SHOWCASE PANEL IV

JUDICIAL DECISIONMAKING: PRECEDENT AND CONSTITUTIONAL MEANING

Sponsored by: Litigation and Federalism & Separation of Powers

Hon. William Fletcher, *U.S. Court of Appeals, 9th Circuit*
Professor Caleb Nelson, *University of Virginia School of Law*
Hon. Diarmuid O'Scannlain, *U.S. Court of Appeals, 9th Circuit*
Hon. Timothy Flanigan, *Deputy Counsel to the President, The White House (moderator)*

HON. FLANIGAN: Thank you.

Our discussion this morning will focus on some issues of great importance in the area of constitutional interpretation. These issues are current, and they are debated in a very lively fashion. We have a good representation of viewpoints here on the panel, and I hope that in the presentations and more importantly in the question and answer period, that we will have an opportunity to explore these in a depth and to a degree that has not been done in a public forum before.

These questions include some subsidiary questions such as, does the mere passage of years dim a constitutional precedent? Many judges, even some law clerks, have had the thrill of working on a constitutional decision and believing at the moment they were chiseling their work into granite, only to find that they were writing in sand.

Recently, in our office and in the Office of Legal Counsel at the Department of Justice, we had the opportunity to visit such questions as: does a 1942 decision dealing with military tribunals still stand? The fact that it has never been challenged, never been overruled, does the mere passage of time dim a decision that is of great constitutional importance and clarity?

A second area deals with the erroneous interpretation of constitutional precedent where subsequent scholarship or subsequent judicial interpretation calls into question a longstanding interpretation.

These subsequent cases are said to undermine the constitutional precedent, but what is the role of settled expectations of litigants, of citizens in existing constitutional precedent?

Also of interest is the use of the "activist" label. Conservatives owned that label for many years and we attached it to the Warren Court, to the precedents of the Warren Court, to creating new constitutional rights out of whole due process cloth. That was activism. Now suddenly activism in common parlance means the new federalism, it means other challenges to existing constitutional precedents that are based on the view that they were erroneously decided. To what extent is a judge or justice bound by constitutional precedent?

These are the types of issues that we will explore with this distinguished panel.

Our first speaker will be Judge O'Scannlain from the 9th Circuit. Judge O'Scannlain was appointed to the Circuit Court by President Reagan in 1986. He received his J.D. from Harvard in 1963. He is an adjunct professor at Northwestern School of Law where he teaches seminars on the Supreme Court and appellate practice. He retired from the United States Army Reserve after 23 years of Reserve and National Guard Service, and I will say he has a good start on a family with eight children.

Our second speaker will be one of Judge O'Scannlain's colleagues on the 9th Circuit, Judge William Fletcher.

Judge Fletcher was confirmed as a United States circuit judge for the 9th Circuit on October 8th, 1998, and was sworn in on February 1st, 1999. He received a bachelor's degree from Harvard College in 1968 and a second B.A. from Oxford University in 1970. He has his J.D. from the Yale Law School in 1975. He was honorably discharged from the United States Navy in 1972, and I will note an item of interest, that he was in the Nixon Administration as part of the Office of Emergency Preparedness, a precursor to the Federal Emergency Management Agency. He clerked for Judge Stanley Wigell in the Northern District of California and later for Justice Brennan. He was a law professor at the University of California at Berkeley, Boalt Hall, from 1977 to 1999.

Our final speaker will be Professor Caleb Nelson of the University of Virginia School of Law. Professor Nelson received his undergraduate degree from Harvard in 1988, and his J.D. from Yale Law School in 1993. He clerked for Judge Stephen F. Williams and later for Justice Clarence Thomas.

With that, I will turn the podium over to Judge O'Scannlain. Our format will be approximately ten to twelve minutes of remarks from each of our panelists, and then a lengthy opportunity for lively discussion.

Judge O'Scannlain.

HON. O'SCANNLAIN: Thank you, Tim, for such a generous introduction. As the father of only eight children, one of whom is a lawyer in the audience today, I stand in awe of the father of 14.

Thanks also to the Federalist Society for inviting me to serve on such a distinguished panel, and thanks again to the Society for choosing such a challenging topic, precedent and constitutional meaning, one of the most complex contemporary questions facing judges, professors, and lawyers alike.

