats urging respect for precedent), with Brief for Petitioner at 30, *Juno Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (an amicus brief by 168 House and 39 Senate Republicans arguing that the Supreme Court should—and often does—overrule its past precedents).

<sup>164</sup> Transcript of Oral Argument, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

<sup>165</sup> *Id.* at 67 (Chief Justice John Roberts expressing a concern that *Casey* had a "paradoxical conclusion" that in the face of outside resistance, stare decisis should be strengthened).

<sup>166</sup> *Id.* at 69–70 (Justice Breyer stating that "[w]e use reason. We don't look to just what's popular.").

<sup>167</sup> See *supra* Section II.B.1.

<sup>168</sup> *Dobbs*, 142 S. Ct. at 2228 (emphasis added).

Rehnquist's dismissal of outside views on abortion in *Casey* because, for Rehnquist, constitutional interpretation is the job of the Court and not the public.<sup>169</sup> Alito expresses a similar sentiment when he states that it is the Court's job to interpret the law, and the Court should not factor in what the outside public believes in judicial opinions.

Now, in some respects, Alito uses language in his opinion that we commonly see among more departmentalist decisions, which makes his opinion somewhat disjointed. While, as mentioned above, he had argued that we cannot let the public affect our decision,<sup>170</sup> he had earlier used the fact that the public was still undecided on abortion as evidence that *Casey* failed to accomplish its goal.<sup>171</sup> The point of doing so is likely to reframe the *Dobbs* opinion as one of judicial deference—more closely associated with departmentalism (at least today)—than an opinion of judicial activism—typically more closely associated with judicial supremacy.<sup>172</sup> Still, a departmentalist overruling of the *Roe* precedent would be deeply concerned with the positions of the other branches. Alito's majority opinion is not. Consider this statement by Alito: “We do not pretend to know how our political system or society will respond to today’s decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision.”<sup>173</sup> Such a statement is fundamentally different than Scalia’s position in *Payne*, which explicitly acknowledges constitutional views outside the Court.<sup>174</sup>

There is also a political pragmatism in Alito’s stance. An empowered Court—a Court of judicial supremacy—has more room to operate and exert its will, which may be attractive when one political party holds six of the nine seats. Professor Thomas Merrill notes that when other branches have no effect on judicial decisions—in tandem with the general lack of political capital to do something dramatic like court

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<sup>169</sup> See *supra* note 148 and accompanying text.

<sup>170</sup> *Dobbs*, 142 S. Ct. at 2278.

<sup>171</sup> *Id.* at 2242 (arguing that the plurality in *Casey* could not effectively end the debate on abortion).

<sup>172</sup> See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 105 (2004) (noting the departmentalism of the *Marbury* court and how it represented limited judicial authority); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 634 (2012) (“Judicial supremacy is an ideology, and its whole purpose and effect is to shift the equilibrium point of public and political acceptance in favor of judicial authority.”).

<sup>173</sup> *Dobbs*, 142 S. Ct. at 2279.

<sup>174</sup> *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (“Booth’s stunning *ipse dixit*, that a crime’s unanticipated consequence must be deemed ‘irrelevant’ to the sentence, conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victim’s rights’ movement.” (citation omitted)).

packing—courts tend to “become more aggressive about asserting their own policy preferences.”<sup>175</sup> The very fact that the Court is supreme, paradoxically, undermines stability and the rule of law, leaving constitutional doctrine more vulnerable to sporadic and fast-paced change.<sup>176</sup> In 1819, departmentalist Thomas Jefferson had expressed this very concern in writing to his friend, Virginia Supreme Court Justice Spencer Roane: “[The [C]onstitution, on this [Federalist judicial supremacy] hypothesis, is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.”<sup>177</sup>

## 2. Departmentalism

The dissent, on the other hand, begins their opinion with a departmentalist framework that centers stare decisis as a doctrine of judicial modesty and humility. Such modesty and humility, they contend, is not evident in the majority’s opinion.<sup>178</sup> In that vein, the dissent criticizes the majority for its use of the insular, “egregiously wrong” “special justification”<sup>179</sup> because that provides too much power to the Justices over precedent by replacing “the rule of law” with the “rule by judges.”<sup>180</sup> For the dissent, an external change outside the Court is necessary to justify the overruling of precedent. For cases like *Brown* or *West Coast Hotel*, the overruling of precedent was justified, according to the *Dobbs* dissent, because of “changes in society or in the law” or new “modern developments.”<sup>181</sup> “[T]hose decisions, unlike today’s, responded to changed law and to changed facts and attitudes that had taken hold *throughout* society.”<sup>182</sup> Citing *Casey*, the dissent writes that changed circumstances and the evolving views of society may impose new constitutional obligations; however, here, there is no such change.<sup>183</sup> The dissent writes that “the constitutional ‘tradition’ of this country is

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<sup>175</sup> Thomas W. Merrill, *The Essential Meaning of the Rule of Law*, 17 J.L. ECON. & POL’Y 673, 704 (2022).

<sup>176</sup> *Id.*

<sup>177</sup> Letter from Thomas Jefferson to Judge Roane (Sept. 6, 1819), in THE WRITINGS OF THOMAS JEFFERSON, 134 (1854).

<sup>178</sup> *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); *accord supra* Section II.B.2.

<sup>179</sup> See *Dobbs*, 142 S. Ct. at 2265 (“*Roe* was also egregiously wrong and deeply damaging.”); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring) (“A garden-variety error or disagreement does not suffice to overrule [precedent]. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it.”).

<sup>180</sup> *Dobbs*, 142 S. Ct. at 2335 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>181</sup> *Id.* at 2337.

<sup>182</sup> *Id.* at 2341 (emphasis added).

<sup>183</sup> *Id.* at 2342.

not captured whole at a single moment.”<sup>184</sup> Instead, the meaning of constitutional law is a building of commitments and successive decisions.<sup>185</sup> This rejection of stagnant and submissive acceptance of prior decisions of constitutional law, even if by the Court, is a clear demonstration of departmentalism. In effect, the dissent is bringing in room for outside changes and views external to the Court to layer onto and potentially weaken precedent—with the absence of such clear, concerted, and uniform outside pressures indicating the strength of a prior decision.

It is arguably the judicial supremacy asserted by Alito’s opinion that makes the dissent so concerned. For the dissent, *Dobbs* is a threat to prior cases like *Obergefell* or *Loving*.<sup>186</sup> In response, Justice Kavanaugh responded that such fears are misplaced because the analysis in *Dobbs* and *Loving* and *Obergefell* do not overlap.<sup>187</sup> Such a response is little comfort to the dissent because they are *not* talking about merely the merits of *Dobbs*; rather, they are talking about the aggressive assertion of judicial supremacy that *Dobbs* represents. Under a Court of judicial supremacy all these decisions are potentially in danger because if the Court is unrestrained from outside views, it becomes an insular body. The dissent, thus, steps in as the inheritors of founding-era departmentalists like Brutus, who, in Anti-Federalist Paper XV, expressed his fear that the Federalists have made federal judges so independent under the Constitution that “no way is left to control them but *with a high hand and an outstretched arm.*”<sup>188</sup>

### III

#### RECONFIGURING CONSTITUTIONAL PRECEDENT UNDER A THEORY OF DEPARTMENTALISM

Part I laid out the appropriate background of stare decisis and interbranch conflict. Picking up on these concepts, Part II then demonstrated the connection between stare decisis and the debate between judicial supremacy and departmentalism in the three instrumental cases

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<sup>184</sup> *Id.* at 2326.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2332.