To use sure, there is still plenty of debate over the role of precedent in statutory construction and over so-called vertical *stare decisis* — the direction lower courts like the one on which Judge Fletcher and I sit should take in following the limited set of instructions that the Supreme Court gives us. But those are easier questions, at least to me. Both are answerable through straightforward fidelity to the prescribing authority's direction, be it Congress or the Supreme Court.

Today's panel is here to explore the much more difficult topic of horizontal *stare decisis* in the realm of constitutional interpretation, and this is an area riddled with plenty of doctrinal inconsistency and precious few clear answers, although my fellow panelists will doubtless strive to give some.

My brother, Judge Fletcher, will probably challenge the originalist view of constitutional interpretation and the notion that a single right answer exists, contrary, no doubt, to Society Board member and Professor Gary Lawson of Boston University. He is not with us on the panel today, but his familiar views will hover over our discussion, perhaps defining one endpoint of the debate.

I gather Professor Nelson, by contrast, would argue that there are some precedents that are demonstrably erroneous. His recent article on the subject in the *Virginia Law Review* argues for a form of *stare decisis* weaker than precedential purists might like, but still relatively robust.

To me, the debate over *stare decisis* is a classic example of giving lawyers or judges an inch and watching them take a mile. Once one admits that there is any room for deviation from the rule of horizontal *stare decisis*, once one admits that sometimes we must rethink some of the judicial glosses that we put on the words of our Constitution, even as those words themselves sit unchanged, then we risk merrily waving practically the entire camel into the tent.

If *stare decisis* is not to be an absolute command, if sometimes we judges are to make at least a few erasures in the Fed. 3ds and in the U.S. Reports, then some intelligible principles for deciding when precedents may properly be set aside are necessary if *stare decisis* is to retain any force or any legitimacy.

The Supreme Court has done its share of overruling in recent years, and as the topic statement for today's panel suggests, some of those rejections of prior precedent have, indeed, come in the service of the so-called federalism revolution with which the current Court is much identified. One of the favorite recent examples is *Seminole Tribe v. Florida*, which held that Congress may not use its Article I powers to abrogate state sovereign immunity, and in doing so overruled a plurality's contrary holding in *Pennsylvania v. Union Gas* just seven years before. One of the dissenters in *Seminole Tribe* went so far as to state in a subsequent sovereign immunity case that he is, "unwilling to accept *Seminole Tribe* as controlling precedent." But neither the overruling nor the resistance is anything new. The Court's interpretation of the Tenth Amendment in *National League of Cities v. Usery* lasted only nine years before the Court changed its mind — over another strong dissent — vowing that one day, the reasoning of *National League of Cities* would again attract a Court majority.

Of course, the Warren Court rethought some durable precedents in nearly every area of constitutional law, from school segregation to criminal procedure to electoral apportionment.

Nowhere in this long history, however, has the Court definitively answered the question of when and why. Its most comprehensive attempt perhaps comes in *Planned Parenthood v. Casey*, but *Casey* raised more questions than it resolved. It suggested that the Court's institutional legitimacy depended on its not reversing course in the face of popular opposition, rather a different view than the traditional argument for junking a precedent that proves unworkable, and rather the inverse of the Court's very recent statement that it would adhere to the *Miranda* rule because the *Miranda* warnings, "had become part of our national culture."

Muddying the waters still further is *Brown v. Board of Education*, one of the Court's most famous retreats from a prior holding. Yet *Brown* merely knocked the doctrinal props out from under *Plessy v. Ferguson* based on new-found learning, social science, and the peculiar status of child victims of segregation rather than taking on a perverse old decision and overruling it directly on its merits.

Serious inconsistencies thus remain in the treatment of these issues. Is a 19th-century precedent to be preserved because litigants have relied upon it for decades, or scrapped because our constitutional order has left it behind?

If a prior decision was based on a flawed reading of history but no circumstances have changed, should a subsequent court correct the error or respect its predecessor? Should dissenters feel themselves bound by the majority's decision the next time the same issue recurs?