<sup>187</sup> *Id.* at 2309 (Kavanaugh, J., concurring). *But see id.* at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

<sup>188</sup> BRUTUS, ESSAY XV (Mar. 20, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 322, 328 (Ralph Ketcham ed., 1986). The statement “with a high hand and an outstretched arm” is a biblical reference meaning the power of God. See, e.g., Deuteronomy 26:8 (King James) (“So the LORD brought us forth out of Egypt with a mighty hand, and with an outstretched arm.”). So, by this, Brutus likely means to say that the judiciary has been made so independent that there is no way to control them, save for some sort of divine intervention.

of *Payne*, *Casey*, and *Dobbs*. Part III of this Note will now take what was learned in Parts I and II to propose that our conceptional understanding of stare decisis is profoundly linked to the fundamental theories of departmentalism and judicial supremacy. And to that point, Part III will suggest a potential way to incorporate both theories of departmentalism and judicial supremacy in a doctrinal framework of precedent that is modeled after Justice Jackson's understanding of separation of powers in his *Youngstown* concurrence.

#### A. The Real Debate Salient in Constitutional Precedent: Departmentalism or Judicial Supremacy

For the reader, the connection between the Lincoln-Douglas debates, the “Southern Manifesto,” death penalty jurisprudence, and *Payne*, *Casey*, and *Dobbs*, among so many others, should be coming together. They are debates over precedent, yes, but they are more than that: They are debates over departmentalism or judicial supremacy and how to best realize these different versions of the judiciary.

However, the Supreme Court—at least explicitly—does not frame their stare decisis jurisprudence as such in their decisions. In truth, the Court does not present the doctrine of stare decisis in *any* clear way. This lack of clear jurisprudence has created a judicial regime surrounding precedent that is essentially coming apart at its seams.<sup>189</sup> How is one supposed to argue under a multi-factor test when the factors, themselves, are undefined?<sup>190</sup> Reframing the question, though, there is an aspect of judicial stare decisis that the Court leaves out that gets to the core debate about precedent. Stare decisis is about democratic disagreement; it is about the age-old debate between departmentalism and judicial supremacy.

Ultimately, the debates between departmentalism and judicial supremacy graft on phenomenally well to the arguments over constitutional precedent. From judicial supremacists, we get a variety of reasons for why the Supreme Court should be the supreme expositor of the Constitution. Functionally, we need someone in charge of constitutional interpretation.<sup>191</sup> Pragmatically, we need a strong judiciary to stand up

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<sup>189</sup> See William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 314 (2020) (describing the current lack of a clear doctrine of precedent as creating “a regime in which individual Justices have substantial discretion whether to adhere to precedent or not”); Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis*, 86 N.C. L. REV. 1165, 1200 (2008) (describing the doctrine of stare decisis as “unworkable”).

<sup>190</sup> See *supra* Section I.B.

<sup>191</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) (“[G]ood institutional design requires

to a democratic mob.<sup>192</sup> Intuitively, it is ridiculous for the Supreme Court to change its behavior based on outside forces.<sup>193</sup> In response, there is a bevy of potential departmentalist retorts. What about separation of powers?<sup>194</sup> The Constitution is supposed to be accountable to the people, not the Courts.<sup>195</sup> Is the Constitution not a sort of co-equal contract among the three branches of government that does not give any of said branches ultimate power over the other?<sup>196</sup> These arguments and positions are functionally the same ones put forward in the cases discussed above.<sup>197</sup>

Without seeing this connection, the debate between judicial supremacy and departmentalism may certainly *seem* to be dead, with judicial supremacy being the ostensible winner.<sup>198</sup> For example, when Reagan's Attorney General, Edwin Meese, announced his belief in departmentalism, he was heavily criticized by the public.<sup>199</sup> Feeling the heat, Meese quickly backed off.<sup>200</sup> Experiences like that of Meese seem to suggest, on the surface, that the debate between departmentalism and judicial supremacy is over. This debate, however, lives on in all but name in the controversy surrounding the proper role of democratic disagreement in constitutional precedent.

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norms that compel decisionmakers to defer to the judgments of others with which they disagree.”).

<sup>192</sup> See, e.g., Chemerinsky, *supra* note 83, at 1464 (arguing that without the federal courts, there is little to stop the President and Congress from “enacting a law that is unconstitutional but politically expedient”).

<sup>193</sup> See, e.g., Barnett, *supra* note 27, at 1233 (describing himself as a “fearless originalist” because he rejects the strengthening of precedent from outside forces).

<sup>194</sup> See, e.g., Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 841 (1991) (“There can be no argument that the large issues of governance are meant to trigger friction and confrontation.”).

<sup>195</sup> See, e.g., KRAMER, THE PEOPLE THEMSELVES, *supra* note 19, at 58 (presenting departmentalist arguments that interpretative authority over the Constitution ultimately belongs to the people).

<sup>196</sup> See, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1422 (1999) (noting the departmentalist position that the American Constitution is unique in that it gives no power to any one branch of government to enforce and interpret the Constitution).

<sup>197</sup> See *supra* Part II.

<sup>198</sup> See Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 229–30 (2003) (arguing that in popular culture judicial supremacy is the norm).

<sup>199</sup> See, e.g., Anthony Lewis, Opinion, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23 (accusing Meese of calling “for radical changes in . . . the Constitution”).

<sup>200</sup> See Stuart Taylor Jr., *Meese and the Supreme Court: He Deals with Critics by Softening his Remarks*, N.Y. TIMES, Nov. 19, 1986, at A16 (discussing a recent speech where Meese advocated for departmentalism before quickly issuing a response backing off after heavy criticism ensued).

One sees this playing out in *Payne*, *Casey*, and *Dobbs*, even if the Justices do not explicitly mention it. Scalia's analysis is departmentalist in that he seeks to accommodate non-judicial opinions about the Constitution in deciding whether to overrule precedent.<sup>201</sup> What other branches believe can affect the validity of the Supreme Court's constitutional interpretations, even if the Supreme Court has previously said the exact opposite.<sup>202</sup> At Scalia's side is Justice Rehnquist, who, while agreeing with Scalia's ultimate decision, disagrees with his departmentalist vision. For Rehnquist, the Supreme Court's decision is *not* due in any part to other branches but, rather, is a result of insular forces such as a Justice's personal view or sharp inner judicial disagreement.<sup>203</sup> Opposite from these two are Justices O'Connor, Kennedy, and Souter in *Casey* and Justices Stevens and Marshall in *Payne*. Like Rehnquist, all five of these Justices see precedent in a judicial supremacist light, believing respect for precedent is crucial to maintain the Supreme Court as the supreme expositor of the Constitution.<sup>204</sup> And then with *Dobbs* we see it all again: Alito asserting judicial supremacy and the joint-dissent of Kagan, Sotomayor, and Breyer advocating for departmentalism.<sup>205</sup>

What makes departmentalist leanings like Justice Scalia's particularly interesting is that for a large part of American history, his view was a profoundly progressive one.<sup>206</sup> President Franklin Delano Roosevelt, in his 1937 Constitution Day address, evinced a vision similar to Scalia's when he argued that the "Constitution of the United States was a layman's document, not a lawyer's contract" and must be receptive to what the people in a democratic government "have the right to expect."<sup>207</sup> Further, Roosevelt urged his fellow citizens not to

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<sup>201</sup> See *supra* Sections II.A.2, II.B.2 (discussing Scalia's departmentalist analyses in *Payne* and *Casey*).

<sup>202</sup> See *supra* Sections II.A.2, II.B.2 (same).

<sup>203</sup> See *supra* Section II.B.1 (discussing Rehnquist's judicial supremacist analysis in *Casey*).

<sup>204</sup> See *supra* Sections II.A.1, II.B.1 (discussing this view as espoused in *Payne* and *Casey*).

<sup>205</sup> See *supra* Section II.C (discussing *Dobbs*).

<sup>206</sup> See, e.g., Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1570 n.10 (2011) (discussing Justice Frankfurter's belief that the Supreme Court should be willing to update its beliefs in response to changes in the prevailing social winds); Victoria F. Nourse, *A Tale of Two Lochner: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 780 (2009) ("The Court had become a refuge, [Former-President Theodore] Roosevelt explained, for the very rich men who wish to act against the interest of the community as a whole." (citation omitted)).