If these inconsistencies have plagued the Court for this long, what simple answer can I offer you today? I think that the best I can do as an advocate of judicial restraint is to reiterate the importance of a meaningful doctrine of *stare decisis* as a force that preserves the legitimacy of the judiciary by constraining what could otherwise be seen as judges' unbounded discretion to make law. Indeed, the expanding role of the modern federal judiciary has made the need for some consistency in the application of the doctrine of *stare decisis* more acute.

The decisions of the Rehnquist Court and the Warren Court alike have asserted a judicial role in the resolution of a large number of questions that were previously left to the other branches, to the political process, or to the

states. Whether it is policing the equality of congressional districts or scrutinizing Congress' exercise of its Fourteenth Amendment enforcement power, the courts today play important roles in a large number of constitutionally significant disputes. It is all the more urgent, then, that such authority be responsibly exercised.

The late Justice William Brennan used to hold up one hand, fingers spread, to illustrate what he called the most important rule in constitutional law, the rule of five: with five votes, a Justice can do anything. Justice Scalia once implicitly criticized that approach as incompatible with an institutionally legitimate conception of *stare decisis*, saying that, "What would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support must be left in place for the sole reason that it once attracted five votes."

The rule of five in its pure form has something in common with a dissenting justice's vow to ignore the majority's decision in subsequent cases, what we might call the rule of four who hope to rule as five. Neither conveys to the public an image of a judiciary "bound down by strict rules and precedents," to use a phrase from *Federalist* 78. As the judiciary's role has grown, so too has the importance of the Court's abiding by the principle that ours is a government of laws and not of men, even men (or women) in black robes.

Stare decisis tells those five justices who can do anything that sometimes they must not do what they wish. Indeed, precedent has played this constraining role ever since the early days of the Anglo-American common law judiciary, and constitutional law, after all, has aptly been described as a species of common law.

As Professor Charles Fried has said, "In constitutional law, doctrine and precedent are merely different names for the same thing." This constraining role seems doubly appropriate in the constitutional realm, in which judicial decisions are virtually the last word, subject to external correction only in rare instances. Under such circumstances, *stare decisis* must be applied in a consistent and principled manner, or it risks appearing like a tool used by a temporary majority to lock in its victory for all time.

We are not quite a year removed from the Supreme Court's decision in *Bush v. Gore*, and that year has seen a remarkable quantity of academic vitriol flung in the direction of the Supreme Court. Just imagine the howls from New Haven and Cambridge if the majority opinion had blithely overruled a few venerable precedents in reaching the same result.

So I close having offered more questions than answers. Allow me to raise one more question. Concluding its lengthy examination of *stare decisis*, the joint opinion in *Planned Parenthood v. Casey* stated that the case before it was one of the rare instances when, "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate." But as *Casey* itself, its progeny, and its cousins in other doctrinal areas made clear, the Court itself has not resolved its own inconsistent answers to when, how, and why *stare decisis* will guide its decisions.

So my final question is the one we are all left with: Will the Court ever settle its own divisions? I look forward to the answers that my fellow panelists will surely provide.

Thank you.

HON. FLETCHER: Thank you very much for the invitation to appear before you. This is my first appearance at a Federalist Society annual meeting. Depending on what I say, it may also be my last. Thank you also for your generous introduction.

My brother, Judge O'Scannlain, in his remarks, mentioned Justice Brennan and the five-finger rule. When I worked for Justice Brennan in October 1976, we were on the losing end. Among other things that Term, *Fay v. Noia* was overruled by *Wainwright v. Sykes*. Justice Brennan used to hold up his hand with the rule of five when he lost, not when he won. It might be that he held up his hand for the rule of five in earlier years when he won, but I wasn't there. In those days, Justice Brennan's reference to the five-finger rule was a protest rather than a justification.

The single constant I have been able to ascertain over the years is that those Justices who have only four votes are particularly fond of precedent.

The task we have been given today is to examine and evaluate the role of precedent in giving meaning to the Constitution. I will focus on the Supreme Court as it uses precedent to determine constitutional meaning.

The question in evaluating the role of precedent in giving constitutional meaning has to be "compared to what?" What are the alternatives? Original intent? The principles inherent in the scheme of ordered liberty? Emerging norms of a civilized society? Modern notions of desirable policy? Where do we find our constitutional meaning?