<sup>207</sup> President Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C. (Sept. 17, 1937) (emphasis added). Note the connection here to Scalia's reference to democratic expectations in *Payne*. See *supra* Section II.A.2 (discussing Scalia's departmentalist analysis in *Payne*).

be alarmed when the Supreme Court “cr[ies] ‘unconstitutional’ at every effort to better the condition of our people.”<sup>208</sup> No longer, the President stressed, should we have to “sacrifice each generation in turn while the law catches up with life.”<sup>209</sup>

Just as advocates of judicial supremacy do not necessarily split along party lines, so too are departmentalists not easily put into “conservative” or “liberal” boxes. The debate is ultimately bigger than just Republican or Democratic politics. It goes to the core of what one sees as the appropriate relationship between the judiciary and the other branches. Precedent is key to this relationship. The meaning of precedent can be stretched, narrowed, kept, or overruled depending on the prevailing winds.<sup>210</sup> It can be used to signal the behavior of other branches.<sup>211</sup> It can serve as a *fait accompli*—a quick offensive burst whose result is then defended by stare decisis.<sup>212</sup> All of this is a negotiation between the Supreme Court and democratic politics over how much power the Court is due. These negotiations form the bedrock of that “conversation” between the Court and the people that effectively creates what we refer to as “constitutional law.”<sup>213</sup> But, while the Court uses precedent to negotiate with other branches over its place in the Constitutional structure, it also faces its own internal struggle of what role, exactly, it sees for itself in that government. The Supreme Court simultaneously asks for a seat at the table while, internally, it disagrees on what type of table it would like to sit at. Some Justices see precedent as properly used to solidify the Supreme Court as a judicially supremacist institution, whereas other Justices see precedent as a way to embody more departmentalist ideals. In this way, the arguments of

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<sup>208</sup> Roosevelt, *supra* note 207.

<sup>209</sup> *Id.*

<sup>210</sup> See, e.g., Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1896 (2014) (describing the concept of narrowing precedent and how the Court in *Casey* used it to bend *Roe* without breaking it); THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 91 (2006) (concluding that, as the ideological distance between the current Court and precedent increases, so do the chances of that precedent being overruled).

<sup>211</sup> See Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, *supra* note 79, at 86 (stating that precedent informs the relationship between the branches of government).

<sup>212</sup> See Stephen F. Smith, *Taking Lessons from the Left?: Judicial Activism on the Right*, 1 GEO. J.L. & PUB. POL'Y 57, 59 (2002) (arguing that the Warren Court's creation of precedent in criminal procedure has been so pervasive as to effectively completely federalize criminal procedure jurisprudence). *Miranda v. Arizona*, 384 U.S. 436 (1966), is a great example. The Court expanded its power over criminal procedure and, through stare decisis, can maintain that power. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda*'s reasoning and its resulting rule . . . the principles of *stare decisis* weigh heavily against overruling it now.”).

<sup>213</sup> See BICKEL, *supra* note 125, at 91 (noting this “conversation” idea).

Alexander Hamilton, Thomas Jefferson, Abraham Lincoln, Steven Douglas, James Buchanan, Franklin Delano Roosevelt, Edwin Meese, and so many others live on.

### B. A Youngstown Separation of Powers Theory to Incorporate Departmentalism Within Constitutional Precedent

Tying discussions of stare decisis to departmentalism and judicial supremacy could provide at least some clarity to a doctrine. To that effect, this Note endorses an approach where judicial supremacy, as a whole, remains for the immediate judicial decision, while theories of departmentalism are explicitly incorporated into the Court's considerations of its own constitutional precedent. This would be done by applying Justice Jackson's *Youngstown* separation of powers analysis but against constitutional precedent.<sup>214</sup> Put another way, the Court should explicitly take account of interbranch views of precedent when considering the strength or weakness of a past precedent. Consequently, interbranch agreement on constitutional precedent would strengthen the precedential value of a decision, and interbranch disagreement would weaken the precedential value of a decision.

Justice Robert H. Jackson's concurrence in *Youngstown* is famous for its framing of conflict between the branches of government as a sort of flexible give-and-take of powers against one another.<sup>215</sup> In examining the President's powers vis-à-vis Congress, Jackson set out three categories.<sup>216</sup> Category one is the height of the President's power, and it is when Congress explicitly or implicitly authorized the President to act.<sup>217</sup> Category three is when the President's power is at its lowest because he or she is acting contrary to the will of Congress.<sup>218</sup> Category two is what Jackson calls the "zone of twilight" where Congress's support or lack of support is unclear and where the President has an intermediate form of power.<sup>219</sup>

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<sup>214</sup> Again, this would be for *constitutional* precedent interpretation, which is fundamentally different from other forms of precedent like statutory interpretation. See Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 43, at 1713 (distinguishing constitutional precedent from other forms); see also *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").

<sup>215</sup> See Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1738–39 (2006) (describing this flexible, "tug[]-of-war" conception of separation of powers from Jackson's *Youngstown* concurrence).

<sup>216</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (describing the three categories).

<sup>217</sup> *Id.* at 635–37.

<sup>218</sup> *Id.* at 637–38.

<sup>219</sup> *Id.* at 637.

Jackson's *Youngstown* framework can also be used as a rough blueprint for a concept of constitutional precedent that explicitly incorporates a theory of departmentalism in considering stare decisis. In this version of *Youngstown*, however, the Court is on one side and the executive and legislature are on the other. Precedent is at its strongest when it is expressly or implicitly supported by the President or Congress. Precedent is at its weakest when it is expressly or implicitly rejected by the President or Congress. And, when the branches are either split or it is unclear what the views of the President or Congress are, then the precedent finds itself in the "twilight zone" where this framework drops out. In a nutshell, one can consider category two to be the baseline. Category three is where there is executive and congressional pushback, which means the precedent is afforded less deference. Category one is where there is executive and congressional support, which means the precedent is afforded more deference.

Notably, such an approach does not demand that the Court necessarily follow these expectations in every instance. Rather, democratic expectations provide a potential "out" for stare decisis, which allows the Court to reconsider its past decisions. The Court does not necessarily *have to* go along with the constitutional interpretations by the other two branches, but it can certainly be persuaded by them. The Supreme Court is supposed to be somewhat separated from the democratic will, but the Framers arguably did not set out to make any branch of government *completely* unaccountable to the others to the point that it purposefully ignores them.<sup>220</sup> Thus, the benefit of incorporating interbranch disputes into decisions on precedent is that it enables the Supreme Court to both accord precedent and the Constitution with the expectations of a democratic society while also doing so in a way that both cabins the Supreme Court's discretion and allows it to retain its immediate power over the decision. It creates the opportunity for progress and the revisiting of past mistakes but vests the authority to do so *outside* the Supreme Court.

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<sup>220</sup> See, e.g., Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1521 (2006) (noting that the Supreme Court is accountable to other institutions of government on issues of constitutional interpretation and does not often have the last word); THE FEDERALIST No. 81 (Alexander Hamilton) (arguing that mechanics in the Constitution like impeachment and selection of judges are there to keep the judiciary accountable to the other branches); U.S. CONST. art. II, § 2, cl. 2 (requiring, through the Appointments Clause, Senate approval of presidential appointments); United States v. Nixon, 418 U.S. 683, 707 (1974) ("In . . . dividing and allocating the sovereign powers among *three* co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with *absolute independence*.").

One potential concern would be that in this framework *everything* would fall under the category two “twilight zone.” Stray statements or campaign promises by the President,<sup>221</sup> a “Southern Manifesto,”<sup>222</sup> or bills in defiance of a judicial decision<sup>223</sup> are not necessarily well-defined, clear institutional statements of constitutional interpretation. However, that is not to say that clear statements to such an effect are impossible in our system of government. Both the executive and legislative branches have bodies or mechanisms to explicitly lend support or derision to past Supreme Court decisions.<sup>224</sup>

The executive is equipped with the Office of Legal Counsel, a perfect institutional interpreter against past Supreme Court precedent. One can conceptualize the OLC as the institution which serves as the Attorney General’s lawyer.<sup>225</sup> If the Attorney General, the President, or potentially anyone else in the executive branch has a legal question, they can turn to the OLC, which will provide an answer often in the form of a written legal opinion.<sup>226</sup> The collection of legal opinions by the OLC makes up a body of legal interpretation so large that it is only shadowed by the federal court system.<sup>227</sup> Consider the potential role the OLC could play if the doctrine of stare decisis was explicitly tied to departmentalist principles. The OLC could conceivably expressly support or oppose any Supreme Court precedent, which the Court can now explicitly consider.