In some areas, constitutional meaning is clear. We have already heard this morning an interesting panel on the jury trial. The Seventh Amendment says that juries are guaranteed in civil trials where more than twenty dollars are at stake. We continue to adhere to twenty dollars even though most people think twenty dollars, in current values, is not what the framers meant. But that's what they wrote.

However, in most other areas – the contested areas – the words are not always crystal clear. And when they are clear, they are sometimes ignored. Let me begin with a story. It does not quite involve constitutional precedent, but something very close to it. The story concerns the Judiciary Act of 1789, the statute that first set up the judiciary. Section 34 of that statute was the foundation for *Swift v. Tyson* decided in 1845, in an opinion written by Justice Story. *Swift*, that

venerable precedent, was finally overruled by *Erie Railroad* in 1938.

Harvard Law School has a letter in its files, written by the famous lawyer John Davis to the equally famous legal historian Charles Warren, complimenting Warren for his great victory in overruling *Swift v. Tyson*. What had Warren done to get this letter? He had written an article in the Harvard Law Review revealing that he had discovered in his historical researches that Justice Story had gotten it wrong; that the original intent of Section 34 of the Judiciary Act of 1789 was not what *Swift v. Tyson* said it was; and that the original intent was what (although we did not know the case name yet) *Erie Railroad* would say it was. His article is cited in Justice Brandeis's opinion in *Erie*. This is Justice Brandeis, ever faithful to a close reading of the constitutional text and original meaning. I think it was his evil twin who invented the Brandeis brief.

Should it matter to us today that most people familiar with the historical literature think that Warren had the history wrong – that is, that the supposed original intent used as one of the reasons for overruling *Swift* turns out to have been wrong? I don't think so. I think *Erie* is right, even though it does not accord with the original intent of Section 34. The world has changed, the judiciary has changed, jurisprudential thinking has changed, and the world to which Section 34 was addressed has simply disappeared.

That is only one example, and an old one. Let me deal with three areas in modern law where original intent and precedent are in tension.

The first area is the Commerce Clause. I want to focus on *United States v. Lopez,* decided in 1995. *Lopez*, as we all know, cuts back on the reach of the Commerce Clause. If we talk about it in terms of precedent, it cuts back the venerable precedent of *Wickard v. Filburn*, decided in 1942. *Lopez* clearly takes a step back from *Wickard,* in the direction of the original intent of the Commerce Cause. Is *Lopez* for that reason a good decision? One way to evaluate whether it is a good decision, or even whether this current majority thinks it is a good decision, is to ask more questions. Is *Lopez* based on a general principle? How broadly does the principle apply? For example, would this Court apply the principle to medical marijuana?

Many states have medical marijuana statutes, allowing marijuana to be used for medical purposes, but federal law forbids the use of marijuana even for medical purposes. A great deal of marijuana is grown in California. What if, as could be easily provable in California, marijuana is grown within the state, exchanged within the state, and consumed within the state for medical purposes, without any money ever changing hands? Is it within the reach of the Federal Government to prohibit that growing, exchange, and consumption? *Lopez* suggests that the answer is no; yet I doubt very much that this is the answer the Supreme Court would give.

Of course, we had a medical marijuana case from California, in which the Supreme Court held that medical necessity did not excuse non-compliance with federal law. I think the Supreme Court on that point had it absolutely right. But no one has yet raised the question of *Lopez* and medical marijuana (I think because they think they know the Supreme Court's answer).

If the federal government can forbid the use of medical marijuana under the Commerce Clause, how much of *Wickard v. Filburn* has been overruled? Has it been overruled for federal control over guns but not marijuana? Is there a principle behind such a partial overruling?

The second area is the Eleventh Amendment. Over the last twenty years or so, the United States Supreme Court has been engaged in a protracted dispute over the meaning of the Eleventh Amendment. People of my generation and earlier never heard of the Eleventh Amendment as they went through law school, but it has now turned out to be a current battleground for federalism.

There is a consistent losing minority of four Justices. These Justices argue that the text of the Eleventh Amendment does not, in fact, speak to the federalism questions with which the Court is dealing; that the text has a very precise and very narrow meaning; that, in accordance with this text, the original intent of the Amendment was simply to repeal an affirmative grant of jurisdiction; and that when this grant was repealed, questions of sovereign immunity came to be governed not by the Eleventh Amendment but by background principles of constitutional law and by other provisions of the Constitution. The five-Justice majority that has won consistently in recent years has, by contrast, insisted that the text of the Amendment has a determinate meaning. But the majority has openly admitted that it has now abandoned that text-based meaning. Both sides, for somewhat different reasons, now pay no attention to the text of the amendment.

The dissenters do so because, in their view, the text does not speak to the relevant questions of sovereign immunity. The majority, however, does so because, in their view, precedent is more important than the constitutional text. To say it in a simple way, in their view, *Hans v. Louisiana,* decided in 1890, is the governing precedent, and they wish to spin out subsequent precedent from *Hans*. Concerning whether this is a proper or improper approach, I will be, for the moment, agnostic. I will just say that this is an attempt by the majority to say in this area that original intent, as expressed in the text, should not control. They prefer the combination of their vision of federalism and the precedent of *Hans v. Louisiana*.

The last area is standing. Justice Douglas – that spiritual father of the Federalist Society – invented the term "injury in fact" in his opinion in *Association of Data Processing Service Organizations v. Camp* in 1970. Prior to that case, "injury in fact" had never been seen as a constitutional requirement under Article III. Justice Douglas made it up.

The current Court has expanded, and emphasized, the injury-in-fact requirement. The current majority used injury in fact in *Lujan v. Defenders of Wildlife* in 1992 to strike down a citizen-suit provision in which Congress clearly granted standing to individuals to sue as private attorneys general. In the Court's view, because there was no injury in fact for the plaintiffs in *Lujan*, Congress could not confer a cause of action on them.

If we look at history, including the historical work of the conservative historian Raoul Burger, it is pretty clear that there is no discernible historical basis for *Lujan*. There is precedent decided in 1970 by our hero, Justice Douglas; but Justice Douglas' opinion is precedent, not original intent.

What are we to conclude from these three areas? I think we have seen enough to conclude that the current performance of this Court is not methodologically different from the performance of the Warren Court. That is to say, both Courts have had visions of what the law is, and what the law ought to be. Both Courts have overruled precedents. Both Courts have appealed to original intent when it has suited their purpose. And both Courts have tried to achieve their preferred notions of modern policy.

There are no saints here. But there are also no sinners. There are simply Justices of the United States Supreme Court, behaving as Justices of the Supreme Court have always behaved.

When I was a student, I greatly admired my professor of constitutional law, Alexander Bickel. I have come to admire him even more as time has gone on. Of the many things he taught me, the most important is that the only way in which the courts of the United States, in particular the United States Supreme Court, can justify their anti-democratic role is their reliance on principle.

The word "principle" is ambiguous. To make the word less ambiguous, Herbert Wexler added the word "neutral," and succeeded only in making "neutral principle" ambiguous. Yet there is something that can be called principle, even neutral principle. It goes beyond original intent, beyond precedent, and beyond emerging policy consensus, but that nonetheless includes all of them. This is what the Supreme Court aspires to, and should aspire to.

The Supreme Court of the United States is a wonderful and peculiar institution. The framers, at the time of the framing, were very proud of themselves for having invented federalism. They thought it was simultaneously their most original and most beneficial invention.

I think this is true, but with the following qualification: They also invented the United States Supreme Court, with the authority to interpret our written Constitution. The Court has been an equally original and beneficial institution. But the Court can never be a simple institution, and no amount of wishing or pretending can make it so.

Thank you.

PROFESSOR NELSON: Almost no one in America favors an absolute rule of *stare decisis*, which would categorically forbid American courts of last resort from overruling their past decisions. Instead, the doctrine of *stare decisis* is almost universally understood to establish only a rebuttable presumption against overruling past decisions. So the important questions are, what is the scope of this rebuttable presumption, and what should it take to overcome the presumption?

When people talk about *stare decisis* at the level of the United States Supreme Court, they often suggest that there should be a pretty general presumption against overruling all past decisions, including even past decisions that the current Court is convinced were erroneous. On this view, members of the Supreme Court should not vote to overrule a past decision just because they think it was wrong; they should vote to overrule it only if it is also causing other, more practical problems.