The Legislature, too, has the ability to present a clear and coherent view on the constitutionality of a decision through the use of concurrent resolutions. Each House can put forward a simple resolution, which expressly allows the chamber to “express the collective sentiment” of its members.<sup>228</sup> Both chambers can then pass identical simple

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<sup>221</sup> Cf. *supra* note 74 and accompanying text.

<sup>222</sup> Cf. *supra* note 66 and accompanying text.

<sup>223</sup> Cf. *supra* note 71 and accompanying text.

<sup>224</sup> Note this is not Congress *requiring* the Court explicitly through law to do anything, so it does not run into the problem of *United States v. Klein*, 80 U.S. 128 (1871), and its progeny. See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 323–24 (7th ed. 2015) (providing background on the “delphic” *Klein* decision, holding that Congress cannot prescribe a rule of decision for the judiciary).

<sup>225</sup> See Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDozo L. REV. 337, 337 (1993) (calling OLC “the Attorney General’s Lawyer” (citation omitted)).

<sup>226</sup> See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010) (discussing the OLC’s opinion-writing process).

<sup>227</sup> See *id.* (quoting John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDozo L. REV. 375, 376 (1993)).

<sup>228</sup> *A Guide to Legislative Votes*, U.S. REP. BILL KEATING, <https://keating.house.gov/policy-work/guide-legislative-votes> [<https://perma.cc/V9ZK-APJR>].

resolutions which is then referred to as a single concurrent resolution, which “expresses the sentiments of both of the houses.”<sup>229</sup> A Court using a *Youngstown* framework for precedent would not necessarily always be forced to read the proverbial constitutional winds for scintillas of constitutional theory but could instead look to clear, authoritative statements on its prior decisions in ascertaining Congress’s constitutional views.

The counter to such an approach would likely come from judicial supremacists like Justice Thurgood Marshall in *Payne*, who argued that precedent serves to protect the powerless who have an interest in the stability of the law.<sup>230</sup> If the powerless always have an interest in the stability of the law, any theory that even remotely weakens this precedent negatively impacts the powerless. However, would taking Marshall’s rationale to its logical conclusion mean that if the Supreme Court were to reconsider *Payne* in 1992, it would then purportedly be in the *interest* of the “unpopular” and “beleaguered” individual for victim impact statements to be upheld because the integrity of the law must be maintained? Justice Marshall likely believes that victim impact statements for death penalty cases are objectionable and harmful to the indigent *regardless* of the current precedent on the books. Any real theory of judicial supremacy as a minority-protecting institution is inextricably linked with the individual decision in question. While judicial supremacists can point to decisions like *Brown v. Board of Education*<sup>231</sup> as the pinnacle of this counter-majoritarian ideal, one cannot just ignore that until *Brown*, the Court had explicitly endorsed segregation.<sup>232</sup> A judicial supremacist prior to *Brown* in segregation cases was failing to protect minority interests, and a departmentalist who railed against *Plessy* was protecting minority interests.

Additionally, for those who seek to preserve the authority of the Supreme Court and, thus, its ability to protect minority groups, a departmentalist understanding of constitutional precedent does just that. The ever-pragmatic Justice Jackson famously warned the Court that it should not convert the Constitution into “a suicide pact.”<sup>233</sup> Constitutional precedent, likewise, should not be a suicide pact. Illustrative of that point, Justice William O. Douglas once wrote that stare decisis was like the Maginot Line of judicial doctrines—it gives only the illusion of comfort

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<sup>229</sup> See *id.*

<sup>230</sup> See *supra* notes 106–09 and accompanying text.