The modern Supreme Court itself sometimes takes this position. As Judge O'Scannlain suggests, it is not entirely consistent about what it says about *stare decisis*, particularly in the constitutional realm. But the joint opinion in *Casey* was joined on this point by Justices Stevens and Blackmun. Five Justices agreed that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."

Even Justice Scalia has sometimes suggested something similar. In one 1995 case, he said that the doctrine of *stare decisis* "would be no doctrine at all" if it did not require overruling judges to "give reasons … that go beyond mere demonstration that the overruled opinion was wrong."

I want to suggest that this conclusion does not necessarily follow. If we accept Justice

Scalia's premise that it is sometimes possible to "demonstrate" that a prior opinion was wrong, no matter what our theory of interpretation is at the moment – let's bracket that for now and consider *stare decisis* on the premise that we can sometimes demonstrate that a prior opinion was wrong -- we don't necessarily have to indulge a presumption against overruling those opinions. In fact, we could have a perfectly coherent doctrine of *stare decisis* that said, when the past decision is demonstrably erroneous, we apply a presumption *in favor of* overruling it. That presumption could be overcome by things like reliance interests, but we could have a rebuttable presumption in favor of overruling demonstrably erroneous precedents, just as we have a rebuttable presumption in favor of adhering to precedents that are not demonstrably erroneous.

That doctrine, in fact, could extend beyond constitutional cases. It need not be limited to constitutional cases. It seems to me that it might be perfectly capable of achieving the purposes that we want a doctrine of *stare decisis* to serve.

One of those purposes, and the one I'll focus on here, is sometimes called the "rule of law" idea. People fear that if judges could overrule a past decision just because they would have reached a different conclusion as an original matter, then there would be wild fluctuations in judicial decisions. The first set of judges will decide a case the way they think it should be decided, but the next set of judges will have a different set of opinions, and their successors will take yet another position. If each court could give effect to its own view about how the case should come out without abiding by precedent, then there might just be an endless series of reversals.

That is certainly a concern, but we should think about exactly what kind of a doctrine of *stare decisis* we need in order to respond to that concern.

I want to start by imagining something that could never exist. Suppose we were in a world in which all legal rules came from statutory codes, and suppose that these statutes were both completely comprehensive and completely determinate. They provide a single determinate answer to every legal question that could conceivably arise. In a world like that, you might well think we do not need *any* doctrine of *stare decisis* in order to get enough consistency in judicial outcomes. Even without help from *stare decisis*, the underlying rules of decision are themselves going to produce pretty consistent outcomes, you might think. Sure, courts are sometimes going to make mistakes about what the statutes mean, but when subsequent courts correct those mistakes, you might think they are not going to trigger an endless series of reversals.

We obviously do not live in such a world. But we are often told that we *do* live in a world in which our written laws, whether they are statutes or constitutions, have only a limited range of indeterminacy. A particular provision might be ambiguous, it might be subject to a variety of different possible constructions, but the provision is unlikely to be completely indeterminate. It is unlikely to give interpreters unlimited discretion to establish whatever rule they please.

The *Chevron* doctrine from administrative law is based on that premise, that idea of interpretation. An ambiguous provision in a statute or other written law might lend itself to a variety of different constructions. A particular provision, for instance, might permissibly be understood to establish any one of three different rules — Rule A, Rule B, or Rule C. *Chevron* tells us that the interpreter has some discretion to choose among those three possible constructions, but the interpreter's discretion is limited. The interpreter can not read the statute to establish Rule D.

This framework might have some implications for how we think about *stare decisis*. When we talk about *stare decisis*, we are used to asking whether the current court should abide by a past decision that it would have decided differently as an original matter. That formulation, though, obscures a distinction that might be important. When a current court says that it would have decided a past case differently as an original matter, it may be saying one or the other of two different things. It may simply be saying that the prior court made a different discretionary choice than it would have made: the prior court picked Rule A when the current court would have used its discretion to pick Rule B instead. Alternatively, it may be saying that the prior court went beyond the range of permissible discretion entirely: it left the range of indeterminacy and it read the provision to mean Rule D.

If we are attracted to *stare decisis* because of concerns about the future stability and predictability of law, those concerns may play out differently in these two different situations. In the first situation, where the past court's decision was permissible even though the current court would have made a different discretionary choice, it may well make sense to have a rebuttable presumption against overruling the precedent. We may well want to have some kind of special reason, like the proven unworkability of the rule chosen by the prior court or the practical problems it is causing, before we let the current court substitute its own discretionary choices for the discretionary choices made by the past court. Otherwise, you really might have an endless series of reversals.

But in the second situation, you might not be so worried about that problem. If the prior court adopted an impermissible construction of the provision, if it went beyond the range of permissible discretion, then it did not just make a discretionary choice. It made what Justice Scalia would call a demonstrably erroneous decision. You might suspect that courts could correct that decision, could overrule that decision, without necessarily triggering an endless series of reversals. As long as the overruling court picks a rule within the permissible range — Rule A, Rule B, or Rule C — you might expect that rule to be relatively stable under this doctrine.

Another way of stating the same point is that a general presumption against overruling all past decisions may go farther than the "rule of law" purpose of *stare decisis* really requires. To the extent that the underlying rules of decision would themselves impose some constraints on conscientious judges, then the stability of the law that is applied in courts need not depend entirely upon *stare decisis*. The underlying rules of decision are themselves a source of stability, and our doctrine of *stare decisis* could reflect that fact.

The bottom line is this. The doctrine of *stare decisis* would indeed be no doctrine at all if current courts could overrule decisions simply because they would have reached a different conclusion as an original matter. But when the current court says, "we would have reached a different conclusion as an original matter *and the prior court's decision was demonstrably erroneous*," it is saying something more than just, "we would have reached a different conclusion as an original matter." It is saying: "Not only would we have reached a different conclusion as an original matter, but the prior decision goes beyond the range of permissible discretion."

The doctrine of *stare decisis* could sensibly take account of the difference between those two statements. The court could recognize a rebuttable presumption *against* overruling decisions that it thinks are *not* demonstrably erroneous while simultaneously recognizing a rebuttal presumption *in favor of* overruling precedents that it thinks *are* demonstrably erroneous.

There are a lot of possible objections to that idea, but if you accept the concept of demonstrable error, as I suspect at least one or two people in this room do, I think it is possible that this weaker version of *stare decisis* might seem attractive to you.

In a sense, in fact, this version of *stare decisis* has already stood the test of time. For much of American history, I would argue, from the founding until at least the Civil War, most American courts and commentators did not indulge a presumption against overruling decisions that they deemed erroneous. This does not mean that they had no doctrine of *stare decisis*. To the contrary, Frederick Kempin has identified this period as the critical years for the growth of *stare decisis* in American law. But they did not extend the doctrine of *stare decisis* farther than the basic purpose of the doctrine seemed to require. When they were convinced that a past decision was wrong, they would overrule that decision unless there was some special reason to adhere to it (such as the need to protect reliance interests, say). The presumption favored overruling precedents that were erroneous, not continuing to follow them.

If you look at the discussions of *stare decisis* from these years, you will see innumerable references to what Alexander Hamilton talks about in *Federalist* 78, the need to avoid "an arbitrary discretion in the courts." People were concerned that in cases where the underlying sources of law did not dictate a single answer, each successive judge might give effect to his own peculiar opinions, and there would be no stable rule.

If you wanted to cast that concern in modern terms, you would say that Americans embraced *stare decisis* as a way to restrain the discretion that the indeterminacy in the underlying rules of decision would otherwise have given to judges. I think that's the gist of what Judge O'Scannlain was talking about in his remarks.

But many people who defended *stare decisis* on this ground were equally clear about the limits of the doctrine. When the underlying rules of decisions were not so indeterminate and the precedent had simply gotten them wrong, then the reasons for presumptive adherence to the precedent, in their view, did not apply.

It has not yet been proven that this version of *stare decisis* is clearly worse than the stronger version that many people talk about today.

Thank you.

HON. FLANIGAN: In the interest of time, I think we will move to questions from the audience, and I will identify people from the audience if you would be so kind as to raise your hand with your questions and direct them to the member of the panel.

SPEAKER: My question is, to what extent should the amount of respect that a case receives as precedent depend on the amount of respect that it gave to precedent? For example, if we take the case of *Fay v. Noia*, which Judge Fletcher mentioned, it ran roughshod over *Daniels v. Allen*, effectively overruling it without saying it was doing so or explaining why it was proper to do so.