<sup>231</sup> 347 U.S. 483 (1954).

<sup>232</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racially segregated accommodations as constitutional).

<sup>233</sup> See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

when, in reality, “[s]ocial forces like armies can sweep around a fixed position and make it untenable.”<sup>234</sup> Give the Court the opportunity to preserve its judicial capital and avoid being in an untenable position if it must.<sup>235</sup> A Court that digs its head in the sand can only do so for so long until it eventually becomes the protector of nobody.

To close, recall the fairly benign cake example in Part I,<sup>236</sup> but let us add some additional factual ingredients to the batter. Your prior decision to let your daughter eat only cake for the day has been criticized by everyone in your orbit: your pediatrician, your daughter’s teacher, and your very own parents felt it amounted to a complete lack of judgment. Now, your son approaches you with an identical request, carefully citing the previous decision you had made with respect to your daughter. Is it really so radical or farfetched to lean on those outside opinions when you are considering whether your initial decision was in error or might—at the very least—be due less deference than you had initially thought?

## CONCLUSION

From our founding to the present, there have been constant fights over whether our constitutional structure should be more departmentalist or more judicial supremacist.<sup>237</sup> This Note cannot and does not seek to settle that debate. Instead, the goal of this Note is to contend that the struggle between these two competing outlooks is currently—and has been for quite a while—firmly attached to debates over stare decisis and how receptive the Supreme Court should be to democratic disagreement. What we see among the Justices in their more candid opinions on stare decisis is, in reality, the mere tip of a vast doctrinal iceberg. Ultimately, fights over legitimacy and the judicial role with respect to precedent are themselves driven by deeper ideological commitments guided by either more departmentalist or more judicial supremacist views. Armed with this understanding, one can hoist the iceberg of stare decisis jurisprudence out of the water and, through a much deeper inspection, better appreciate the whole of its shape.

Furthermore, these deeper debates also provide a path forward to judicial reform in an era where the Supreme Court’s legitimacy is

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<sup>234</sup> William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735 (1949).

<sup>235</sup> Cf., e.g., Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 366 (2013) (“For Frankfurter, the court-packing crisis underscored the Court’s limited role . . . . The people had repeatedly spoken; it was the Court’s job to listen.”).

<sup>236</sup> See *supra* Section I.A.

<sup>237</sup> See Kramer, *supra* note 198, at 221 (discussing the departmentalist and judicial supremacist debates of the 1790s).

at an all-time low.<sup>238</sup> It is fair to say this Note believes that, for most, the only visualization of a Supreme Court is a judicially supremacist one. Perhaps this is the core of the Court's current illegitimacy crisis: The people feel stuck in a false Hobson's choice between a legitimate judicially supremacist Supreme Court and no legitimate Court at all. There is, however, another role for the Court in a departmentalist system, one pushed by Thomas Jefferson more than 200 years ago,<sup>239</sup> made even more famous by Lincoln a half-century after that,<sup>240</sup> and occasionally revived by those who take issue with the Supreme Court at any given time.<sup>241</sup> In a system built on the separation of powers, many may be yearning for certain interpretive powers to separate.<sup>242</sup>

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<sup>238</sup> See Devan Cole, *60% of Americans Approved of the Supreme Court Last July. Now It's 38%, According to a New Poll*, CNN (July 20, 2022, 5:03 AM), <https://www.cnn.com/2022/07/20/politics/supreme-court-job-approval-marquette-poll/index.html> [https://perma.cc/CPX2-N79N].

<sup>239</sup> See Wallace Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327, 332 (1962) (describing the Jeffersonian theory of concurrent review of constitutional issues).

<sup>240</sup> See *supra* notes 10–11 and accompanying text.

<sup>241</sup> See, e.g., John Yoo, *Judicial Supremacy Has Its Limits*, 20 TEX. REV. L. & POL. 1, 25–26 (2015) (discussing departmentalism in the context of resistance to the *Obergefell* decision).

<sup>242</sup> See THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987) (“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 134 (2004) (connecting departmentalism and the separation of powers).