Is that a proper factor in a subsequent court's deciding to return at least in part to the earlier rule of law and overrule the precedent?

HON. FLETCHER: If that is directed to me, my answer to you would be "yes." This is particularly true in habeas, which is a special kind of case. Prior to the adoption of AEDPA, the Anti-terrorism and Effective Death Penalty Act, the Court, over a number of years, changed its concept of habeas in response to the conditions it perceived. *Fay v. Noia* was decided during the period when the Supreme Court thought that the Southern courts were behaving very badly and were not enforcing the newly created constitutional rights in criminal procedure.

By the time of *Wainwright v. Sykes*, decided in October Term 1976, the world had changed. The Supreme Court was no longer substantially at variance from what the state courts were doing. Both precedents were either both right, or both easily defensible, at the time they were decided.

AUDIENCE PARTICIPANT: Judge O'Scannlain made reference to *Pennsylvania v. Union Gas*, and I believe you referenced the lead opinion there as the plurality opinion and some portion of it as a holding of the Court. I would just like to focus on that. Where you have a four-one-four decision where the one Justice in the middle joins only in the judgment and expressly disavows joining in the reasoning of the lead opinion, can you call that either a holding or even a plurality opinion of the Court?

HON. O'SCANNLAIN: Well, that theoretical issue faces us from time to time, but one has to recognize that there was a five-judge decision. To the extent that fewer than five judges joined in the rationale, we simply refer to that, of course, as a plurality. We are not stuck with the notion that it is a holding, but at least it is a statement that represents the dominant view of that particular panel, and to that extent, I think we have to give some credence to it.

The technical status of that, of course, becomes rather blurred because at some point there is going to be a new case with a slightly different context which may permit one to distinguish it. So I think one has to do what one can to recognize that the plurality at least controls so far as that case is concerned.

AUDIENCE PARTICIPANT: Jonathan Adler. Case Western Reserve University.

I was wondering if any of the panelists would like to comment on the recent debate over what to make of unpublished opinions and their precedential effect.

As I think many people know, beginning in the 8th Circuit, there has been the suggestion that Article III can't countenance appellate decisions that do not have binding effect and that cannot be cited by litigants.

HON. O'SCANNLAIN: I will be happy to offer a reference to Judge Kozinski, who I believe is here in the room, or at least was earlier. He has just written an opinion for our court that rejects the 8th Circuit, or at least the, 8th Circuit panel approach, and reinforces the validity of our rule.

I like to approach it on a very practical basis. The fact of the matter is that Judge Fletcher and I sit on a court that has now about 10,000 filings per year. Some of those cases go away for failure to prosecute or whatever, but we are issuing on the order of over 4,000 dispositions on the merits every year.

Now, neither one of us, I am sure, would say that we read all 4,000 cases that our fellow members on the court decide. Most of us do not even read the roughly 600 or 700 of those 4,000 that are actually published and therefore, precedential. So it seems to me that we have no choice but to be somewhat responsible in the amount of new precedent or precedent bearing cases that we issue every year, and I am one of those on the court who has very serious concerns about whether we do a good enough job policing our own precedents.

One of the corollaries to that, of course, is that we probably have the highest percentage of en banc activity simply because we are on a court of 28 judges with the possibility of not only nine panels, but, with our senior judges, perhaps as many as 15 panels meeting simultaneously, there is a very, very difficult problem. In theory, every unpublished disposition follows either an existing Supreme Court precedent or a previously published precedent of our own court, and if there is a problem, it is up to the parties to bring it to

the attention of that panel or off-panel people with an interest to bring it to the attention of the court through the existing rules.

PROFESSOR NELSON: This is one that the 9th Circuit, I think, has gotten absolutely right. I think Chief Judge Arnold's opinion for the 8th Circuit is premised on the idea that if a court does not issue opinions with precedential effect for the future, it is not exercising the judicial power within the meaning of Article III. That seems to me to leave federal district courts, whose decisions have not hitherto been thought to have formal precedential effect, in a fairly precarious position.

HON. FLANIGAN: Thank you very much. Please join me in thanking the panel.